BRB No. 08-0124 BLA

E.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONG CONSTRUCTION COMPANY	)	DATE ISSUED: 11/26/2008
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Second Decision and Order on Remand Awarding Benefits (2001-BLA-00468) of Administrative Law Judge Larry W. Price (the administrative law judge) on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal

[1] Claimant filed his first claim on March 30, 1983. That claim was denied by a Department of Labor Claims Examiner on July 29, 1983 because claimant failed to establish any of the elements of entitlement. Director's Exhibit 48. Claimant filed a second claim on January 27, 1999, which was denied on May 12, 1999, for failure to establish either the existence of pneumoconiosis arising out of coal mine employment or disability causation. Director's Exhibit 47. No further action was taken until claimant filed the instant claim on June 2, 2000. Director's Exhibit 1. In a Decision and Order

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] This case has a lengthy procedural history, set forth *supra* at n.1. On second remand, the administrative law judge found that the weight of the evidence was sufficient to establish disability causation at 20 C.F.R. §718.204(c), the only issue before him for adjudication. Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's finding of disability causation at Section 718.204(c), arguing that the administrative law judge failed to apply the proper standard; that he shifted the burden of proof to employer; that he failed to provide adequate and valid reasons for his credibility determinations; and that he failed to properly resolve the conflict in claimant's reported smoking histories.

---

issued on February 12, 2004, Administrative Law Judge Daniel F. Solomon found that because the parties had stipulated to the existence of pneumoconiosis and that such pneumoconiosis arose, at least in part, from coal mine employment, elements of entitlement previously adjudicated against claimant, a material change in conditions was established pursuant to 20 C.F.R. §725.309 (2000). Considering the entire record, Judge Solomon found that claimant had established every element of entitlement. [*E.S.*] *v. Long Construction Co.*, 2001-BLA-00468, Decision and Order at 16-17 (Feb. 12, 2004); 20 C.F.R. §718.204(b), (c). On appeal, the Board affirmed Judge Solomon's finding of pneumoconiosis arising out of coal mine employment based on employer's stipulations, and thus affirmed his finding that claimant had established a material change in conditions. Additionally, the Board affirmed, as unchallenged, Judge Solomon's finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but vacated his award of benefits and remanded the case for further consideration of the issue of disability causation at Section 718.204(c). [*E.S.*] *v. Long Construction Co.*, BRB No. 04-0459 BLA (March 29, 2005) (unpub.). On remand, Judge Solomon again found disability causation established. [*E.S.*] *v. Long Construction Co.*, 2001-BLA-00468 (Sept. 9, 2005). On employer's second appeal, the Board vacated the award of benefits, and remanded the case for a reassessment of the evidence relevant to disability causation at Section 718.204(c). The Board further directed that this case be reassigned to a new administrative law judge. [*E.S.*] *v. Long Construction Co.*, BRB No. 06-0123 BLA (Oct. 21, 2006) (unpub.).

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

Claimant has not submitted a response, and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the arguments on appeal, the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Initially, we reject employer's argument that the administrative law judge failed to adequately explain his finding that claimant had a thirty pack-year smoking history. Employer's Brief at 10, n.1. The administrative law judge accurately summarized the conflicting smoking histories recorded by the various physicians of record, including two hospital treatment records listing a history in excess of one hundred pack-years, and determined that the average reported smoking history was thirty-six pack-years, with most physicians noting that claimant smoked between one-half pack and one pack per day. After considering claimant's testimony, that he never smoked as much as two packs per day but averaged a full pack per day for approximately thirty years, the administrative law judge acted within his discretion in finding that claimant's testimony was credible and that it established a significant smoking history of thirty pack-years. Decision and Order at 2, n.2; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir 1999); *See v. Washington Metro. Area Transit Authority*, 36 F.3d 375, 384 (4th Cir. 1994).

Employer next asserts that the evidence in the prior denial was uncontradicted in establishing that the actual cause of disability was the removal of claimant's left lung in 1995 due to smoking-related cancer, and thus, claimant failed to meet his burden of proving that pneumoconiosis is a necessary condition to his total disability at Section 718.204(c). Employer's Brief at 8-10; *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). Employer's argument lacks merit. The district director denied claimant's prior claim without rendering findings of fact as to the cause of disability, and it is the administrative law judge's function to independently adjudicate the issue based on his consideration of all relevant evidence of record. The administrative law judge determined that, while all of the physicians agreed that claimant

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable, because the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

is totally disabled, and that claimant's pneumonectomy caused some level of disability, the issue was whether the pneumoconiosis present in claimant's remaining lung worsened the pre-existing impairment. Decision and Order at 4. As Drs. Fino, Castle, Robinette and Rasmussen acknowledged the existence of a chronic obstructive respiratory impairment in addition to the impairment caused by the pneumonectomy, the administrative law judge rationally found that claimant's pneumonectomy was not the sole cause of disability, and that the credible medical opinions of Drs. Rasmussen and Robinette established that claimant's pneumoconiosis was a substantially contributing cause of disability, *i.e.*, the pneumoconiosis either had a materially adverse effect on the respiratory/pulmonary condition, or it materially worsened a totally disabling respiratory impairment caused by a disease that is unrelated to coal dust exposure. 20 C.F.R. §718.204(c)(1)(i), (ii); Decision and Order at 3, 9; *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003). The administrative law judge properly accorded diminished weight to Dr. Forehand's opinion, that the sole cause of disability was claimant's pneumonectomy, as the physician provided no explanation for his conclusion, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), and failed to diagnose clinical or legal pneumoconiosis, in direct conflict with the administrative law judge's finding and employer's concession. Decision and Order at 6; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge also permissibly accorded little weight to Dr. Naeye's opinion, that the pneumoconiosis observed on claimant's tissue slides was too mild to cause disability, Employer's Exhibit 1, because he found that, considering the potentially latent and progressive nature of pneumoconiosis, the physician's conclusion based on twelve-year-old tissue slides does not account for the possibility that claimant's pneumoconiosis subsequently worsened, and Dr. Naeye did not review the more recent clinical data. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); Decision and Order at 6.

After determining that all of the physicians were well qualified, the administrative law judge acted within his discretion in according less weight to the opinions of Drs. Fino and Castle, that claimant's second impairment was caused entirely by smoking, and crediting the contrary opinions of Drs. Rasmussen and Robinette, that claimant's second impairment was caused by a combination of coal dust exposure and smoking. Decision and Order at 9. In so finding, the administrative law judge properly discredited Dr. Fino's 2001 opinion, Employer's Exhibit 16, attributing claimant's disability entirely to the pneumonectomy, on the ground that it was inconsistent with his 2002 opinion, Employer's Exhibit 22, diagnosing a second obstructive impairment due to smoking. Decision and Order at 4. Additionally, while Dr. Fino indicated in his 2001 report that the significant reduction in claimant's pulmonary function evidenced on all of the pulmonary function studies subsequent to 1999 was due to the left pneumonectomy in 1995, and explained that claimant's 1983 pulmonary function study, "performed at or

about the time when [claimant] left the mines,"[4] revealed a clinically insignificant qualitative obstruction that would not have resulted in an impairment or disability, Employer's Exhibit 16, the physician presumed that claimant's pneumoconiosis could not have worsened over the years. Thus, the administrative law judge properly found that Dr. Fino failed to recognize the potential latent and progressive nature of pneumoconiosis, contrary to the regulatory definition at 20 C.F.R. §718.201. *See Sea "B" Mining Co. v. Dunford*, 188 Fed. Appx. 191, 199 (4th Cir. 2006); *Four L Coal Co. v. Director, OWCP*, 157 Fed. Appx. 551, 555 (4th Cir. 2005); *see also Lewis Coal Co. v Director, OWCP* [*McCoy*], 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004).

With respect to Dr. Castle's opinion, that claimant's second impairment was due solely to smoking, the administrative law judge acted within his discretion in finding that the physician failed to provide an adequate explanation for his opinion that the pneumoconiosis that he acknowledged was present in claimant's remaining lung would not have any significant effect on claimant's pulmonary function. Decision and Order at 9; *see Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. While Dr. Castle reported that his examination of claimant and review of the medical records failed to demonstrate any consistent physical findings, such as rales, crackles or crepitations, indicating the presence of an interstitial pulmonary process, the administrative law judge noted that Dr. Castle did not discuss the findings of rales and rhonchi by other physicians, as listed in Dr. Castle's summary of claimant's medical records. Decision and Order at 7; *see Gross*, 23 BLR at 1-19. Additionally, the administrative law judge determined that Dr. Castle's opinion was "misaligned with the definition of legal pneumoconiosis," as the physician, when asked whether coal mine employment can cause chronic obstructive pulmonary disease (COPD), responded: "Well, not in the same sense that we're talking about, in the normal sense of COPD….[i]t causes airway obstruction….I believe that COPD is a term that is utilized to mean a certain disease entity….[c]oal workers' pneumoconiosis is another entity that may be associated with airway obstruction…." Employer's Exhibit 27 at 24; Decision and Order at 7 n.7; *see Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Consequently, the administrative law judge permissibly accorded the opinion less weight.

We find no merit in employer's contention that the administrative law judge failed to properly consider, and accord deference to, the opinions of claimant's treating physicians, Drs. Sutherland and Patel. Employer's Brief at 22. Contrary to employer's assertion that if these physicians believed that pneumoconiosis was a significant condition in claimant's case, they would have indicated as much in their treatment

[4] Dr. Fino's report, however, reflects that claimant ceased mining in 1987, not 1983. Employer's Exhibit 16. Thus, claimant had approximately four additional years of coal dust exposure after undergoing his 1983 pulmonary function study.

records, the administrative law judge properly concluded that the records focused primarily on the status of claimant's lung cancer and did not address the cause of claimant's disabling obstructive impairment. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 187, 22 BLR 2-564, 2-571 (4th Cir. 2002); *Grizzle v. Pickand Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Thus, the administrative law judge rationally found claimant's treatment records to be of little probative value in evaluating the cause of his disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Lastly, we reject employer's contention that there is no support in the record for the administrative law judge's finding that the opinions of Drs. Robinette and Rasmussen were entitled to greater weight than the combined weight of the contrary medical opinions. Employer's Brief at 23-31. Employer's arguments essentially constitute a request to reweigh the evidence, and overturn the administrative law judge's credibility findings, which is beyond the scope of our review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge properly considered the factors enumerated at 20 C.F.R. §718.104(d)(5), and declined to accord controlling weight to the opinion of Dr. Robinette based on his status as a treating physician because he found that Dr. Robinette did not see claimant on a consistent basis. Decision and Order at 8; *see Grizzle*, 994 F.2d at 1067, 17 BLR at 2-129. Nevertheless, the administrative law judge acted within his discretion in crediting Dr. Robinette's opinion as well-reasoned, as he found that it was based on accurate smoking and coal mine employment histories, multiple examinations and clinical tests, and it was supported by its underlying objective documentation, although the administrative law judge acknowledged that Dr. Robinette did not have access to as many medical records, reports and data as did Drs. Fino and Castle. Decision and Order at 8; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Similarly, the administrative law judge found Dr. Rasmussen's opinion to be well-reasoned and supported by the record. The administrative law judge acknowledged that Dr. Rasmussen relied on a slightly inaccurate smoking history in his report dated January 29, 2002,[5] but determined that the physician's opinion was still worthy of credit, as an earlier report listed a more accurate smoking history, and Dr. Rasmussen's conclusion, that both smoking and coal dust exposure contributed to claimant's loss of lung function, and that coal dust exposure was a "significant or major contributing factor," was similar in both reports. Decision and Order at 5; *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR

[5] Dr. Rasmussen's report dated January 29, 2009 listed a smoking history of one-half pack to one pack of cigarettes per day for 32 years, Claimant's Exhibit 11, whereas his report dated July 28, 2000 listed a smoking history of one pack per day for 33 years. Director's Exhibit 14.

1-254 (1988). As Dr. Rasmussen examined claimant on more than one occasion, reviewed the results of numerous objective tests, and cited extensive literature in support of his conclusions, the administrative law judge permissibly found that Dr. Rasmussen's opinion was sufficiently reasoned and documented, and that the consensus between Drs. Robinette and Rasmussen was more persuasive than the contrary medical opinions of record. Decision and Order at 5, 9; *see Compton*, 211 F.3d at 211, 22 BLR at 2-175. As substantial evidence supports the administrative law judge's findings pursuant to Section 718.204(c), they are affirmed. Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Second Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge