BRB No. 08-0174 BLA

D.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 11/25/2008
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/Carrier (employer) appeals the Decision and Order (05-BLA-5449) of Administrative Law Judge Joseph E. Kane awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case involves a claim filed on November 18, 2003. After crediting claimant with twenty-one years of coal mine

employment,[1] the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[2] The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer initially contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis[4] pursuant

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[1] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[2] The administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

[3] Because no party challenges the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its

to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(2). The record contains medical reports from Drs. Baker, Dahhan, and Rosenberg. Dr. Baker opined that claimant suffers from chronic obstructive pulmonary disease and chronic bronchitis, due to both coal dust exposure and cigarette smoking. Director's Exhibits 15, 44. Drs. Dahhan and Rosenberg agreed that claimant suffers from chronic obstructive pulmonary disease, but opined that the disease is due entirely to cigarette smoking. Director's Exhibit 37; Employer's Exhibits 1-3.

The administrative law judge accorded less weight to the opinions of Drs. Dahhan and Rosenberg because he found that they were premised on facts and assumptions that were inconsistent with the Act and the regulations. Decision and Order at 14-17. The administrative law judge also found that, even if the doctors' opinions were not hostile, Drs. Dahhan and Rosenberg did not provide well-reasoned opinions or adequately explain why claimant's coal dust exposure did not contribute to his chronic obstructive pulmonary disease. *Id.* Conversely, the administrative law judge found that Dr. Baker's diagnosis of legal pneumoconiosis was well-reasoned and well-documented. *Id.* at 17-19.

Employer initially contends that the administrative law judge erred in his consideration of the opinions of Drs. Dahhan and Rosenberg. Employer specifically argues that the opinions of Drs. Dahhan and Rosenberg are not hostile to the Act because both physicians acknowledged the possibility that coal dust exposure can cause an obstructive pulmonary impairment. Although both of these physicians acknowledged that coal dust exposure can cause an obstructive impairment,[5] the administrative law judge permissibly found that their opinions were not well-reasoned, because they were based on scientific studies and premises that were contrary to the Department of Labor's findings underlying the regulations. In regard to Dr. Dahhan's opinion, the administrative law judge explained:

> Dr. Dahhan's contention that claimant's obstruction is too severe to have been caused by dust inhalation is . . . based on a premise that is inconsistent with the Act. At his deposition, Dr. Dahhan testified that airway obstruction caused by coal dust generally causes a loss in FEV1 of three to five cc's per year, but [c]laimant's loss was "much, much more." This premise is inconsistent with the Department's findings in implementing the

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sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] Dr. Dahhan opined that "[s]ome airway obstruction can be seen in individuals secondary to the inhalation of coal dust." Director's Exhibit 37 at 10. Dr. Rosenberg stated that "there is no question that coal mine dust exposure can cause airflow obstruction." Employer's Exhibit 3.

> Act; specifically, the Department cited with approval a study "which demonstrated a clear relationship between coal dust exposure and a decline in pulmonary function of about 5 to 9 millimeters a year, even in miners with no radiographic evidence of clinical coal workers' pneumoconiosis. Final Rule, 65 Fed. Reg. at 79940 (Dec. 20, 2000). This figure is substantially more than the figure upon which Dr. Dahhan relied.

Decision and Order at 14 (footnote omitted).

The administrative law judge similarly found that "Dr. Rosenberg's premise that coal dust exposure does not cause a decreased diffusing capacity, is flawed, in that it contradicts legislative fact, as found by the Department." Decision and Order at 17 (citing 65 Fed. Reg. 79940, 79943 (Dec. 20, 2000)).

Thus, the administrative law judge accorded less weight to the opinions of Drs. Dahhan and Rosenberg because the doctors relied upon studies that contradicted the Department's findings as to the weight of the medical literature concerning coal dust exposure and obstruction to support their view that claimant's obstructive disease was too severe to have been caused by coal dust exposure. Because these studies were integral to the doctors' analysis, the administrative law judge permissibly discredited the opinions of Drs. Dahhan and Rosenberg. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 492, 23 BLR 2-18, 2-28-29 (7th Cir. 2004) (upholding an administrative law judge's discrediting of a physician's opinion where the physician formed his opinion in part by "referenc[ing] parts of medical literature that deny that coal dust exposure can ever cause pneumoconiosis . . . .").

The administrative law judge also permissibly accorded less weight to the opinions of Drs. Dahhan and Rosenberg because he found that these physicians did not adequately explain why claimant's response to treatment with bronchodilators necessarily foreclosed a finding of legal pneumoconiosis.[6] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 15-17. Further, the administrative law judge acted within his discretion when he discounted the opinions of Drs. Dahhan and Rosenberg, that claimant's respiratory condition is due entirely to smoking, because the doctors failed to adequately address why claimant's coal dust exposure did not contribute to his obstructive pulmonary condition. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 15, 17.

[6] Drs. Dahhan and Rosenberg relied upon claimant's positive response to bronchodilator therapy as support for their opinions that claimant did not suffer from legal pneumoconiosis. However, the administrative law judge accurately noted that Drs. Dahhan and Rosenberg reported qualifying values "both before and after bronchodilator administration." Decision and Order at 21.

Because the administrative law judge has discretion as the trier-of-fact to render credibility determinations, we affirm the administrative law judge's decision to accord less weight to the opinions of Drs. Dahhan and Rosenberg as to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Employer next argues that the administrative law judge erred in relying upon Dr. Baker's opinion to support a finding of legal pneumoconiosis because the doctor's opinion was not sufficiently reasoned or documented. Employer essentially asks the Board to examine the credibility of the doctor's opinion, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). In crediting Dr. Baker's determination that claimant suffers from legal pneumoconiosis, the administrative law judge noted that Dr. Baker "considered the objective medical data, including the qualifying pulmonary function study, relevant work and smoking histories, and [c]laimant's history of symptoms." Decision and Order at 19. The administrative law judge also found that Dr. Baker's opinion was "based on a more reasoned assessment of [c]laimant's medical and work history" and was "not premised on facts and assumptions which contradict the Act and its regulations." *Id.* The administrative law judge, therefore, found that Dr. Baker's diagnosis of legal pneumoconiosis was "well-reasoned and well-documented." *Id.* Because the administrative law judge's determination is rational and supported by substantial evidence, we affirm the administrative law judge's credibility determination. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. Therefore, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer also argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In his consideration of this issue, the administrative law judge stated:

> [A]s neither physician diagnosed pneumoconiosis, I find the medical reports of Drs. Dahhan and Rosenberg unreasoned on the issue of total disability due to pneumoconiosis and give them little weight. As Dr. Baker diagnosed legal pneumoconiosis, I give his opinion that Claimant's disability is due to pneumoconiosis greater weight. I also find Dr. Baker's opinion to be well-documented and better-reasoned. Therefore, I find that Claimant has established that his total disability is due to pneumoconiosis.

Decision and Order at 22.

In weighing the conflicting evidence, the administrative law judge permissibly assigned less weight to the opinions of Drs. Dahhan and Rosenberg, as to the cause of claimant's disability, since neither physician diagnosed the existence of legal pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4).[7] *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 22.

Employer also contends that the administrative law judge erred in relying upon Dr. Baker's opinion to support a finding that claimant's total disability is due to pneumoconiosis. Employer argues that Dr. Baker's opinion regarding disability causation is not sufficiently reasoned. However, because determinations as to the weight and credibility of the evidence are within the discretion of the trier-of-fact, we affirm the administrative law judge's finding that Dr. Baker's opinion was sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark*, 12 BLR at 1-155. We, therefore, affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[7] Dr. Rosenberg opined that, even if he assumed that claimant suffered from a degree of simple coal workers' pneumoconiosis, *i.e.*, clinical pneumoconiosis, this would not alter his opinion. Employer's Exhibit 1. However, because the administrative law judge did not find the existence of clinical pneumoconiosis, Dr. Rosenberg's assumption of clinical pneumoconiosis does not undermine the administrative law judge's determination to accord less weight to his opinion because the doctor did not diagnose legal pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge