BRB No. 08-0187 BLA

D.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAPPHIRE MINING INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY	)	DATE ISSUED: 11/25/2008
	)	
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 Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (06-BLA-6087) of Administrative Law Judge Joseph E. Kane rendered 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). The administrative law judge credited

claimant with thirty-one years of coal mine employment, and adjudicated this claim, filed on September 16, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings that the evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) and total respiratory disability at Section 718.204(b)(2). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this case.

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.[1] 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).

Employer initially challenges the administrative law judge's reliance on the medical opinion of Dr. Rasmussen over the contrary opinion of Dr. Westerfield in finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4). Employer contends that the administrative law judge erred in crediting the opinion of Dr. Rasmussen, and failed to state a valid basis for attributing less weight to Dr. Westerfield's opinion. Employer's Brief at 10-12. Employer's arguments are without merit.

In finding that legal pneumoconiosis had been established, *see* 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinion of Dr. Rasmussen, Director's Exhibit 16, Claimant's Exhibit 1, who opined that claimant's obstructive impairment was due at least in part to his coal mine employment, over the contrary opinions of Drs. Dahhan and Westerfield, Employer's Exhibits 3, 4, who determined that claimant's impairment was due entirely to smoking. Decision and Order at 12-14. The administrative law judge acted within his discretion in finding Dr. Rasmussen's opinion to be well reasoned and well documented, as the physician relied on claimant's symptoms, physical examination, objective test results, and his employment, smoking and social histories, and explained that, while claimant's cigarette smoking contributed to

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

his disability, claimant's extensive coal mine employment must also be considered a significant contributing factor to his disabling lung disease. Decision and Order at 8, 12; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). While the administrative law judge found that the contrary opinion of Dr. Westerfield was also well documented and well reasoned, as the doctor relied on objective testing, and documented which pulmonary function results supported his conclusions, he permissibly accorded the opinion less weight because the physician's analysis only "somewhat explain[ed]" why claimant's history of coal dust exposure did not contribute to his pulmonary abnormality. Decision and Order at 13; *see Barrett*, 478 F.3d 350, 23 BLR 2-472. Similarly, the administrative law judge permissibly accorded little weight to the opinion of Dr. Dahhan, finding that it was not well reasoned because the physician failed to adequately explain why thirty-one years of coal dust exposure did not exacerbate claimant's impairment. Decision and Order at 13-14; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), citing *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Accordingly, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4) is affirmed, as supported by substantial evidence.

Employer next contends that the administrative law judge erred in crediting the opinion of Dr. Rasmussen over the opinions of Drs. Westerfield and Dahhan in finding that claimant established total disability at Section 718.204(b)(2)(iv). Asserting that Dr. Rasmussen failed to adequately explain his finding of total disability in light of normal pulmonary function study and blood gas study results, and that Dr. Rasmussen opined that claimant was totally disabled while claimant was still working, employer contends that the administrative law judge erred in finding Dr. Rasmussen's opinion to be well reasoned and documented. Employer's Brief at 12-20; Decision and Order at 16. Some of employer's arguments have merit.

The administrative law judge accorded the opinions of Drs. Westerfield and Dahhan less weight because they failed to compare their assessment of claimant's respiratory impairment against the exertional requirements of his last coal mine employment. Conversely, the administrative law judge credited Dr. Rasmussen's opinion as well reasoned, because the doctor explained that claimant's mild impairment prevented him from performing the heavy exertional requirements of his duties as a section foreman, which involved operation of a continuous miner and roof bolter. Decision and Order at 3, 16; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). While the administrative law judge could properly accord less weight to those medical opinions that do not compare the assessment of impairment with the exertional requirements of claimant's job, the administrative law judge failed to address the fact that

claimant was still working on November 29, 2005, when Dr. Rasmussen issued his first report and concluded that claimant did not retain the pulmonary capacity to continue his current coal mine employment.[2] Director's Exhibit 16. The administrative law judge also did not consider the fact that claimant was still working at the time of Dr. Dahhan's examination on July 12, 2006, *see* Employer's Exhibit 3. Specifically, Dr. Dahhan opined that claimant retained the respiratory capacity to continue his present coal mining work, and noted in his report that claimant "is a 50 year old man who claims to have worked in the mining industry for 32 years and continues to do so." Employer's Exhibit 3. Claimant testified at deposition on July 17, 2006 that he was still working but planned to quit shortly, Deposition Transcript at 18, and testified at the hearing that he stopped working in July 2006, Hearing Transcript at 19. As the administrative law judge did not consider whether claimant's continued employment affected the credibility of the physicians' opinions regarding claimant's ability to perform his last coal mine employment, we vacate the administrative law judge's finding of total disability pursuant to Section 718.204(b)(2)(iv), and remand this case for the administrative law judge to address the effect of claimant's continued employment in relation to the opinions of Drs. Rasmussen and Dahhan.

[2] Dr. Rasmussen also found that claimant was totally disabled from performing his usual coal mine employment in his second report of January 31, 2007, when claimant had ceased working. Claimant's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

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