BRB No. 09-0259 BLA

THOMAS MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 11/25/2009
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Award of Benefits (06-BLA-6082) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent 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 is before the Board for the second time with respect to this claim.[1] In his original Decision and Order, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and

[1] Claimant's initial application for benefits, filed on February 19, 1992, was finally denied on June 17, 2003 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed the present application on August 22, 2005. Director's Exhibit 3.

credited the parties' stipulations that claimant worked in qualifying coal mine employment for at least twenty-three years and that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Based on the stipulation that total respiratory disability was established, the administrative law judge found that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's determination that claimant established a change in an applicable condition of entitlement under Section 725.309(d), based on employer's concession of total respiratory disability. The Board, however, vacated the administrative law judge's determinations under Sections 718.202(a)(4), 718.203(b), and 718.204(c), and remanded the case for the administrative law judge to provide a sufficient explanation for his weighing of the conflicting medical opinions of Drs. Rasmussen, Hippensteel, and Castle. The Board instructed the administrative law judge to review the medical opinion evidence to determine whether it was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), and to explain his weighing of the conflicting medical opinions and his resultant credibility determinations. If, on remand, the administrative law judge found that pneumoconiosis was established at Section 718.202(a)(4),[2] the Board directed him to weigh together all of the evidence relevant to Section 718.202(a) to determine whether it was sufficient to establish the existence of pneumoconiosis by a preponderance of the evidence and, if reached, to determine whether claimant established disability causation under Section 718.204(c). *T. M.* [*Mullins*] *v. Island Creek Coal Co.*, BRB No. 07-0886 BLA (June 26, 2008) (unpub.).[3]

[2] The Board additionally noted that, if the administrative law judge found the medical opinion evidence sufficient to establish the existence of legal pneumoconiosis on remand, the need to address its etiology pursuant to 20 C.F.R. §718.203 would be obviated. *T. M.* [*Mullins*] *v. Island Creek Coal Co.*, BRB No. 07-0886 BLA, *slip op.* at 7 n.6 (June 26, 2008) (unpub.).

[3] The administrative law judge's finding that claimant established at least twenty-three years of coal mine employment, and his finding that the evidence of record was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), were affirmed as unchallenged on appeal. *T. M.* [*Mullins*], BRB No. 07-0886 BLA, *slip op.* at 3 n.3.

On remand, the administrative law judge credited the opinion of Dr. Rasmussen over the contrary opinions of Drs. Hippensteel and Castle, and found that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Weighing all of the relevant evidence together at Section 718.202(a), the administrative law judge found that claimant established the existence of pneumoconiosis by a preponderance of the evidence thereunder, and further found that claimant established disability causation at Section 718.204(c). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's weighing of the evidence in finding legal pneumoconiosis and disability causation established at Sections 718.202(a)(4) and 718.204(c). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not 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.[4] 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 contends that the administrative law judge erred in finding that Dr. Rasmussen's opinion was better reasoned than the opinions of Drs. Hippensteel and Castle. Initially, employer asserts that, in assessing the respective qualifications of the physicians, the administrative law judge's reliance on *Martin v. Ligon Preparation Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005), to conclude that Dr. Rasmussen was the best qualified physician, was improper because the administrative law judge should have independently evaluated Dr. Rasmussen's qualifications, based on the specific facts of the instant case. Relying on *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998), which stands for the proposition that "experts' respective qualifications are important indicators of the reliability of their opinions," employer argues that the dual Board-certifications in internal medicine and pulmonary disease medicine possessed by Drs. Hippensteel and Castle demonstrate that their credentials are superior to those of Dr. Rasmussen, who is not Board-certified in pulmonary medicine. Employer avers further that the administrative law judge failed to explain his determination that Dr. Rasmussen's black lung research and publications outweighed the clinical expertise of Drs. Hippensteel and Castle, who have extensively treated miners with pulmonary diseases. Employer's Brief at 6-7. Employer's arguments lack merit.

[4] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as 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.

In addressing the comparative qualifications of the physicians, the administrative law judge acknowledged that Drs. Hippensteel and Castle possessed superior Board-certifications as pulmonologists, but concluded that Dr. Rasmussen was also "an acknowledged expert in the field of pulmonary impairments of coal miners." Decision and Order at 3, citing 1972 *U.S. Code Cong. Adm. News* 2305, 2314. The administrative law judge noted that in *Martin*, the United States Court of Appeals for the Sixth Circuit stated that "Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis." Decision and Order on Remand at 3-4, *citing Martin*, 400 F.3d at 307, 23 BLR at 2-286. The administrative law judge examined the various publications of, and research performed by, each physician, and determined that, while Dr. Hippensteel had authored two articles and Dr. Castle had authored four articles, Dr. Hippensteel's most recent article was written in 1979, and Dr. Castle's most recent article was written in 1973. Moreover, the administrative law judge found that neither physician had written an article specifically regarding pneumoconiosis, nor conducted any research on the subject. Decision and Order on Remand at 3-4; Director's Exhibit 19; Employer's Exhibit 4. By contrast, the administrative law judge noted that Dr. Rasmussen had written sixteen articles concerning respiratory diseases and pneumoconiosis, and had contributed as a member of the advisory board to NIOSH, the organization that sets standards for the evaluation of black lung disease. Thus, because Dr. Rasmussen, whose most recent commentary was written in 2001, had not only authored articles dealing directly with coal miners and pneumoconiosis, but had also conducted research in the field and "is an acknowledged expert," the administrative law judge acted within his discretion in concluding that Dr. Rasmussen was "the best qualified" physician to render an opinion on the disease. Decision and Order on Remand at 4; Director's Exhibit 13.

Employer next contends that the administrative law judge erred in relying on the opinion of Dr. Rasmussen to support his finding of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Employer argues that Dr. Rasmussen's failure to differentiate between the effects of claimant's exposure to cigarette smoke and coal mine dust rendered his opinion, attributing claimant's lung disease and total disability to both causes, to be too equivocal and uncertain to affirmatively establish that claimant's lung disease was "significantly related to, or substantially aggravated by coal dust exposure." Employer's Brief in Support of Petition for Review at 9, *citing* 20 C.F.R. §718.201(b). Employer avers further that Dr. Rasmussen's differential opinion is predicated on claimant's history of coal dust exposure, which, standing alone, is insufficient to establish the presence of legal pneumoconiosis.

Employer's arguments are premised upon the erroneous assumption that a physician's opinion must specify the relative contributions of coal dust exposure and cigarette smoking in order to establish that claimant's respiratory impairment constitutes

legal pneumoconiosis. The Fourth Circuit court has held that a physician need not apportion a precise percentage of a miner's lung disease to cigarette smoke and coal dust exposure, as such particularized findings are not necessary. The court emphasized that "the miner is not required to demonstrate that coal dust was the *only* cause of his current respiratory problems," but need only show that his lung disease was "significantly related to, or substantially aggravated by coal mine dust exposure." *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *accord Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *see also Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984).

In assessing the probative value of the medical opinions, the administrative law judge determined that Dr. Rasmussen definitively linked claimant's disabling lung disease to both smoking and coal mine dust exposure in excess of twenty years, and properly found that his opinion was sufficient to affirmatively establish the existence of legal pneumoconiosis. 20 C.F.R. §718.201(b); *Williams*, 453 F.3d at 522, 23 BLR at 2-372; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003). The administrative law judge was persuaded by Dr. Rasmussen's explanation that "[b]oth cigarette smoking and coal mine dust cause lung tissue destruction, which is caused by identical cellular and biochemical processes" and that "the effects of smoking and coal mine dust exposure cannot be distinguished by any means known including radiographic means." Decision and Order on Remand at 4; Director's Exhibit 13. The administrative law judge determined that Dr. Rasmussen's diagnosis of legal pneumoconiosis was based on his physical examination findings of diminished chest expansion, markedly reduced breath sounds, and inspiratory and expiratory wheezes; pulmonary function studies demonstrating a moderate partially reversible obstructive ventilatory impairment; a single breath carbon monoxide diffusing capacity that was minimally reduced; moderate resting hypoxia; and arterial blood gas studies indicating marked impairment in oxygen transfer during light exercise. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order on Remand at 7. Finding that Dr. Rasmussen's rationale was consistent with the language of the regulations and commonly accepted principles set forth therein regarding the concepts of aggravation and the cumulative effects of coal dust exposure and smoking, *see* 20 C.F.R. §718.201; 65 Fed. Reg. 79,940 (Dec. 20, 2000), the administrative law judge reasonably determined that Dr. Rasmussen's opinion was bolstered by his reference to several epidemiological studies substantiating his observation that in cases, such as this, where there is an absence of radiographic evidence of clinical pneumoconiosis, a miner can nonetheless "develop disabling coal mine dust induced lung disease." Decision and Order on Remand at 7; Director's Exhibit 13. Accordingly, as the administrative law judge critically examined the various bases supporting Dr. Rasmussen's opinion, that claimant "has legal pneumoconiosis which is a material contributing cause of [claimant's] disabling lung

disease," Director's Exhibit 13, and acted within his discretion in finding that Dr. Rasmussen's opinion was well-reasoned and adequately explained, we reject employer's contention that the administrative law judge erred in crediting the opinion.

Employer next argues that the administrative law judge irrationally discredited the opinions of Drs. Hippensteel and Castle on the basis that the physicians failed either to discuss the effect of coal dust exposure on claimant's condition or to fully explain why they ruled out coal dust exposure as a contributing or aggravating cause of claimant's severe respiratory impairment. Employer asserts that Drs. Hippensteel and Castle adequately explained their rationale for concluding that claimant's pulmonary impairment was unrelated to coal dust exposure, and maintains that the administrative law judge improperly shifted the burden of proof to employer to rule out a diagnosis of legal pneumoconiosis. Further, employer asserts that the administrative law judge inappropriately relied on case law to suggest that asthmatic bronchitis or bronchial asthma may constitute legal pneumoconiosis if either condition is related to coal dust exposure. Employer's arguments are without merit.

The administrative law judge determined that Drs. Hippensteel and Castle diagnosed a disabling pulmonary impairment and identified the cause as either asthmatic bronchitis or bronchial asthma unrelated to coal dust exposure, based primarily on the results of claimant's pulmonary function studies that revealed a partially reversible, purely obstructive impairment with a normal diffusion that was not typical of coal workers' pneumoconiosis, but was consistent with the diagnosed conditions. Decision and Order on Remand at 5-6, 8; Director's Exhibit 19; Employer's Exhibits 4, 7, 8. Dr. Hippensteel explained that the reversibility of function is not compatible with pneumoconiosis, which usually causes a fixed and irreversible impairment, and stated that asthmatic bronchitis was not a disease related to coal dust exposure but is a disease of the general public. Employer's Exhibit 8. Similarly, Dr. Castle stated that coal mine dust "is not one of the causes of asthma, and that has been looked at and it has not been found to cause bronchial asthma," Employer's Exhibit 7 at 11-12, and explained that when coal workers' pneumoconiosis causes impairment, it generally does so by causing a mixed, irreversible obstructive and restrictive ventilatory defect. The administrative law judge noted that, pursuant to the regulations and applicable precedent, asthmatic bronchitis and bronchial asthma may fall within the definition of legal pneumoconiosis at 20 C.F.R. §718.201 if these conditions are aggravated by coal dust exposure. Additionally, the administrative law judge found that Drs. Hippensteel and Castle failed to adequately address the effect of coal dust exposure on this claimant's pulmonary condition. Decision and Order at 7; *see generally Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999) (legal pneumoconiosis encompasses a wide variety of "diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomotology have nonetheless been made worse by coal dust exposure"); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir.

1995). Further, as the regulations contemplate that pneumoconiosis can result in an obstructive impairment without a restrictive component, *see* 20 C.F.R. §§718.201(a)(2), (b), 718.204, and as partial reversibility does not preclude the presence of disabling pneumoconiosis, but may suggest a combination of factors where, as here, the test results demonstrate a residual impairment after bronchodilation, the administrative law judge acted within his discretion in finding that the rationales provided by Drs. Hippensteel and Castle were not persuasive. Decision and Order on Remand at 6-8; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because the administrative law judge found that Dr. Rasmussen was better qualified to render an opinion as to whether claimant's condition constituted legal pneumoconiosis, and provided a more persuasive rationale for his conclusions, the administrative law judge permissibly accorded dispositive weight to Dr. Rasmussen's opinion. *See generally Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002) (employer is asking the Board to overturn the administrative law judge's credibility determinations which exceeds the Board's limited scope of review); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). As the administrative law judge provided valid reasons for his credibility determinations, and his findings are supported by substantial evidence, we affirm his finding that the weight of the medical opinions established legal pneumoconiosis under Section 718.202(a)(4), and that claimant established the existence of pneumoconiosis by a preponderance of the evidence under Section 718.202(a).

At Section 718.204(c), because Drs. Hippensteel and Castle did not diagnose pneumoconiosis, in direct contradiction to the administrative law judge's finding that legal pneumoconiosis was established, the administrative law judge properly accorded little weight to their opinions, that claimant's disabling respiratory impairment was unrelated to pneumoconiosis. Decision and Order on Remand at 9; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge permissibly relied on the opinion of Dr. Rasmussen, that both pneumoconiosis and smoking were substantial contributing cause of claimant's disability, to support his finding that the evidence established disability causation at Section 718.204(c), and we affirm his findings thereunder as supported by substantial evidence. *See Gross*, 23 BLR at 1-17, 1-18. Consequently, we affirm the administrative law judge's finding that claimant is entitled to benefits.[5]

[5] Our affirmance of the administrative law judge's Decision and Order on Remand awarding benefits renders moot employer's request for reassignment of the case to a different administrative law judge upon remand.

Accordingly, the Decision and Order on Remand of the administrative law judge 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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JUDITH S. BOGGS
Administrative Appeals Judge