BRB No. 09-0300 BLA

ROGER LEE LAMBERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 11/20/2009
	)	
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 Awarding Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (05-BLA-5489) of Administrative Law Judge Alice M. Craft (the administrative law judge) 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). This is the

second time this case has come before the Board. In the initial decision, the administrative law judge credited claimant with thirty-one and one-half years of coal mine employment,[1] and found that claimant established the existence of pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), because the administrative law judge had erred: in failing to fully address the relevant evidence; in failing to place the burden of proof upon claimant; and in failing to explain her findings. *Lambert v. Consolidation Coal Co.*, BRB No. 06-0786 BLA, slip op. at 5 (Aug. 30, 2007)(unpub.)(McGranery, J., dissenting). The Board instructed the administrative law judge, on remand, to reconsider whether the medical opinions of record establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), being mindful to distinguish between diagnoses of clinical and legal pneumoconiosis. The Board further instructed the administrative law judge to then weigh together all of the relevant evidence to determine whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a).[2] *Id*. at 6. The Board additionally instructed that if, on remand, the administrative law judge again found that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), she was to consider whether the pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). Further, in light of its decision to vacate the administrative law judge's finding at 20 C.F.R. §718.202(a), the Board vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and directed the administrative law judge to reconsider that issue if reached.[3] *Id*. at 7.

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

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

[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the existence of pneumoconiosis was not established under 20 C.F.R. §718.202(a)(1)-(3) and that total disability was established under 20 C.F.R. §718.204(b)(2). *Lambert v. Consolidation Coal Co.*, BRB No. 06-0786 BLA, slip op. at 2 n.2 (Aug. 30, 2007)(unpub.)(McGranery, J., dissenting).

On remand, the administrative law judge again found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant's totally disabling respiratory impairment is due to pneumoconiosis at 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 evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging the Board to affirm the administrative law judge's Decision and Order. 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. 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).

To be entitled 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 he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Mullins, Hippensteel, and Castle. Dr. Mullins examined claimant on July 20, 2004, and diagnosed chronic obstructive pulmonary disease (COPD) due to coal workers' pneumoconiosis. Dr. Mullins further opined that claimant is totally disabled by a moderate ventilatory impairment, attributing 95% of the impairment to coal workers' pneumoconiosis, and 5% to other causes. Director's Exhibit 16; Claimant's Exhibit 1. When deposed, on October 26, 2005, Dr. Mullins revised her opinion, stating that there was probably a greater asthma component to claimant's obstruction than she had initially indicated. Dr. Mullins clarified her opinion, stating that she would attribute approximately 50% of claimant's impairment to pneumoconiosis. Claimant's Exhibit 1 at 24-25. By contrast, Drs. Hippensteel and Castle, who examined claimant on October 12, 2004 and February 22, 2005, respectively, and reviewed his medical records, each opined that claimant does not have coal workers' pneumoconiosis or any other coal dust-related lung disease, but suffers from a totally disabling pulmonary impairment caused by bronchial asthma, which is unrelated to coal dust exposure. Employer's Exhibits 1, 4. In depositions taken on October 17 and October 19, 2005, respectively, Drs. Hippensteel

and Castle reiterated their conclusions. Employer's Exhibit 6 at 12, 17; Employer's Exhibit 7 at 19-20.

The administrative law judge considered the conflicting medical opinions and credited Dr. Mullins's opinion, that claimant suffers from legal pneumoconiosis,[4] in the form of COPD due in part to coal dust exposure, over the contrary opinions of Drs. Hippensteel and Castle. Decision and Order on Remand at 14-15. Employer asserts that, in so doing, the administrative law judge impermissibly substituted her opinion for that of a medical expert and improperly placed the burden of proof on employer to disprove the existence of legal pneumoconiosis. Employer's Brief at 6. We disagree.

In evaluating the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge initially found, correctly, that all three physicians agree that claimant has a disabling obstructive impairment and asthma, and that his smoking history is insignificant. Decision and Order on Remand at 13. The administrative law judge therefore found that "[t]he issue comes down to whether the Claimant's asthma is the only cause of [his] obstructive impairment, or whether coal dust was also a contributing factor." Decision and Order on Remand at 13. The administrative law judge permissibly found Dr. Mullins's opinion to be a well-reasoned diagnosis of legal pneumoconiosis,[5] because the doctor explained that, unless claimant's post-bronchodilator pulmonary function studies showed that his FEV1 value corrects to normal (up to 80% of predicted), claimant has some degree of coal workers' pneumoconiosis, given that his smoking history is insignificant and there are no risk factors other than coal dust exposure that would explain the presence of a significant, non-reversible obstructive impairment.[6] *See*

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] As noted above, Dr. Mullins diagnosed chronic obstructive pulmonary disease (COPD) due to [coal workers pneumoconiosis]. Director's Exhibit 16. The administrative law judge reasonably found that, although Dr. Mullins used the terms "coal workers' pneumoconiosis" and "CWP," her opinion was sufficiently broad to encompass legal pneumoconiosis because the doctor identified coal dust as a contributing factor to claimant's obstructive pulmonary impairment. Decision and Order on Remand at 13 and n.3; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761, 21 BLR 2-587, 2-601-02 (4th Cir. 1999)(holding that in determining whether a doctor has diagnosed pneumoconiosis, the "focus should be on the descriptive facts and opinions of a doctor" rather than the "medical term of art" used by the doctor).

[6] The record reflects that none of the post-bronchodilator pulmonary function studies showed the FEV1 value correcting to normal. Director's Exhibit 16; Employer's Exhibits 1, 4.

Milburn Colliery Co. v. Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). The administrative law judge further observed that while Dr. Mullins acknowledged that asthma can cause a fixed impairment, through a process called airways remodeling, the physician explained that airways remodeling generally occurs in people who have had asthma since childhood, whereas claimant did not report symptoms of asthma until age thirty, and there is no evidence that he had childhood asthma. Decision and Order on Remand at 13; Claimant's Exhibit 1 at 27-28. As the administrative law judge explained her determination to find Dr. Mullins's opinion to be a well-reasoned and documented diagnosis of legal pneumoconiosis, and as employer does not challenge this finding, it is affirmed. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Further, substantial evidence supports the administrative law judge's finding that Dr. Hippensteel did not provide an explanation for his opinion that coal dust exposure did not contribute to the irreversible component of claimant's obstruction. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; *see also Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. May 11, 2004); Decision and Order on Remand at 14. Specifically, as the administrative law judge found, while Dr. Hippensteel discussed the concept of airways remodeling, he did not address whether airways remodeling actually occurred in this case, and thus did not credibly address the source of claimant's fixed impairment. Decision and Order at 14; Employer's Exhibit 7 at 16-17, 19. Therefore, contrary to employer's assertion, the administrative law judge permissibly accorded diminished weight to the opinion of Dr. Hippensteel, finding it to be less well-reasoned than that of Dr. Mullins. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; *see also Swiger*, 98 F. App'x. at 237.

The administrative law judge further found that Dr. Castle did not provide sufficient reasoning for his opinion that coal dust exposure played no role in the irreversible component of claimant's obstructive impairment. Decision and Order at 14. The administrative law judge noted, correctly, that Dr. Castle testified that if asthma is not treated "appropriately and aggressively," over time, airways remodeling will occur, resulting in some degree of fixed airway obstruction. Employer's Exhibit 6 at 18-19. Dr. Castle added that claimant suffers from some degree of fixed airway obstruction, and opined that if claimant's asthma were treated more aggressively, his obstruction might improve significantly. Employer's Exhibit 6 at 17-19. The administrative law judge acted within her discretion in discounting Dr. Castle's opinion, however, because Dr.

Castle did not adequately explain his conclusion that claimant's fixed obstruction results from inadequate treatment for his asthma, in light of the record evidence that claimant is treated for asthma with at least four medications. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; Decision and Order at 14; Employer's Exhibit 6 at 9. Thus, contrary to employer's argument, the administrative law judge permissibly accorded diminished weight to Dr. Castle's opinion. Consequently, we affirm the administrative law judge's credibility determination, and her finding that claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that Dr. Mullins's well-documented and reasoned opinion outweighed the negative x-ray evidence, and established the existence of legal pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174-75. Employer does not challenge this finding. It is therefore affirmed.[7] *Skrack*, 6 BLR at 1-711.

Employer next asserts that the administrative law judge erred in discounting the opinions of Drs. Hippensteel and Castle as to disability causation under 20 C.F.R. §718.204(c). Employer's contention lacks merit. The administrative law judge permissibly found that the opinions of employer's physicians were entitled to less weight on the issue of disability causation because they did not diagnose any type of coal dust-related disease. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). In contrast, the administrative law judge properly relied on the well-reasoned opinion of Dr. Mullins that 50% of claimant's disabling impairment is due to pneumoconiosis. Decision and Order on Remand at 16. Consequently, the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) is affirmed.

The administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-113. As they are supported by substantial evidence, we affirm the administrative law judge's findings that

[7] Addressing whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge correctly noted that, since claimant had established legal pneumoconiosis, the causal relationship to his coal mine employment was already established by the opinion of Dr. Mullins. Decision and Order at 15; *see Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

claimant established that he is totally disabled due to legal pneumoconiosis. Therefore, we affirm the administrative law judge's award of benefits. *See Anderson*, 12 BLR at 1-114; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge