BRB No. 09-0339 BLA

RONNIE LEE BOWER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MYSTIC ENERGY, INCORPORATED	)	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-Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

Employer appeals the Decision and Order-Awarding Benefits (2007-BLA-5936) of Administrative Law Judge Thomas M. Burke 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.* This case involves a request for modification.[1] The administrative law judge adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established thirty-two years of coal mine employment, the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) on the basis of x-ray evidence, and the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) on the basis of medical opinion evidence. On weighing the x-ray and medical opinion evidence together, the administrative law judge found that both clinical and legal pneumoconiosis were established at 20 C.F.R. §718.202(a).[2] The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b). Further, the administrative law judge found that claimant established that he had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and that his total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Consequently, having considered both the old and new evidence together, the administrative law judge found that employer was not entitled to modification at 20 C.F.R. §725.310, as the evidence did not establish a change in conditions or that a mistake in a determination of fact had been made in the previous decision awarding benefits. Accordingly, the administrative law judge denied employer's request for modification and awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established both clinical and legal pneumoconiosis at Section 718.202(a)(1) and (4) and that the administrative law judge substituted his judgment for that of the medical experts in doing so. Additionally, employer asserts that the administrative law judge erred in his evaluation of the medical opinion evidence on the issue of total disability and erred, therefore, in finding total disability established at Section 718.204(b). Employer also contends that the administrative law judge erred in not considering the opinions of

[1] This case involves employer's request for modification of an award of benefits on a claim filed on March 22, 2001. Benefits were previously awarded in this case by Administrative Law Judge Daniel L. Leland on January 2, 2004. Director's Exhibit 55. Pursuant to employer's appeal, on February 28, 2005, the Board vacated Judge Leland's award of benefits and remanded the case for the administrative law judge to reconsider the evidence relevant to total disability and disability causation at 20 C.F.R. §718.204(b) and (c). On July 15, 2005, Judge Leland again awarded benefits. On July 28, 2006, the Board affirmed the award. On August 3, 2006, employer filed a request for modification. The denial of that request is on appeal herein.

[2] The administrative law judge found that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) because there was no biopsy evidence in this living miner's claim and the presumptions at 20 C.F.R. §718.202(a)(3) were not applicable in this case. Decision and Order at 14.

Drs. Crisalli and Zaldivar on the issue of disability causation at Section 718.204(c), on the ground that they did not find claimant to be totally disabled.[3] Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, by letter, to the issue of total disability. The Director contends that the opinions of Drs. Crisalli and Zaldivar, who found that claimant could perform his usual coal mine employment, were insufficient, as a matter of law, to establish that claimant was not totally disabled. The Director so contends because Drs. Crisalli and Zaldivar found that claimant could perform his usual coal mine employment *only if he received intensive medical therapy*. Therefore, the Director contends that these opinions are insufficient to establish that claimant can perform his usual coal mine employment because the test for determining whether claimant is totally disabled is whether he is able to perform his usual coal mine employment, not whether he can perform his usual coal mine employment *if he takes medication*.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish a requisite element of entitlement will preclude a finding of entitlement to benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In determining whether modification is established at 20 C.F.R. §725.310, the administrative law judge must consider whether there has been a change in conditions or

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[3] Employer does not challenge the administrative law judge's finding that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). That finding is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

whether a mistake in a determination of fact was made in the previous decision. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1993). In considering whether a mistake in a determination of fact has been made, the administrative law judge is required to consider the entire evidentiary record. *Nataloni*, 17 BLR at 1-84. In this case, in considering all of the evidence of record, the administrative law judge found that employer failed to establish a change in conditions or a mistake in a determination of fact.

After considering the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is rational, supported by substantial evidence and contains no reversible error.

PNEUMOCONIOSIS

Contrary to employer's argument, the administrative law judge properly found that the x-ray evidence established clinical pneumoconiosis at Section 718.202(a)(1), based on the preponderance of the positive x-ray readings by the better qualified physicians. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*). Specifically, contrary to employer's contention, the administrative law judge properly found that the June 13, 2001 x-ray was positive, as it was read twice as positive and once as negative by dually qualified readers. *See* 20 C.F.R. §718.202(a)(1); *Adkins*, 958 F.2d at 52, 16 BLR at 2-65. Likewise, the administrative law judge properly found the February 13, 2002 x-ray to be positive, as it was read as positive by a dually qualified reader, and as negative by a B reader. *See* 20 C.F.R. §718.202(a)(1); *Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Cranor*, 22 BLR at 1-7. Further, contrary to employer's argument, the administrative law judge properly found the x-rays of July 17, 2002 and June 19, 2003 to be inconclusive for the presence or absence of pneumoconiosis, as they were each read as positive and negative by dually qualified readers. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Additionally, contrary to employer's argument, the administrative law judge was not required to accord greater weight to the readings of physicians who are professors of radiology. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Accordingly, we affirm the administrative law judge's finding that

the x-ray evidence established clinical pneumoconiosis pursuant to Section 718.202(a)(1).

Next, the administrative law judge credited the opinions of Drs. Cohen, Rasmussen and Mullins, who attributed a portion of claimant's respiratory impairment to coal dust, to find legal pneumoconiosis established at Section 718.202(a)(4), over the opinions of Drs. Zaldivar and Crisalli, who found that claimant's respiratory impairment was caused exclusively by non-occupationally related asthma. Decision and Order at 10. Contrary to employer's argument, the administrative law judge properly rejected the opinions of Drs. Zaldivar and Crisalli because they failed to "explain how the fact that [c]laimant may have asthma necessarily exclude[d] [c]laimant's thirty-two years of coal dust exposure as a contributing factor" to his respiratory impairment. Decision and Order at 13; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Instead, the administrative law judge properly found the opinions of Drs. Cohen, Rasmussen and Mullins, that coal dust exposure was a cause of claimant's respiratory impairment, to be more persuasive, as they were better reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

Specifically, contrary to employer's arguments, the administrative law judge permissibly credited the opinion of Dr. Cohen over the opinions of Drs. Zaldivar and Crisalli, because he found that Dr. Cohen addressed the possibility that claimant had asthma, but concluded that the evidence was insufficient to support that finding. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge also permissibly credited the opinion of Dr. Cohen over the opinions of Drs. Zaldivar and Crisalli, because he found that Dr. Cohen better explained how the respiratory improvement experienced by claimant with the use of bronchodilators was not definitive evidence that claimant's respiratory impairment arose from asthma, rather than coal mine employment, as medical literature states that coal miners often respond to bronchodilator therapy. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103. Additionally, the administrative law judge permissibly credited that Dr. Cohen's opinion because he found that it better explained how claimant's normal diffusion capacity did not rule out a coal-dust induced condition, because not all diseases caused by coal dust result in a reduced diffusion capacity. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-104. Further, the administrative law judge properly credited Dr. Rasmussen's opinion because he explained how there was no scientific support for Dr. Zaldivar's opinion that the absence of a reduced diffusing capacity rules out a coal dust-induced respiratory impairment. *See Clark*, 12 BLR at 1-155. Similarly, the administrative law judge properly accorded little weight to Dr. Crisalli's opinion because he did not sufficiently explain or cite to support for his finding that claimant's normal

oxygenation at rest was indicative of asthma to the exclusion of coal dust. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-104. Further, the administrative law judge properly credited the opinions of Drs. Cohen, Rasmussen and Mullins, who opined that the fact that there was no persistent pattern of improvement in respiratory function following bronchodilator therapy mitigated against asthma as the sole cause of claimant's respiratory impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Beeler*, 521 F.3d at 726, 24 BLR at 2-104; *Gross*, 23 BLR at 1-18. The administrative law judge properly credited the opinion of Dr. Mullins, who attributed claimant's respiratory impairment to a combination of coal dust, smoking and asthma, but found the doctor opined that it was unlikely that claimant's respiratory impairment was caused entirely by one risk factor, as the symptoms caused by each often overlap. *See Gross*, 23 BLR at 1-18.

Having reviewed the medical opinion evidence, therefore, the administrative law judge properly concluded that the opinions of Drs. Cohen, Rasmussen and Mullins established legal pneumoconiosis at Section 718.202(a)(4), as they were better reasoned. *See Gross*, 23 BLR at 1-18; *Clark*, 12 BLR at 1-155; *Beeler*, 521 F.3d at 726, 24 BLR at 2-104. Consequently, the administrative law judge properly found that the medical opinion evidence established legal pneumoconiosis pursuant to Section 718.202(a)(4). Further, on weighing the x-ray and medical opinion evidence together, the administrative law judge properly found that both clinical and legal pneumoconiosis were established at 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

TOTAL DISABILITY

Turning to the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge rationally accorded significant weight to the opinion of Dr. Cohen, that claimant was totally disabled, because he specifically explained the requirements of claimant's usual coal mine employment and was the only physician of record who demonstrated a detailed understanding of those requirements. Decision and Order at 15; *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-179 (2006); *see Barrett*, 478 F.3d at 357, 23 BLR at 2-483; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Further, the administrative law judge properly accorded Dr. Cohen's opinion significant weight because it was supported by the qualifying pre-bronchodilator values of June 19, 2003 and January 17, 2007, as well as other medical data. *Clark*, 12 BLR at 1-155. Likewise, the administrative law judge rationally credited Dr. Rasmussen's opinion, that claimant was totally disabled, because it was supported by claimant's June 19, 2003 and January 17, 2007 qualifying pre-bronchodilator values, as well as other medical data. *Id*.

On the other hand, the administrative law judge properly accorded little weight to the opinions of Drs. Zaldivar, Crisalli and Mullins because their opinions, that claimant

could perform his usual coal mine employment *with medication*, were highly speculative, vague and qualified.[5] *See Stanley v Eastern Assoc. Coal Corp.*, 6 BLR 1-1157, 1-1162 (1984).

Further, we agree with the Director, that the opinions of Drs. Zaldivar and Crisalli are insufficient to show that claimant does not have a totally disabling respiratory impairment because they are premised on the condition that claimant can perform his usual coal mine employment *if he takes medication*. As the Director contends, the test to establish total disability is whether a miner can perform his usual coal mine employment, not whether he can perform his usual coal mine employment *if he takes medication*. Director's Brief at 1; 20 C.F.R. §718.204(b)(1)(i). Moreover, as the Director contends, the opinions of Drs. Zaldivar and Crisalli, that claimant can perform his usual coal mine employment with the use of bronchodilators, are insufficient to show that claimant can perform his usual coal mine employment because the use of a bronchodilator does not provide an adequate assessment of the miner's disability. Director's Brief at 1; 45 Fed. Reg. 13682 (1980). We, therefore, affirm the administrative law judge's finding that total disability was established at Section 718.204(b)(2)(iv), on the basis of the well-reasoned opinions of Drs. Cohen and Rasmussen. *Clark*, 12 BLR at 1-155. Further, as the administrative law judge weighed both the qualifying and non-qualifying pulmonary function and blood gas study evidence, along with all of the medical opinion evidence, we conclude that the administrative law judge properly found that total disability was established at Section 718.204(b). *Rafferty v. Jones & Lauglin Steel Corp.*, 9 BLR 1-231, 1-232 (1987).

DISABILITY CAUSATION

Finally, contrary to employer's argument, the administrative law judge properly accorded little weight to the opinions of Drs. Crisalli and Zaldivar on the issue of disability causation at Section 718.204(c) because they failed to find that claimant had clinical or legal pneumoconiosis or that he was totally disabled. An administrative law judge who finds that claimant suffers from pneumoconiosis and is totally disabled, "may not credit a medical opinion that the former did not cause the latter, unless the [administrative law judge] can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest

[5] The administrative law judge noted that Dr. Zaldivar opined that claimant could perform his usual coal mine employment with "intensive" bronchodilator treatment; that Dr. Crisalli opined that it would be "possible" for claimant to perform his usual coal mine employment with additional bronchodilator therapy or if he were allowed to rest frequently; and that Dr. Mullins opined that claimant would only be able to perform heavy labor in "sporadic bursts." Decision and Order at 16.

upon [his] disagreement with the [administrative law judge's] finding as to either or both of the predicates in the causal chain." *Toler v. Eastern Asso. Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Thus, in this case, the administrative law judge could not rely on the opinions of Drs. Crisalli and Zaldivar, who found that claimant was not disabled by clinical or legal pneumoconiosis, as both doctors' opinions on the issue of disability causation were based on their findings that claimant did not have clinical or legal pneumoconiosis and that he was not totally disabled. The administrative law judge, therefore, properly rejected their opinions on the issue of disability causation at Section 718.204(c). *Toler*, 43 F.3d at 16, 19 BLR at 2-83. Instead, the administrative law judge properly found disability causation established at Section 718.204(c) based on the opinions of Drs. Cohen and Rasmussen, who found both clinical and legal pneumoconiosis, as well as total disability. *See Toler*, 43 F.3d at 116, 19 BLR at 2-83. The administrative law judge properly found the opinions of Drs. Cohen and Rasmussen, attributing claimant's total disability to pneumoconiosis, to be well-reasoned and well-documented. *See Gross*, 23 BLR at 1-18; *Clark*, 12 BLR at 1-155.

MODIFICATION

In conclusion, the administrative law judge properly found, on reconsidering the evidence of record, that it established both clinical and legal pneumoconiosis at Section 718.202(a), that pneumoconiosis arose out of coal mine employment at Section 718.203(b), that claimant was totally disabled at Section 718.204(b), and that claimant's disability was due to pneumoconiosis at Section 718.204(c). The administrative law judge, therefore, properly found that employer failed to show a change in conditions or a mistake in a determination of fact at Section 725.310. Consequently, the administrative law judge properly rejected employer's request for modification, *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), and awarded benefits.

Accordingly, the Decision and Order-Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge