BRB No. 09-0361 BLA

HAROLD CALLOWAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/27/2009
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-6695) of Administrative Law Judge Thomas F. Phalen, Jr. 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 subsequent claim filed on December 17, 2001.[1] After crediting claimant with nineteen years of coal mine employment,[2] the

[1] Claimant initially filed a claim for benefits on July 21, 1994. Director's Exhibit 1. The district director denied the claim on December 15, 1994, because claimant did not establish any of the elements of entitlement. *Id.* Claimant filed a second claim on December 10, 1998. Director's Exhibit 2. In a Decision and Order dated November 29,

administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). However, the administrative law judge found that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior 1998 claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2001 claim on the merits. After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence established 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 contends that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 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). Claimant responds is support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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

2000, Administrative Law Judge Robert L. Hillyard found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Hillyard denied benefits. *Id.*

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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*).

[3] Because no party challenges the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The administrative law judge's finding that evidence established total disability pursuant to 20 C.F.R. §718.204(b) is similarly affirmed. *Id.*

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish that he suffered from pneumoconiosis. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he suffers from pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

The Existence of Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4).

Summary of the New Medical Opinion Evidence

The record contains new medical opinions from Drs. Majmudar, Baker, Selby, and Repsher. In a March 5, 2002 report, Dr. Majmudar diagnosed chronic obstructive pulmonary disease (COPD), chronic bronchitis, and pneumoconiosis. Director's Exhibit 11. Dr. Majmudar attributed these diseases to smoking and coal dust exposure. *Id.* During a December 28, 2006 deposition, Dr. Majmudar opined that claimant's coal dust

[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).

exposure aggravated his COPD. Claimant's Exhibit 1 at 13. The following exchange also took place:

> [Claimant's Counsel]: In interpreting what you're saying here today, is it a fair statement to say that the coal mine dust inhalation is the predominant cause of his pneumoconiosis and COPD?
>
> [Dr. Majmudar]: Yeah. With a history of only 10-pack year of smoking, you know, I think in his case, [the] predominate cause does appear to be pneumoconiosis.

Claimant's Exhibit 1 at 14.

In a report dated November 30, 2006, Dr. Baker diagnosed coal workers' pneumoconiosis, COPD, bronchitis, and resting arterial hypoxemia. Claimant's Exhibit 2. Dr. Baker attributed claimant's coal workers' pneumoconiosis to his coal dust exposure and claimant's COPD, bronchitis, and resting arterial hypoxemia. to "coal dust exposure/cigarette smoking/question asthma." *Id.* Dr. Baker indicated that claimant's primary problem "was probably that of asthma, though there may be some contribution from his coal dust exposure as well." *Id.* Dr. Baker further stated:

> Coal Workers Pneumoconiosis 1/0, COPD with a severe obstructive defect, moderate resting arterial hypoxemia and mild bronchitis have all been significantly contributed to and substantially aggravated by coal dust exposure from his coal mine employment. There has been minimal contribution from his less than 15-pack year history of smoking, but there may be a significant contribution to his obstructive airway disease from his probable bronchial asthma.

Claimant's Exhibit 2.

In a report dated March 6, 2003, Dr. Selby opined that claimant does not suffer from coal workers' pneumoconiosis or any pulmonary disease caused by his coal mine dust exposure. Employer's Exhibit 1. Dr. Selby opined that claimant "has a severe obstructive lung defect potentially as a result of . . . asthma and as the result of emphysema developing from primary and secondary cigarette smoke." *Id.* Dr. Selby reiterated his opinions during a June 26, 2007 deposition. Employer's Exhibit 3.

In a report dated March 22, 2007, Dr. Repsher opined that claimant does not suffer from clinical or legal pneumoconiosis. Employer's Exhibit 2. Dr. Repsher opined that claimant suffers from COPD "most likely due solely to his long and heavy cigarette smoking habit." *Id.* During a July 25, 2007 deposition, Dr. Repsher opined that claimant's COPD is due entirely to cigarette smoking. Employer's Exhibit 4 at 34.

The Administrative Law Judge's Finding

Having credited claimant with nineteen years of coal mine employment and a fourteen pack-year smoking history, the administrative law judge addressed the evidence regarding the etiology of claimant's COPD. The administrative law judge found that Dr. Majmudar's opinion was "sufficiently well-reasoned and well-documented" to support a finding of legal pneumoconiosis. Decision and Order at 20. Although the administrative law judge found that Dr. Baker's opinion was also "sufficiently reasoned," he found that it was entitled to less weight based on its equivocal nature, noting that Dr. Baker opined that claimant's primary problem "was *probably* that of asthma, though there *may be* some contribution from his coal dust exposure as well." Decision and Order at 20-21; Claimant's Exhibit 2.

The administrative law judge accorded less weight to Dr. Repsher's opinion because he found that the doctor "failed to illustrate how he rationally eliminated [c]laimant's 19 years of coal mine employment as a contributor to [his] COPD." Decision and Order at 21. The administrative law judge also accorded less weigh to Dr. Repsher's opinion because he found that it was equivocal. *Id.* at 21-22. The administrative law judge, therefore, found that Dr. Repsher's opinion was insufficiently reasoned. The administrative law judge also found that Dr. Selby's opinion was insufficiently reasoned, finding that the doctor did not explain why he ruled out coal dust exposure as a cause of claimant's COPD. *Id.* at 22.

The administrative law judge, therefore, found that:

> While three reports have been accorded "less weight," I note that I did not find them devoid of probative value. As such, there is one report with probative weight and one report with less weight that diagnosed legal pneumoconiosis and two reports with less weight that found no pneumoconiosis at all. Therefore, I find that [c]laimant has proven by a preponderance of the evidence that he suffers from pneumoconiosis under [Section] 718.202(a)(4).

Decision and Order at 22.

Discussion

Employer argues that the administrative law judge committed numerous errors in finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD due to coal dust exposure. Employer initially argues that Dr. Majmudar's diagnosis of legal pneumoconiosis, in the form of COPD due to coal dust exposure and smoking, is undermined by the doctor's reliance on a positive x-ray interpretation. We disagree. The administrative law judge permissibly found that

the March 5, 2002 x-ray that Dr. Majmudar interpreted as positive for clinical pneumoconiosis was interpreted by Dr. Wiot, a better qualified physician, as negative for clinical pneumoconiosis, thus calling into question the reliability of Dr. Majmudar's diagnosis of clinical pneumoconiosis.[5] *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Director's Exhibit 11. However, because Dr. Majmudar's diagnosis of legal pneumoconiosis, *i.e.*, COPD due to coal dust exposure and smoking, was not based upon his positive x-ray interpretation, it does not undermine his diagnosis of legal pneumoconiosis.

Employer also argues that the administrative law judge erred in not adequately addressing Dr. Majmudar's reliance upon an inaccurate smoking history. In assessing the credibility of a medical opinion, an administrative law judge may take into account the fact that a physician has relied upon an inaccurate smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). However, the significance of the discrepancy, and the effect, if any, that it has on the credibility of a physician's opinion, is left to the discretion of the administrative law judge. In this case, the administrative law judge addressed the discrepancy between the cigarette smoking history that he credited (fourteen pack years) and the amount relied upon by Dr. Majmudar (ten and one-half pack-years), rationally finding that the three and one-half pack-year difference was not significant. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). We, therefore, affirm the administrative law judge's determination that Dr. Majmudar's opinion provides credible support for a finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). We also affirm the administrative law judge's finding that Dr. Baker's opinion, that claimant's COPD is attributable to his coal dust exposure, is supportive of Dr. Majmudar's opinion.

Employer also argues that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Selby. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Repsher and Selby, that claimant's COPD was due solely to smoking, because neither physician adequately explained how claimant's coal dust exposure could be eliminated as a source of claimant's obstructive impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-

[5] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although two physicians, Drs. Majmudar and Baker, diagnosed clinical pneumoconiosis, the administrative law judge found that the x-rays that they interpreted as positive for pneumoconiosis were interpreted as negative by better qualified physicians. The administrative law judge, therefore, discredited the only new medical opinion evidence supportive of a finding of clinical pneumoconiosis.

483 (6th Cir. 2007); Decision and Order at 21-22. The administrative law judge permissibly found that Drs. Repsher and Selby did not adequately explain why claimant's nineteen years of coal dust exposure did not contribute, along with claimant's fourteen pack-year smoking history, to claimant's COPD. The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Repsher and Selby.[6]

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis in the form of COPD arising out of coal mine employment.[7]

In light of our affirmance of the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(4), we affirm the administrative law judge's finding that the applicable conditions of entitlement has changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309.

Total Disability Due to Pneumoconiosis

Employer next 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). Employer's contention has no merit. The administrative law judge rationally discounted the opinions of Drs. Repsher and Selby because they did not diagnose legal pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *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); *Adams v. Director, OWCP*, 886 F.2d 818, 826,

[6] Because the administrative law judge provided a proper basis for according less weight to the opinions of Drs. Repsher and Selby, *i.e.*, that they did not adequately explain why claimant's coal dust exposure did not contribute to his COPD, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We, therefore, need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Repsher and Selby.

[7] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge was not required to separately determine the etiology thereof at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

13 BLR 2-52, 2-63-64 (6th Cir. 1989). Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Majmudar to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on Dr. Majmudar's opinion, as supported by that of Dr. Baker, to find that claimant is totally disabled due to legal pneumoconiosis. *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).

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