BRB No. 10-0112 BLA

JOSEPH R. TANKERSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 11/18/2010
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-Award of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (07-BLA-5580) of Administrative Law Judge Edward Terhune Miller rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with at least ten years of coal mine employment, pursuant to the parties' stipulation,[2] and found that the medical opinion evidence developed since the denial of claimant's prior claim established that claimant has legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) and emphysema due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4).[4] The administrative law judge, therefore, determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that claimant established that he is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to Section

[1] Claimant filed three previous claims, all of which were finally denied. His third claim, filed on December 12, 1997, was denied on February 28, 2000, because claimant did not establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 3. Claimant timely requested modification, which was denied by the district director on December 5, 2000. Director's Exhibit 3. Claimant filed his fourth and current claim on May 20, 2006. Director's Exhibit 5.

[2] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibits 3, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] "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).

[4] The administrative law judge found that the new x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 15. Noting further that "proof of legal pneumoconiosis is not dependent upon positive x-ray evidence," the administrative law judge found that the negative x-ray evidence did "not disprove the existence of legal pneumoconiosis" established by the medical opinion evidence. Decision and Order at 16-17; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), filed a response brief.[5]

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).

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[6] The Director responds, and employer agrees, that Section 1556 does not affect this case because claimant cannot establish fifteen years of qualifying coal mine employment for purposes of the Section 411(c)(4) presumption. Claimant responds that Section 411(c)(4) applies to his claim, as the administrative law judge credited him with twenty-four and one-half years of coal mine employment[7] and found that he has a totally disabling respiratory impairment. Claimant, however, asserts that a remand for the administrative

[5] The administrative law judge's finding that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) is unchallenged on appeal. It is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[7] As noted earlier, the administrative law judge credited claimant with at least ten years of coal mine employment, based on the parties' stipulation. Decision and Order at 2 n.2. Claimant focuses on the administrative law judge's later statement, that Social Security Administration earnings records, and claimant's testimony, established at least twenty-four and one-half years of coal mine employment for purposes of 20 C.F.R. §718.203(b), when claimant's work as a federal coal mine inspector was included. Decision and Order at 23.

law judge to consider the claim pursuant to Section 411(c)(4) is unnecessary in view of the award of benefits.

Based upon the parties' responses, and our review, we hold that Section 1556 does not affect the disposition of this case. As will be discussed below, we affirm the administrative law judge's award of benefits. Thus, there is no need to consider whether claimant could establish entitlement with the aid of the rebuttable presumption that was reinstated by Section 1556.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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 failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he has pneumoconiosis or is totally disabled due to pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Rasmussen, Agarwal, Dahhan, and Castle.[8] All of the physicians agreed that claimant has obstructive lung disease. Drs. Rasmussen and Agarwal opined that claimant's disabling COPD is due not only to smoking, but is significantly contributed to, and substantially aggravated by, his years of exposure to coal mine dust. Director's Exhibit 14; Claimant's Exhibit 3. By contrast, Drs. Dahhan and Castle opined that claimant's COPD is due solely to smoking. Employer's Exhibits 1, 2, 7, 8, 11.

After setting forth the medical opinions and the physicians' qualifications, the administrative law judge found that the opinions of Drs. Rasmussen and Agarwal were

[8] The administrative law judge also considered, and discredited, Dr. Smiddy's medical opinion diagnosing "Coal Workers' Pneumoconiosis." Claimant's Exhibit 6; Decision and Order at 19. On appeal, no party challenges this aspect of the administrative law judge's decision.

more persuasive in their rationale for attributing claimant's COPD, in part, to coal mine dust exposure. The administrative law judge found that, by contrast, the opinions of Drs. Dahhan and Castle were "not sufficiently convincing" in their explanations for why claimant's COPD was unrelated to his coal mine dust exposure. The administrative law judge therefore found that the medical opinions of Drs. Rasmussen and Agarwal established the existence of legal pneumoconiosis.

Employer contends that administrative law judge shifted the burden of proof to employer by requiring Drs. Dahhan and Castle to explain why claimant's coal mine employment played no role in his lung disease. Employer's Brief at 15, 19-20. Employer argues further that the opinions of Drs. Rasmussen and Agarwal cannot be considered reasoned diagnoses of legal pneumoconiosis, because the physicians admitted that they were unable to distinguish between smoking and coal mine dust exposure as causes of claimant's COPD. *Id*. at 15-16. Additionally, employer maintains that the administrative law judge substituted his judgment for that of Drs. Dahhan and Castle when he discounted their opinions. *Id*. at 19-21.

After consideration of 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 is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to employer's initial argument, the administrative law judge did not shift the burden of proof to employer to eliminate coal dust exposure as a cause of claimant's COPD. The administrative law judge required claimant to "establish by a preponderance of [the] evidence" the existence of legal pneumoconiosis. Decision and Order at 14. In analyzing the conflicting medical opinions, the administrative law judge found that the opinions of Drs. Rasmussen and Agarwal were well-reasoned, persuasive opinions that claimant's COPD is due, in part, to coal mine dust exposure, while the contrary opinions of Drs. Dahhan and Castle, "though reasoned and documented, [were] not sufficiently convincing to rebut . . . the preponderance of proof provided by Dr. Rasmussen and Dr. Agarwal." Decision and Order at 23. Thus, the administrative law judge weighed the medical opinions with the burden of proof on claimant. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994).

Additionally, we reject employer's allegation that the administrative law judge erred in finding the medical opinions of Drs. Rasmussen and Agarwal to be well-reasoned. The determination of whether a medical opinion is reasoned is a credibility matter for the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). In this case, substantial evidence supports the administrative law judge's findings that Drs. Rasmussen and Agarwal based their

opinions regarding the etiology of claimant's COPD on objective studies and his smoking and coal mine employment histories, that Dr. Rasmussen cited pertinent medical literature, and that both physicians provided plausible reasoning for their opinions. Director's Exhibit 14; Claimant's Exhibit 3. Therefore, the administrative law judge permissibly found their opinions to be well-reasoned and documented. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Further, contrary to employer's contention, Drs. Rasmussen and Agarwal were not required to specifically apportion the effects of cigarette smoking and coal mine dust on claimant's COPD. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). Thus, we reject employer's allegation of error.

We also reject employer's argument that the administrative law judge substituted his judgment for that of Drs. Dahhan and Castle when he discounted their opinions that claimant's COPD is unrelated to coal dust exposure, because his impairment partially reverses with the administration of bronchodilators. Contrary to employer's contention, the administrative law judge acted within his discretion when he found that Drs. Dahhan and Castle did not adequately explain why partial reversibility necessarily eliminated a diagnosis of legal pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. 2004). Moreover, substantial evidence supports the administrative law judge's permissible credibility determination, that Drs. Dahhan and Castle did not persuasively explain their opinions that coal mine dust exposure had no effect on claimant's COPD. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 19-23; Employer's Exhibits 1, 2, 7, 8, 11. The Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Accordingly, we affirm the administrative law judge's findings that the existence of legal pneumoconiosis, and a change in an applicable condition of entitlement, were established pursuant to Sections 718.202(a)(4), 725.309(d).[9]

Finally, contrary to employer's arguments, the administrative law judge properly found that disability causation was established pursuant to Section 718.204(c), based on the opinions of Drs. Rasmussen and Agarwal. Employer contends that the administrative law judge's analysis was insufficient because he did not explain how legal

[9] Employer does not challenge the administrative law judge's findings, on the merits, that the more recent medical evidence merited greater weight than that submitted with claimant's previous claim, and that the weight of all of the medical evidence of record established the existence of legal pneumoconiosis. Those findings are therefore affirmed. *See Skrack*, 6 BLR at 1-711.

pneumoconiosis contributes to claimant's total disability, when the administrative law judge who denied claimant's prior claim found that he was totally disabled due to smoking. Employer's Brief at 18. In this claim, claimant established a change in an applicable condition of entitlement by demonstrating the existence of legal pneumoconiosis. Therefore, contrary to employer's analysis, the disability causation finding made in the prior claim was not binding in this claim. *See* 20 C.F.R. §725.309(d)(4). Moreover, substantial evidence supports the administrative law judge's finding that the opinions of Drs. Rasmussen and Agarwal established that legal pneumoconiosis is a "substantial component" of claimant's disabling COPD, and is therefore "a contributing cause of [c]laimant's totally disabling pulmonary impairment."[10] Decision and Order at 24; *see* 20 C.F.R. §718.204(c)(1). Accordingly, we affirm the administrative law judge's finding that disability causation was established pursuant to Section 718.204(c).

[10] The administrative law judge could accord only little weight to the contrary opinions of Drs. Dahhan and Castle, because the doctors did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 267, 269, 22 BLR 2-372, 2-379-80, 2-384 (4th Cir. 2002); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008).

Accordingly, the administrative law judge's Decision and Order-Award of 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