BRB No. 10-0190 BLA

MELVIN T. STOUT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COVENANT COAL CORPORATION	)	
	)	DATE ISSUED: 11/24/2010
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 on Remand Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (06-BLA-5448) of Administrative Law Judge Daniel F. Solomon (the administrative law judge), rendered on a claim 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). This case is before the Board for the second time.

In the initial decision, the administrative law judge determined that claimant established the existence of legal pneumoconiosis,[1] in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4), and that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration.[2] *M.S.* [*Stout*] *v. Covenant Coal Corp.*, BRB No. 08-0276 BLA (Dec. 30, 2008)(unpub.). The Board instructed the administrative law judge to fully explain how he resolved the conflict in the opinions of Drs. Rasmussen, Rosenberg, and Castle, as to whether claimant's disabling COPD is related to coal mine dust exposure. *Stout*, slip op. at 5-7. In particular, the Board instructed the administrative law judge to "identify what specific literature contradicts Dr. Rosenberg's medical conclusions, and discuss with specificity why he concluded that Dr. Rosenberg's opinion is entitled to less weight in comparison to Dr. Rasmussen's opinion." *Stout*, slip op. at 6.

On remand, the administrative law judge again found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that his totally disabling respiratory impairment is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that the medical opinion evidence establishes legal pneumoconiosis and that claimant's totally disabling respiratory impairment is due to legal pneumoconiosis under 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant did not file a response brief. The Director, Office

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[1] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[2] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established at least 12.91 years of coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *M.S.* [*Stout*] *v. Covenant Coal Corp.*, BRB No. 08-0276 BLA, slip op. at 2 n.1 (Dec. 30, 2008)(unpub.).

of Workers' Compensation Programs (the Director), filed a limited response, urging the Board to reject employer's assertion that the administrative law judge erred in finding Dr. Rosenberg's opinion, that claimant's COPD is due solely to smoking, to be unpersuasive. Employer has filed a reply brief, reiterating its contention that the administrative law judge erred in discounting Dr. Rosenberg's opinion.

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.[3] 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).

Impact of the Recent Amendments

By Order dated April 14, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), which amended the Act with respect to the entitlement criteria for certain claims.[4] The Director and employer have responded.

The Director states that, because claimant alleged that he worked for at least eighteen years in coal mine employment, and never conceded to having worked fewer than fifteen years, the applicability of Section 411(c)(4) "cannot be ruled out at this juncture." Director's Supplemental Brief at 2 n.2. The Director therefore asserts that, if the Board vacates the award of benefits, the case must be remanded for the administrative law judge to determine whether claimant worked for at least fifteen years in qualifying coal mine employment and, if so, to consider whether claimant is entitled to invocation of the Section 411(c)(4) presumption.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[4] Relevant to this living miner's claim, Section 1556 reinstated the "15-year 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. 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)). The record reflects that claimant filed this claim on February 16, 2005. Director's Exhibit 2.

Employer responds that claimant is bound by his stipulation to 12.91 years of coal mine employment. Employer therefore asserts that, because claimant cannot establish at least fifteen years of coal mine employment, Section 1556 does not affect this case. Employer additionally asserts that, "in the event it is found that the amendments apply to this claim, the Board should . . . hold the claim in abeyance until . . . the Secretary has promulgated regulations implementing the amendments . . . ." Employer's Supplemental Brief at 2.

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. Because claimant carried his burden to establish each element of entitlement by a preponderance of the evidence, there is no need to consider whether claimant could establish entitlement with the aid of the rebuttable presumption that was reinstated by Section 1556.

Merits of Entitlement

To establish entitlement to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Rasmussen,[5] Rosenberg,[6] and Castle.[7] The administrative law judge

[5] Dr. Rasmussen diagnosed claimant with severe chronic obstructive pulmonary disease (COPD), based on the significant reduction in the FEV1 seen on claimant's pulmonary function testing, and the fact that claimant's arterial blood gas testing demonstrated that he has hypoxemia. Claimant's Exhibit 2. Dr. Rasmussen stated that it is impossible to distinguish between the independent but "additive" effects of smoking and coal mine dust exposure on claimant's respiratory condition, because they both manifest the same type of obstructive respiratory pattern seen in this case. *Id*. He opined that claimant's respiratory condition was primarily due to smoking, given a lengthy smoking habit, but that claimant's coal mine dust exposure and apparent asthma also contributed to his COPD. *Id*.

[6] Dr. Rosenberg maintained that claimant's pattern of respiratory impairment is inconsistent with coal mine dust exposure. Director's Exhibit 15; Employer's Exhibit 22. Dr. Rosenberg explained that the definition of COPD is a decrease in the FEV1 divided by the FVC (FEV1/FVC ratio). Director's Exhibit 15. Dr. Rosenberg further explained

observed that, although Dr. Rasmussen, unlike Drs. Rosenberg and Castle, is not a Board-certified pulmonary specialist, he is an acknowledged expert in the field of pulmonary impairments of coal miners, and that, of the three physicians, only he has performed relatively recent research in pneumoconiosis and COPD. Decision and Order on Remand at 5, *citing Martin v. Ligon Preparation Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). The administrative law judge therefore found Dr. Rasmussen to be "better qualified." Decision and Order at 5. Further, the administrative law judge found Dr. Rasmussen's opinion to be better reasoned and more consistent with the regulations than the contrary opinions of Drs. Rosenberg and Castle, because Dr. Rasmussen better accounted for claimant's more than twelve years of coal mine dust exposure as a causal factor in claimant's COPD than did Drs. Rosenberg and Castle. *Id*. The administrative law judge additionally discounted Dr. Rosenberg's opinion, finding that the Attfield and Hodous study, on which Dr. Rosenberg relied, did not support his opinion, but rather, supported Dr. Rasmussen's opinion, because the study demonstrated a clear relationship between coal mine dust exposure and a decline in pulmonary function, according to findings made by the Department of Labor when it revised the regulatory definition of pneumoconiosis. *Id*. at 3. Based on "a review of the evidence," the administrative law judge found that claimant "established that his obstruction arose out of coal mine employment through Dr. Rasmussen's well-reasoned opinion." *Id*. at 5.

Employer initially asserts that the administrative law judge erred in crediting Dr. Rasmussen's opinion because it is unsupported. We disagree. When this case was last before the Board, the Board affirmed the administrative law judge's finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis was well-reasoned and documented.

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that, epidemiological studies of the populations of coal miners by Morgan, Attfield and Hodous, and Sutter and Hurley, indicate that coal mine dust exposure does not result in any clinically significant reduction in the FEV1/FVC ratio, but the ratio is characteristically reduced with smoking-related COPD. Employer's Exhibit 22 at 11. Because claimant's FEV1/FVC ratio was reduced to fifty-two percent, and because Dr. Rosenberg found evidence of air trapping, he opined that claimant's respiratory condition is unrelated to his coal mine employment. *Id*. at 13-14.

[7] Dr. Castle opined that claimant does not suffer from an obstructive respiratory disease due to coal dust exposure, because claimant's diffusion capacity was normal, and his pulmonary function results varied and showed reversibility with bronchodilators, a finding inconsistent with the fixed and irreversible impairment typically seen with respiratory impairment caused by coal dust exposure. Employer's Exhibit 1. Dr. Castle therefore attributed claimant's respiratory disease solely to his history of smoking and asthma. *Id*.

Stout, BRB No. 08-0276 BLA, slip op. at 5. As employer has not shown that the Board's holding was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

Employer also asserts that the administrative law judge erred in discounting Dr. Rosenberg's opinion at 20 C.F.R. §718.202(a)(4). In employer's view, the administrative law judge did not recognize that "[t]he main point of Dr. Rosenberg . . . is that while there is evidence of a decline in the FEV1/FVC value in relation to coal mine dust exposure, unlike a decline in the FEV1 value, the decline in the ratio is not clinically significant." Employer's Reply Brief at 3-4. Employer submits that a review of the Attfield and Hodous article supports Dr. Rosenberg's opinion, and that the administrative law judge therefore erred in finding his reliance on the Attfield and Hodous study to be flawed. The Director responds that the administrative law judge "correctly recognized" the interpretation of the Attfield and Hodous study that was set forth by the Department of Labor in the preamble to the revised regulations. Director's Brief at 4. The Director therefore asserts that the administrative law judge "properly faulted Dr. Rosenberg's opinion for relying on a flawed premise that is contrary to legislative fact." *Id*.

Contrary to employer's assertion, the administrative law judge could, as fact-finder, reasonably find that Dr. Rosenberg's opinion is not supported by the findings of Attfield and Hodous. Dr. Rosenberg stated, "[w]hen the relationship of the FEV1% and coal mine dust exposure have been investigated in miners (Soutar and Hurley, Morgan, Attfield and Hodous), it has been determined that the FEV1% does not decrease to any clinically significant extent." Director's Exhibit 15, Dr. Rosenberg's Report at 4. As the Director states, however, the administrative law judge correctly recognized that the preamble[8] to the revised regulations indicates that the Attfield and Hodous study analyzed pulmonary function data (in particular, the FEV1, FVC and FEV1/FVC ratio) and found a clear relationship between dust exposure and a decline in pulmonary function. Decision and Order on Remand at 3, *citing* 65 Fed. Reg. 79940 (Dec. 20,

[8] The preamble states, "Attfield and Hodous analyzed pulmonary function data (specifically, FEV1, FVC, and FEV1/FVS ratio) drawn from Round 1 of the National Study of Coal Workers' Pneumoconiosis, along with job specific cumulative dust exposure estimates for U.S. underground coal miners, to determine whether there was an exposure-response relationship. Allowing for decrements due to age and smoking history, Attfield and Hodous demonstrated a clear relationship between dust exposure and a decline in pulmonary function of about 5 to 9 milliliters per year, even in miners with no radiographic evidence of clinical coal workers' pneumoconiosis." 65 Fed. Reg. 79940 (Dec. 20, 2000).

2000); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009). Attfield and Hodous stated, in the study cited by Dr. Rosenberg and attached to his deposition:

> If it is thought that a 5- to 9-ml decrement of FEV1 per year is clinically insignificant, it must be remembered that the average decrement for smokers was only 5 ml per pack-year. This, in itself, is also a minor loss in lung function. However, it is well known that smoking can cause severe effects in some smokers. Hence, this small average loss among smokers conceals some severe long-term effects in a minority. *Could it then be that the average decrement of 5 to 9 ml associated with dust exposure also hides some severe dust exposure effects? Further study is continuing on this topic. The existence of such an effect is suggested in the findings of Hurley and Soutar (7), who detected a subgroup of miners with severe dust-related losses in FEV1.* (emphasis added)

Employer's Exhibit 22 (deposition exhibit). Consequently, the administrative law judge reasonably found that the study did not support Dr. Rosenberg's conclusion.

Because it is supported by substantial evidence, we affirm the administrative law judge's permissible credibility determination. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

Employer additionally asserts that the administrative law judge failed to provide an understandable reason for discounting Dr. Castle's opinion. We disagree. The administrative law judge explained that Dr. Castle's opinion was unpersuasive, because Dr. Castle did not adequately explain how claimant's partial response to bronchodilators supported his conclusion that claimant's coal mine dust exposure was not a cause of his obstructive lung disease. Decision and Order on Remand at 4, 5; *see Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. May 11, 2004); *see also Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). As it is supported by substantial evidence, we affirm the administrative law judge's permissible credibility determination. Therefore, because the administrative law judge provided valid reasons for crediting Dr. Rasmussen's diagnosis of legal pneumoconiosis over the contrary opinions of Drs. Rosenberg and Castle, we affirm the administrative law judge's finding

that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[9]

Employer asserts that the administrative law judge erred in finding that the evidence, as a whole, establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a). Specifically, "employer submits [that, Dr. Rasmussen's opinion aside,] there is absolutely no other evidence that the miner's chronic obstructive pulmonary disease is in any way due to coal dust exposure." Employer's Brief at 18. Employer, however, fails to explain how the absence of such other evidence undermines the administrative law judge's finding of legal pneumoconiosis. Further, employer "notes" that Dr. Iosif, who treated claimant for asthma and diagnosed him with COPD, did not diagnose any form of pneumoconiosis. Employer's Brief at 18. The Board previously rejected employer's assertion that the administrative law judge erred in failing to infer that Dr. Iosif's treatment records weigh against a finding of pneumoconiosis. *Stout*, slip op. at 8 n.9. Employer has shown no basis for an exception to the law of the case doctrine. *See Brinkley*, 14 BLR at 1-151; *Williams*, 22 BRBS at 237. Because employer raises no additional challenges to the administrative law judge's finding of legal pneumoconiosis, we affirm his finding at 20 C.F.R. §718.202(a).

Relevant to 20 C.F.R. §718.204(c), the administrative law judge credited Dr. Rasmussen's opinion, that claimant's legal pneumoconiosis "contributes in a major way to his disabling chronic lung disease," Director's Exhibit 10 at 4, over the contrary opinions of Drs. Rosenberg and Castle, who did not diagnose legal pneumoconiosis. Decision and Order on Remand at 6. Employer challenges the administrative law judge's finding, asserting that the administrative law judge made "largely the same" errors in crediting Dr. Rasmussen's opinion under 20 C.F.R. §718.204(c) as he made in finding legal pneumoconiosis established. Employer's Brief at 19. As we have affirmed the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we reject employer's assertion. Further, substantial evidence supports the administrative law judge's finding that Dr. Rasmussen based his opinion as to the etiology of claimant's obstructive impairment on objective studies, his smoking and coal mine employment histories, and scientific journal articles. *See Hicks*, 138 F.3d at 533, 21

[9] We reject employer's assertion that the administrative law judge erred in failing to point to any medical evidence establishing that claimant's asthma is due to coal dust exposure, and in failing to "take back his erroneous conclusion in his first opinion that Drs. Castle and Rosenberg wrongfully assume asthma and coal dust exposure are mutually exclusive." Employer's Brief at 14. The Board previously vacated the administrative law judge's findings with respect to Drs. Castle and Rosenberg. On remand, the administrative law judge did not again assume that claimant's asthma is due to coal mine dust exposure.

BLR at 2-336; Decision and Order on Remand at 5. Contrary to employer's assertion, therefore, the administrative law judge rationally credited Dr. Rasmussen's opinion pursuant to 20 C.F.R. §718.204(c).

We additionally reject employer's assertions that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Castle, and in failing to consider Dr. Robinette's opinion under 20 C.F.R. §718.204(c). The administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Castle as to disability causation, because the physicians did not diagnose claimant with legal pneumoconiosis. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006). Similarly, because Dr. Robinette did not diagnose legal pneumoconiosis,[10] we reject employer's assertion that the administrative law judge erred in failing to consider his opinion under 20 C.F.R. §718.204(c). *See Collins*, 468 F.3d at 224, 23 BLR at 2-412. Because employer raises no additional challenges to the administrative law judge's disability causation findings, we affirm the administrative law judge's finding that claimant established that his totally disabling respiratory impairment is due to legal pneumoconiosis at 20 C.F.R. §718.204(c). As claimant has established each element of entitlement, we affirm the award of benefits.

[10] The Board previously affirmed the administrative law judge's discounting of Dr. Robinette's opinion under 20 C.F.R. §718.202(a)(4), because Dr. Robinette did not address whether claimant's COPD was "substantially contributed to or substantially aggravated" by coal dust exposure. *Stout*, slip op. at 7; Claimant's Exhibit 1 at 6.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge