BRB No. 12-0112 BLA

FENTON HILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 11/26/2012
	)	
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 of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2006-BLA-5118) of Administrative Law Judge Adele H. Odegard (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the Black Lung Benefits Act, as

[1] Claimant filed his first claim on June 6, 1984. Director's Exhibit 1. On June 5, 1987, Administrative Law Judge Alfred Lindeman issued a Decision and Order denying benefits. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed this claim on August 25, 2004. Director's Exhibit 3.

amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] This case is before the Board for the second time. In a Decision and Order dated March 4, 2009, the administrative law judge credited claimant with over 40 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. Further, in a Decision and Order on Reconsideration dated May 18, 2009, the administrative law judge denied claimant's motion for reconsideration.

In response to claimant's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding. *Hill v. Valley Camp Coal Co.*, BRB No. 09-0679 BLA, slip op. at 2 n.3 (Aug. 31, 2010)(unpub.). The Board also affirmed the administrative law judge's findings that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b) and, thus, that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id*. Further, the Board affirmed the administrative law judge's finding that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203. *Id*. However, the Board vacated the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Hill*, BRB No. 09-0679 BLA, slip op. at 8-15.

On remand, the administrative law judge found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Because both of claimant's claims were filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Employer contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Houser and Rosenberg.[4] Dr. Houser opined that claimant's disabling respiratory impairment is due, in part, to coal workers' pneumoconiosis. Claimant's Exhibits 4, 5. By contrast, Dr. Rosenberg opined that claimant's disabling respiratory impairment is related to his diaphragmatic dysfunction, and not to coal workers' pneumoconiosis. Employer's Exhibit 4. The administrative law judge gave significant weight to Dr. Houser's opinion because she found that it was documented and reasoned. The administrative law judge also discounted Dr. Rosenberg's opinion because she found that it was not documented or well-reasoned. Hence, based on Dr. Houser's opinion, the administrative law judge found that claimant established total disability due to pneumoconiosis at Section 718.204(c).

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

[4] The administrative law judge also considered the reports of Drs. Zaldivar and Rasmussen. Dr. Zaldivar opined that claimant's disabling restrictive impairment is a result of either congestive heart failure with a pleural effusion or abnormal function of the right hemidiaphragm due to phrenic nerve damage, which may be idiopathic. Director's Exhibit 12; Employer's Exhibits 4, 5. Dr. Rasmussen, in addressing the causes of claimant's disabling lung disease, opined that coal mine dust exposure is a contributing factor to his loss of lung function. Director's Exhibit 10. The administrative law judge stated, "[o]n review, I confirm my conclusion, as enunciated in my prior decision, that the opinions of Dr. Zaldivar and Dr. Rasmussen are not well-reasoned, and I give them little weight." Decision and Order on Remand at 7. No party contests the administrative law judge's weighing of the opinions of Drs. Zaldivar and Rasmussen.

Employer initially asserts that the administrative law judge erred in discounting Dr. Rosenberg's opinion because "it was inconsistent with [the Department of Labor's] enunciated position on latency and progressivity." Employer's Brief at 13. Specifically, employer argues that the administrative law judge mischaracterized Dr. Rosenberg's opinion because, employer alleges, Dr. Rosenberg did not opine that coal workers' pneumoconiosis could not be latent or progressive. We disagree.

Contrary to employer's assertion, the administrative law judge properly found that Dr. Rosenberg's opinion is inconsistent with the preamble to the amended regulations, as Dr. Rosenberg determined that claimant's respiratory disability was not due to pneumoconiosis because his pneumoconiosis did not progress. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); 65 Fed. Reg. 79,971 (Dec. 20, 2000). Dr. Rosenberg diagnosed simple coal workers' pneumoconiosis (CWP) and opined that claimant would be considered disabled from a respiratory perspective because of his moderate degree of restriction, based on his reduced total lung capacity. Employer's Exhibit 4. Dr. Rosenberg further stated that, "[w]ith respect to [claimant], one can appreciate during the time span between the time of Dr. Gaziano's evaluation in 1984 and those of other examiners (Drs. Rasmussen, Zaldivar and Crisalli) after 1999, he had no progression of his interstitial opacities; consequently, specific to [claimant,] it is *not* logical to conclude that his restriction was related to CWP." *Id*. (emphasis added). The administrative law judge stated, "[t]aken in its context, I find that Dr. Rosenberg's comment in his opinion does not relate to the [c]laimant's development of pneumoconiosis, which Dr. Rosenberg has conceded, but rather to the progression of the [c]laimant's respiratory disability." Decision and Order on Remand at 5. Thus, because the administrative law judge properly found that Dr. Rosenberg's opinion was inconsistent with the preamble to the amended regulations, *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 79,971 (Dec. 20, 2000), we reject employer's assertion that the administrative law judge mischaracterized Dr. Rosenberg's opinion regarding the latency and progressivity of pneumoconiosis.[5]

[5] Employer additionally asserts that the administrative law judge selectively analyzed the evidence by finding that Dr. Rosenberg's opinion regarding latency and progressivity was inconsistent with the radiographic evidence. The administrative law judge stated that "Dr. Rosenberg's conclusion does not accurately address the evidence he reviewed." Decision and Order on Remand at 6. We hold that any error by the administrative law judge in finding that the radiographic evidence reviewed by Dr. Rosenberg reflects a progression in the opacities and, thus, that he did not accurately address the evidence he reviewed, is harmless, as she provided a valid basis for discounting Dr. Rosenberg's opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As discussed, *supra*, the administrative law judge properly found that Dr. Rosenberg's opinion was inconsistent with the preamble to the amended regulations, as Dr. Rosenberg

Employer also asserts that the administrative law judge erred in finding that Dr. Rosenberg's opinion was not documented because, employer alleges, the medical evidence supports Dr. Rosenberg's finding of a paralyzed right diaphragm. Dr. Rosenberg stated that, "[m]ost likely, what has occurred with respect to [claimant] is that he had a phrenic nerve injury, as a complication of his bypass surgery performed in 1999" and that "[t]his damaged phrenic nerve resulted in a nonfunctional or poorly functional right diaphragm and thus 'extrinsic' restriction." Employer's Exhibit 4. The administrative law judge acknowledged that all of the physicians in this case recognized that claimant has an abnormality in his right diaphragm, and that none of them opined that the abnormality was caused by his occupation. Nevertheless, the administrative law judge noted that "[t]he only physician who rendered an opinion that included a discussion of a paralyzed diaphragm is Dr. Rosenberg." Decision and Order on Remand at 8. Further, the administrative law judge found that Dr. Rosenberg's conclusion that claimant sustained a complication of his heart surgery is speculative, as there is no evidence in the record that claimant sustained such an injury and there is no clear evidence in the record regarding when claimant first became disabled. The administrative law judge therefore stated that, "[b]ased on the foregoing, I conclude that Dr. Rosenberg's opinion, which is based in large part on his hypothesis about a paralyzed diaphragm due to a specific injury, is not documented." *Id*. at 9. Because administrative law judge permissibly found that the record does not support Dr. Rosenberg's finding that claimant has a paralyzed diaphragm, *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), we reject employer's assertion that the administrative law judge erred in discounting Dr. Rosenberg's opinion because it was not documented.

Employer next asserts that the administrative law judge erred in crediting Dr. Houser's opinion. Specifically, employer argues that the administrative law judge selectively analyzed the opinions of Drs. Houser and Rosenberg regarding claimant's response to oxygenation. After noting that it was not necessary for her to address "the lack of documentation to support [Dr. Houser's] conclusion regarding the amount of contribution that the [c]laimant's diaphragm abnormality played in his overall impairment,"[6] Decision and Order on Remand at 8, the administrative law judge found

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believed that claimant's respiratory disability was not due to pneumoconiosis because his pneumoconiosis did not progress. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); 65 Fed. Reg. 79,971 (Dec. 20, 2000).

[6] In considering Dr. Houser's opinion that claimant's disabling restriction is due, at least in part, to coal dust exposure, the administrative law judge found that "Dr. Houser's opinion, if documented and reasoned, would be sufficient to find that the [c]laimant is totally disabled due to pneumoconiosis." Decision and Order on Remand at 8.

that Dr. Houser's opinion, that claimant's overall disabling respiratory impairment was due, in part, to coal workers' pneumoconiosis, was documented and reasoned. In so finding, the administrative law judge stated:

> Dr. Houser's opinion was exceptionally thorough. Although he did not address Dr. Rosenberg's specific comment on oxygenation response, Dr. Houser did address the issue of the A/a gradient (alveolar oxygen gradient). *See* CX 5. With a normal value of 1-15 mmHg, Dr. Houser noted the value in blood gas testing on 11/12/2004 was 34, and after exercise was 31, and on 01/06/2006 was 20. Dr. Houser stated that an increase in alveolar oxygen gradient implies the presence of underlying lung disease associated with gas exchange abnormalities. His discussion addresses multiple instances of the [c]laimant's arterial blood gas testing results. In contrast, Dr. Rosenberg did not address the blood gas testing in as complete a fashion.

Decision and Order at 8-9 (footnote omitted).[7] Thus, the administrative law judge properly found that Dr. Houser's opinion was documented and reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Consequently, we reject employer's assertion that the administrative law judge selectively analyzed the opinions of Drs. Houser and Rosenberg regarding claimant's response to oxygenation. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer further asserts that the administrative law judge erred in applying an inconsistent standard in weighing the opinions of Drs. Houser and Rosenberg. Employer argues that "[w]hile [the administrative law judge] closely scrutinized Dr. Rosenberg's findings – and in particular his finding concerning the paralysis of the [c]laimant's diaphragm – she did not subject Dr. Houser's opinion to the same level of scrutiny or consider many of the facts and evidence that detracted from his conclusions." Employer's Brief at 18. In considering the cause of claimant's disabling respiratory impairment, Dr. Houser concluded that "[claimant] does have an elevated right hemidiaphragm" but "[t]here is no evidence that he has a paralyzed diaphragm." Claimant's Exhibit 5. Further, after noting an x-ray showing buckshot in the upper left

[7] The administrative law judge stated that "Dr. Rosenberg supported his contention, that the [c]laimant's pneumoconiosis did not cause his impairment, by citing the [c]laimant's normal oxygenation response and preserved diffusion capacity (when corrected for lung volume)." Decision and Order on Remand at 8.

posterior chest wall, Dr. Houser concluded that "[t]here is no evidence that this injury could have caused trauma to the right phrenic nerve which innervates the right hemidiaphragm." *Id*. As discussed, *supra*, the administrative law judge noted that she had concern about the lack of documentation to support Dr. Houser's conclusion regarding the amount of contribution that claimant's diaphragm abnormality played in his overall impairment. Nevertheless, the administrative law judge permissibly found that it was not necessary for her to address this part of Houser's opinion because the doctor's opinion that claimant's disabling respiratory impairment was due, in part, to coal workers' pneumoconiosis was sufficient to establish disability causation, as it was documented and reasoned. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294. Thus, we reject employer's assertion that the administrative law judge erred in applying an inconsistent standard in weighing the opinions of Drs. Houser and Rosenberg.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and further affirm the award of benefits.

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in the prior appeal, BRB No. 09-0679 BLA, pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of $2,772.00 for 11.55 hours of legal services at an hourly rate of $240.00. No objections to the fee petition have been received. Upon review of the fee petition, the Board finds the requested fee to be reasonable in light of the services performed and approves a fee of $2,772.00, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203; *see Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, and claimant's counsel is awarded a fee of $2,772.00.

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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BETTY JEAN HALL
Administrative Appeals Judge