BRB No. 03-0175 BLA

JOSEPH E. MASSIE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 10/28/2003
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order On Remand - Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Second Decision and Order On Remand Awarding Benefits (1998-BLA-00855) of Administrative Law Judge Daniel F. Sutton 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*. (the Act).[1] When this case was most recently on

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

appeal before the Board, the Board noted that claimant had been credited with twenty-three years of coal mine employment based on the parties= stipulation and that employer had conceded that claimant was totally disabled, but the Board vacated the administrative law judge=s finding that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000) and remanded the case for reconsideration and reweighing of the medical opinion evidence, thereunder.[2] The Board further instructed the administrative law judge that if he determined, on remand, that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), he must then weigh together all types of evidence listed at Section 718.202(a)(1)-(4), to determine whether claimant had established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210-11, 22 BLR 2-162, 2-171-172 (4th Cir. 2000). Further, in view of its disposition of the case at Section 718.202(a)(4) (2000), the Board also vacated the administrative law judge=s findings at Sections 718.203(b)(2000) and 718.204(b)(2000), now 718.204(c),[3] and remanded the case for further consideration under those sections, if reached. *Massie v. Consolidation Coal Co.*, BRB No. 01-0376 BLA (Jan. 10, 2000)(unpub.).

On remand, the administrative law judge concluded that the evidence established the existence of pneumoconiosis at Section 718.202(a)(4), that pneumoconiosis arose out of coal mine employment at Section 718.203(b), and that claimant was totally disabled due to pneumoconiosis at Section 718.204(c). Accordingly, benefits were awarded.

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[2] The Board had previously affirmed the administrative law judge=s finding that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(1)-(3). *Massie v. Consolidation Coal Co.*, BRB No. 99-0973 BLA (June 30, 2000)(unpub.).

[3] The provision pertaining to total disability, previously set out at 20 C.F.R. '718.204(c), is now found at 20 C.F.R. '718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. '718.204(b), is now found at 20 C.F.R. '718.204(c).

On appeal, employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge=s award of benefits. The Director, Office of Workers= Compensation Programs, filed a letter indicating that he will not participate in this appeal.

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. '921(b)(3), as incorporated into the Act 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. ''718.3, 718.202(a), 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR1-1 (1986)(*en banc*).

Employer first contends that the administrative law judge erred in finding that Dr. Rasmussen=s erroneous understanding of claimant=s smoking history was irrelevant to judging the credibility of his opinion inasmuch as it would corroborate the other evidence in this case which showed that claimant=s mild obstructive impairment was due to smoking, not coal mine employment.[4] Further, employer contends that the administrative law judge erred in finding that Dr. Rasmussen=s opinion was reasoned without explaining how or why the objective evidence supported Dr. Rasmussen=s conclusions.

In evaluating Dr. Rasmussen=s opinion, the administrative law judge noted that Dr. Rasmussen had incorrectly relied on a negative smoking history when he examined claimant. Nonetheless, he found that this error was inconsequential since there was a clear consensus of opinion that claimant=s obstructive impairment was mild and Dr. Rasmussen reasonably explained that the existence of a positive smoking history by claimant would not have altered his opinion since he would have expected to have found more of an obstructive impairment if claimant=s lung abnormalities were traceable to his past cigarette smoking. Instead, the administrative law judge noted that Dr. Rasmussen did not directly contradict the opinions of Drs. Jarboe and Castle that claimant=s obstructive impairment was due to smoking, but

[4] Dr. Rasmussen=s report indicates that claimant never smoked, while claimant testified at the hearing that he smoked about one pack of cigarettes per day from 1963 to 1969. *See Massie v. Consolidation Coal Co.*, BRB No. 01-0376 BLA (Jan. 10, 2000)(unpub.); Hearing Transcript at 20; Director=s Exhibit 10.

merely concluded that claimant=s smoking history was not a determinative factor of his lung abnormalities; a finding consistent with the findings of the other physicians. Thus, the administrative law judge concluded that the presence or absence of a mild, clinically insignificant obstructive impairment caused by smoking was a red herring in this case since no physician attributed claimant=s primary pulmonary abnormality to smoking, and the error made by Dr. Rasmussen regarding claimant=s smoking history was inconsequential. This was reasonable. *See* Director=s Exhibit 10; Claimant=s Exhibit 3; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, contrary to employer=s contention, the administrative law judge acted within his discretion in finding Dr. Rasmussen=s opinion to be reasoned and documented since he found Dr. Rasmussen=s opinion, that claimant=s respiratory impairment was caused by coal mine employment, to be based on objective evidence, *i.e.*, Dr. Rasmussen relied on physical examinations, x-rays, and pulmonary function and blood gas studies when he diagnosed the existence of legal pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (*en banc*)(1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Compton*, 211 F.3d at 212, 22 BLR at 2-176. Likewise, the administrative law judge rationally found Dr. Rasmussen=s opinion better reasoned than the contrary opinions of Drs. Zaldivar, Jarboe, Fino, Loudon, and Castle because he found the opinions of those physicians to be cursory, contradictory and ultimately less persuasive and less well-reasoned than Dr. Rasmussen=s. This was proper. *See Lucostic v. Director, OWCP*, 8 BLR 1-46, 1-47 (1985).

Employer contends, however, that the administrative law judge erred in discrediting Dr. Zaldivar=s opinion because Dr. Zaldivar did not address the possibility that claimant=s pulmonary impairment could be related to coal mine employment and because Dr. Zaldivar stated that he believed that claimant weighed 256 pounds and therefore, attributed claimant=s respiratory impairment in part to his gross obesity, when claimant=s correct weight was 156 pounds.

In according less weight to Dr. Zaldivar=s opinion, however, the administrative law judge stated that Dr. Zaldivar=s testimony regarding pulmonary fibrosis served to negate only the existence of clinical pneumoconiosis, not legal pneumoconiosis, as a cause of claimant=s pulmonary abnormality. The administrative law judge also found that Dr. Zaldivar=s conclusion that claimant=s rapid development of a gas exchange impairment subsequent to normal test results in 1994, was inconsistent with the existence of coal workers= pneumoconiosis reflected a limited consideration of clinical pneumoconiosis, not legal pneumoconiosis. Further, the administrative law judge noted that his confidence in Dr. Zaldivar=s opinion as to the cause of claimant=s respiratory impairment was also eroded by Dr. Zaldivar=s incorrect testimony that claimant was grossly obese, even though Dr. Zaldivar subsequently acknowledged his mistake. This was rational. *Clark*, 12 BLR at 1-155;

Anderson, 12 BLR at 1-113.

Employer also contends that the administrative law judge erred in rejecting Dr. Jarboe=s opinion since, contrary to the administrative law judge=s finding, Dr. Jarboe=s evaluation of claimant was not limited solely to the existence of clinical pneumoconiosis: he does address whether claimant=s respiratory impairment was related to coal mine employment. Employer further contends that the administrative law judge erred in rejecting Dr. Jarboe=s opinion as if he relied solely on x-ray evidence, when, in fact, Dr. Jarboe considered other medical evidence in making his finding.

In considering Dr. Jarboe=s opinion, the administrative law judge noted that, although Dr. Jarboe used terminology which suggested that he considered whether claimant suffered from legal pneumoconiosis, an analysis of his evaluation of claimant shows that he effectively limited his analysis to the existence of clinical pneumoconiosis only. Specifically, the administrative law judge noted that Dr. Jarboe concluded that claimant=s Adrop in oxygen tension with exercise [was] more likely related to cigarette smoking than coal dust exposure because some studies have shown that miners with >simple coal workers= pneumoconiosis= rarely experience disabling physiological changes during exercise testing and because this type of abnormality is >very unusual in coal miners unless they have advanced disease on x-ray.@ Employer=s Exhibit 8 at 4-5. Accordingly, contrary to employer=s argument, the administrative law judge=s acted rationally in rejecting of Dr. Jarboe=s opinion because Dr. Jarboe attempted to rule out the existence of legal pneumoconiosis by referring to the characteristics of clinical pneumoconiosis. *See* 20 C.F.R. '718.201; *Compton*, 211 F.3d at 210, 22 BLR at 2-172; *Clark*, 12 BLR at 1-155; *see Anderson*, 12 BLR at 1-113 (1989).

Employer also contends that the administrative law judge erred in rejecting Dr. Fino=s opinion by finding it to be cursory and by finding Dr. Fino, who was Board-certified in internal medicine and the subspecialty of pulmonary diseases, less experienced than Dr. Rasmussen, who was Board-certified in internal medicine only. Contrary to employer=s argument, the administrative law judge recognized the credentials of both Drs. Fino and Rasmussen, stating that Dr. Fino was certified in the sub-specialty of pulmonary disease, while Dr. Rasmussen was not. Decision and Order at 9, 12; Claimant=s Exhibits 3, 8. The administrative law judge went on, however, to find that Dr. Rasmussen=s opinion was entitled to greater weight because of his experience: he had practiced medicine in West Virginia; specialized in the study of miner=s disease; he had held positions as the chief medical officer of the Appalachian Coal Miners Research Unit of the U.S. Public Health Service Division of Occupational Health, chief of the pulmonary section of the Appalachian Region Hospital and medical director of the Appalachian Pulmonary Laboratory; he had examined approximately 40,000 coal miners; and published six or seven articles relevant to the disease of pneumoconiosis, *see* Decision and Order at 9. The administrative law judge

observed that in contrast, Athere [was] no evidence in the record that Dr. Fino has had anywhere near the extensive experience that Dr. RasmussenYhad in the study and diagnosis of occupational lung disease in coal miners.@ Decision and Order at 20. This was rational. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-166, 2-280-81 (7th Cir. 2001). Further, contrary to employer=s argument, the administrative law judge also found Dr. Fino=s opinion to be cursory and lacking the detail and substance underlying Dr. Rasmussen=s contrary conclusion, because Dr. Fino=s opinion was based primarily on the results of a 1994 blood gas study. This was rational. *See* Director=s Exhibit 10; Employer=s Exhibit 14; *Hicks*,138 F.3d 524, 21 BLR 2-323; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark*, 12 BLR at 1-155 *Fields*, 10 BLR 1-19; *Lucostic*, 8 BLR at 1-47.

In addition, employer contends that the administrative law judge erred in rejecting Dr. Loudon=s opinion because Dr. Loudon had not addressed whether claimant=s respiratory impairment was due to coal mine employment when, in fact, Dr. Loudon had addressed the issue and found that claimant=s respiratory impairment was unrelated to coal mine employment.

The administrative law judge found that Dr. Loudon=s reports were clearly limited to a consideration of whether the evidence supported a diagnosis of clinical pneumoconiosis. The administrative law judge also found that Dr. Loudon had conceded that he was unable to identify the cause or causes of claimant=s lung abnormality, stating that such abnormalities were common to several respiratory impairments and that the doctor had not stated that these possible diagnoses were unrelated to the claimant=s coal dust exposure. The administrative law judge concluded that the doctor had not made a medical finding that claimant did not suffer from legal pneumoconiosis. Decision and Order at 21. This was rational. *See Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-113; *Lucostic*, 8 BLR at 1-47; *see also Compton*, 211 F.3d at 210, 22 BLR at 2-173.

Similarly, employer contends that the administrative law judge also erred in rejecting Dr. Castle=s opinion because the administrative law judge=s rejection of Dr. Castle=s opinion ignores the fact that Dr. Castle considered all the evidence in reaching his conclusion. Contrary to employer=s argument, however, the administrative law judge rationally found Dr. Castle=s opinion regarding the presence of legal pneumoconiosis flawed because, even though Dr. Castle recognized the definition of legal pneumoconiosis, he nonetheless attempted to dismiss the presence of legal pneumoconiosis by referring to the characteristics and findings associated with clinical pneumoconiosis, *i.e.*, the radiographic evidence. Decision and Order at 21. This was rational. *See Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-113; *see also Compton*, 211 F.3d at 210, 22 BLR at 2-173.

Employer also contends that the administrative law judge erred in circumventing the requirements of *Compton*, 211 F.3d 203, 22 BLR 2-162, by completely ignoring the x-ray and medical opinion evidence addressing the existence of clinical pneumoconiosis and by dismissing medical opinions which considered x-ray evidence in rendering their diagnoses. Contrary to employer=s argument, the administrative law judge did consider the x-ray and medical opinions together pursuant to *Compton*, Decision and Order at 22. *Compton* does not, however, preclude the administrative law judge from rejecting the opinions of physicians who try to rule out the presence of legal pneumoconiosis based solely on the absence of evidence which can establish the presence of only clinical pneumoconiosis. *See* 20 C.F.R. ' 718.202(a)(1); *Compton*, 211 F.3d at 210, 22 BLR at 2-173.

Finally, employer contends that the administrative law judge merely reiterated his findings at Section 718.202(a)(4) on the issue of disability causation without treating it as a separate element of entitlement with its own standard of proof and independently considering the opinions under that standard.

In considering the issue of disability causation, the administrative law judge found that although Drs. Zaldivar, Jarboe, Fino, Loudon and Castle were all highly qualified pulmonary specialists, their opinions that the miner=s impairment was not related to coal dust exposure was outweighed by the contrary, better reasoned opinion of Dr. Rasmussen for the same reasons the administrative law judge proffered for crediting Dr. Rasmussen=s opinion at Section 718.202(a)(4). This was rational. Contrary to the employer=s contention, the reasons the administrative law judge gave for not crediting the opinions of Drs. Zaldivar, Jarboe, Fino, Loudon and Castle and for crediting the opinion of Dr. Rasmussen were relevant to his consideration of their opinions on the issue of disability causation. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-113; *Fields*, 10 BLR 1-19. We, therefore, affirm the administrative law judge=s finding that Dr. Rasmussen=s opinion was sufficient to establish disability causation as it was supported by substantial evidence and in accordance with law.

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

SO ORDERED.

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