BRB No. 08-0120 BLA

W.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/30/2008
	)	
CONSOLIDATION 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 – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Washington and Lee University School of Law Legal Clinic), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (05-BLA-5078) of Administrative Law Judge Daniel L. Leland 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). Claimant filed his claim for benefits on July 5, 2001. Director's Exhibit 2. In an Order dated May 27, 2003, Administrative Law Judge Michael P. Lesniak granted claimant's motion, unopposed by the Director, Office of Worker's Compensation Programs (the Director), to remand the case to the district director for a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406(a), The case was subsequently referred to the Office of Administrative Law Judges upon completion of a complete pulmonary evaluation performed by Dr. Rasmussen.

In a decision dated September 28, 2007, Administrative Law Judge Daniel L. Leland (the administrative law judge) credited claimant with thirty-three and one-half years of coal mine employment.[1] The administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), when he credited medical reports indicating that the miner suffers from chronic obstructive pulmonary disease (COPD) and an asthmatic component caused or exacerbated by coal mine dust exposure and smoking. The administrative law judge further found that claimant established that he was totally disabled by a respiratory or pulmonary impairment that was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant has legal pneumoconiosis and is totally disabled due to pneumoconiosis, pursuant to Sections 718.202(a)(4), 718.203(b), and 718.204(c).[2] Employer argues further that Judge Lesniak improperly remanded this case to the district director for a complete pulmonary evaluation to be provided, thereby violating employer's due process rights. Claimant responds, urging affirmance of the award of benefits and contending that Judge Lesniak did not err in remanding the case for a complete pulmonary evaluation. The Director has filed a limited response, contending that Judge Lesniak's order remanding the case to the district director was appropriate because the initial medical report provided to claimant did not meet the Director's obligation to provide a complete pulmonary evaluation, and

[1] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

employer was not prejudiced by the development and submission of a complete pulmonary evaluation.

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).

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).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that claimant established the existence of legal pneumoconiosis,[3] crediting the opinions of Drs. Parker, Rasmussen, and Celko, that claimant's COPD arose in part out of his coal mine employment, over the contrary opinions of Drs. Renn and Fino, that claimant's COPD was due solely to asthma. Decision and Order at 10. The administrative law judge found that the opinions of Drs. Parker, Rasmussen, and Celko were supported by the objective evidence and medical literature that the physicians cited, whereas the contrary opinions of Drs. Renn and Fino did not adequately account for the irreversible component of claimant's obstructive pulmonary impairment. *Id*.

Employer first argues that the administrative law judge erred in according great weight to the opinions of Drs. Parker, Rasmussen, and Celko diagnosing legal pneumoconiosis, when these physicians were unaware that claimant wore breathing protection at times while working underground and worked in an enclosed cab aboveground. We disagree.

Claimant testified that although he wore breathing protection during ten of the fifteen years that he worked underground, he was still exposed to coal dust. Transcript at 43. Moreover, claimant testified that he was exposed to coal dust when he worked as a truck driver aboveground in an enclosed cab, as the job required him to shovel the tracks for an hour each day and to carry three to four gallon buckets of motor oil. Transcript at 27-33; Decision and Order at 2. The record reflects that Drs. Parker, Rasmussen, and Celko knew that claimant was exposed to coal dust in both his approximately fifteen

[3] "Legal pneumoconiosis" includes any chronic disease or impairment of the lung and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

years of underground and twenty years of aboveground coal mine employment, the latter employment requiring him to shovel coal dust off the tracks for an hour each day. Moreover, employer's experts, Drs. Renn and Fino, did not rely on claimant's use of breathing protection or his work in an enclosed cab to support their opinions that claimant does not have legal pneumoconiosis. Dr. Renn specifically calculated claimant's coal dust exposure based on his job titles, which Drs. Parker, Rasmussen and Celko also knew. Employer's Exhibit 8 at 16-17. Therefore, we reject employer's allegation that the administrative law judge overlooked a significant conflict in the evidence concerning claimant's coal mine dust exposure when weighing the medical opinions, as the record does not disclose such a conflict.

Employer next argues that the administrative law judge erred in according great weight to Dr. Parker's opinion, that claimant's pulmonary disease is significantly related to coal mine employment, when Dr. Parker was the only physician of record who did not diagnose claimant with asthma. We reject employer's argument. Dr. Parker testified by deposition that he did not believe that claimant has "classic asthma" because claimant's lung function testing does not return entirely to normal after inhaled bronchodilators. Claimant's Exhibit 7 at 33. The administrative law judge reasonably considered Dr. Parker's explanation for this diagnosis when weighing his opinion, and he acted within his discretion to find that Dr. Parker's opinion was "well documented and reasoned." Decision and Order at 9; *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). We conclude that substantial evidence supports the administrative law judge's permissible credibility determination. *See Anderson*, 12 BLR at 1-113.

Employer further argues that the administrative law judge erred in according great weight to Dr. Parker's opinion because it was based on medical studies in the scientific literature, since these studies, "when critically reviewed," do not support Dr. Parker's conclusion that claimant has legal pneumoconiosis. Employer's Brief at 18. Employer essentially urges the Board to undertake its own review of the reasoning and documentation of Dr. Parker's opinion, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. To support his opinion that claimant's coal dust exposure and obstructive pulmonary impairment are related, Dr. Parker cited and relied, in part, on several studies in the medical literature addressing the causal relation between coal mine dust exposure and obstructive lung disease. Claimant's Exhibit 5 at 2-4; Claimant's Exhibit 7 at 27-29, 52-63, 76-88. The administrative law judge permissibly found that Dr. Parker's opinion was well-reasoned, in part, because it was based on relevant medical literature.[4] *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Anderson*, 12 BLR at 1-113.

[4] The record reflects the administrative law judge's additional consideration that Dr. Parker, who, like employer's medical experts, is Board-certified in Internal Medicine

Employer also argues that the administrative law judge erroneously found that Dr. Rasmussen opined that claimant's coal dust exposure and cigarette smoking aggravated his asthma because, employer alleges, Dr. Rasmussen could not state with absolute certainty that claimant's asthma was caused or aggravated by his coal dust exposure. We reject this argument. Dr. Rasmussen testified that claimant's coal dust exposure and cigarette smoking aggravated his asthma, and thus, substantial evidence supports the administrative law judge's characterization of Dr. Rasmussen's opinion. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 9; Employer's Exhibit 5 at 76.

Employer next contends that the administrative law judge erred in according great weight to Dr. Celko's opinion, that claimant's pulmonary impairment is not attributable solely to asthma, and in according little weight to Dr. Renn's opinion, that claimant's pulmonary impairment is due solely to asthma, because there was no medical documentation in the record of any treatment for asthma attacks. We disagree. Dr. Celko testified by deposition that not all of claimant's pulmonary impairment is due to asthma because, if claimant had asthma severe enough to cause him airway remodeling and profound pulmonary function abnormalities, he would have a significant history for recurrent admissions to the hospital or emergency room or an inability to work. Claimant's Exhibit 9 at 20-21, 34, 65. The administrative law judge reasonably inferred that the absence from the record of documentation of asthma attacks better supported Dr. Celko's opinion that claimant's pulmonary impairment was not attributable solely to asthma. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Consequently, we reject employer's argument.

Employer argues that the administrative law judge erred in according little weight to Dr. Renn's opinion because it was inconsistent with the regulatory definition of legal pneumoconiosis. At his deposition, Dr. Renn stated that claimant's bronchoreversibility is inconsistent with pneumoconiosis because pneumoconiosis is a fibrotic reaction. Employer's Exhibit 8 at 61, 72. Dr. Renn also stated that he has testified that an impairment due to pneumoconiosis would not be seen unless the x-ray was classified as 2/2. Employer's Exhibit 8 at 60. Contrary to employer's contention, the administrative law judge's finding that Dr. Renn applied a narrower definition of pneumoconiosis that the one that is set forth in the regulations is supported by substantial evidence, and in

---

and Pulmonary Disease, also conducts research in, and has coedited a textbook on, occupational lung disease, has written textbook chapters on the subject, and reviews articles for scientific publications. Decision and Order at 6. The administrative law judge further noted that Dr. Parker based his opinion on claimant's coal dust exposure and smoking histories, the progressive nature of claimant's airflow obstruction, and Dr. Parker's own expertise in examining patients. Decision and Order at 6, 9.

accordance with law.[5] *See* 20 C.F.R. §718.201(a)(1), (2); *Mancia v. Director, OWCP*, 130 F.3d 579, 581 n.3, 21 BLR 2-214, 2-219 n.3 (3d Cir. 1997); *Kline v. Director, OWCP*, 877 F.2d 1175, 1178, 12 BLR 2-346, 2-352-53 (3d Cir. 1989); Decision and Order at 10; Employer's Exhibit 8 at 60-61, 72. As the administrative law judge provided one valid reason for the weight he accorded to Dr. Renn's opinion, we need not address employer's remaining arguments regarding the administrative law judge's decision to accord little weight to Dr. Renn's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Employer argues that the administrative law judge erred in finding that Dr. Fino's reasoning, that claimant's impairment is due to asthma and not coal mine employment, because of the late onset of claimant's symptoms, is contrary to the definition of pneumoconiosis as a latent and progressive disease. Employer asserts that Dr. Fino relied on other reasons, in addition to late onset of symptoms, to support his conclusion that claimant's impairment did not arise out of coal mine employment, and that the administrative law judge ignored these reasons.[6] Employer further contends that the administrative law judge erred in faulting Dr. Fino's opinion for summarily discounting the miner's twenty-year, aboveground exposure as insufficient to cause a clinically significant obstructive impairment. Employer also argues that the administrative law judge erred in transforming the possibility of the latency and progressivity of pneumoconiosis in the regulations to a presumption or requirement in all cases.

---

[5] Dr. Renn's testimony, that claimant's bronchoreversibility is inconsistent with pneumoconiosis because pneumoconiosis is a fibrotic reaction, implies that claimant does not have legal pneumoconiosis because he does not have the fibrotic reaction required of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1). Moreover, Dr. Renn's testimony, that an impairment due to pneumoconiosis would not be seen unless the x-ray was classified as 2/2, implies that claimant does not have legal pneumoconiosis because, although he has a totally disabling pulmonary impairment, he has no positive chest x-ray required for clinical pneumoconiosis.

[6] Specifically, employer asserts that Dr. Fino also based his conclusion that claimant's impairment did not arise out of coal mine employment on the following: 1) that the variable diffusing capacity results suggested reversible airways disease or hyperactive airways disease all of which could be related to an asthmatic component because coal mine employment does not cause a reversible impairment; 2) that claimant is being prescribed medications and a coal mine employment-related impairment is not treatable by medications; 3) that the reduction in FEV1 to FVC ratio is seen in cigarette smokers and asthmatics, but not seen in association with coal mine employment; and 4) failure to see a drop in the PO2 with exercise was consistent with asthma, while a drop in PO2 is a common impairment caused by coal dust exposure in coal workers.

Contrary to employer's contention, it was unnecessary for the administrative law judge to specifically address each and every reason Dr. Fino provided for attributing claimant's impairment to asthma, when the administrative law judge accepted that claimant's obstructive impairment has an asthmatic component. Decision and Order at 9. In determining whether claimant suffers from legal pneumoconiosis, the only part of Dr. Fino's opinion that the administrative law judge rejected was that claimant's impairment is due *solely* to asthma. On that issue, we reject employer's arguments, and hold that the administrative law judge rationally found that Dr. Fino's reasoning for attributing claimant's pulmonary impairment solely to asthma--that claimant did not experience respiratory symptoms until towards the end of his coal mine employment--was not persuasive in light of the regulatory definition of pneumoconiosis. *See* 20 C.F.R. §718.201(a); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10, 22 BLR 2-467, 2-478-79 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order at 10; Transcript at 59-60, 80-82, 100, 108, 112. Contrary to employer's argument, the administrative law judge's consideration of Dr. Fino's opinion does not indicate that he applied a presumption that pneumoconiosis is always a latent disease. Rather, the administrative law judge was not persuaded by Dr. Fino's determination to exclude coal mine employment as a cause of claimant's impairment based upon claimant's lack of symptoms until he had completed over thirty years of coal mine employment, since the regulations expressly recognize that pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). *See Kramer*, 305 F.3d at 211, n.17, 22 BLR at 2-481 n.17 (rejecting a similar argument). Further, we conclude that substantial evidence supports the administrative law judge's permissible determination that Dr. Fino discredited, without adequate justification, claimant's twenty years of aboveground exposure as insufficient to cause a clinically significant impairment. *See Anderson*, 12 BLR at 113; Transcript at 69, 82, 98, 109; Decision and Order at 10. Additionally, the administrative law judge acted within his discretion as the fact-finder when he determined that neither Dr. Fino nor Dr. Renn adequately accounted for the irreversible component of claimant's obstructive impairment when they opined that asthma was the sole cause of claimant's disabling obstructive disease. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order at 10. We therefore affirm the administrative law judge's decision to accord little weight to Dr. Fino's opinion. *See Kozele*, 6 BLR at 1-382-83 n.4.

Based on the foregoing discussion, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[7]

[7] Because the issue at 20 C.F.R. §718.202(a)(4) is the existence of legal pneumoconiosis, the inquiry at 20 C.F.R. §718.203(b) is necessarily subsumed within the administrative law judge's finding that claimant's chronic obstructive pulmonary disease

Pursuant to Section 718.204(c), the administrative law judge credited the opinions of Drs. Parker, Rasmussen, and Celko, that claimant's pneumoconiosis substantially contributes to his total disability, and discredited the opinions of Drs. Renn and Fino, that claimant's disability is unrelated to pneumoconiosis, because the latter opinions were contrary to the administrative law judge's finding that claimant established the existence of legal pneumoconiosis. Decision and Order at 11.

Employer argues that the opinions of Drs. Parker, Rasmussen, and Celko are insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c) because all three doctors conceded that they cannot distinguish between the effects of legal pneumoconiosis and cigarette smoking, and because Drs. Rasmussen and Celko conceded that part of claimant's impairment is due to non-occupational asthma. Employer also argues that the administrative law judge erred in discounting the opinions of Drs. Renn and Fino because the doctors did not diagnose legal pneumoconiosis.

Employer's arguments lack merit. Drs. Parker, Rasmussen, and Celko were not required to distinguish between the effects of legal pneumoconiosis and cigarette smoking.[8] *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-346, 2-372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). Moreover, the opinions of Drs. Rasmussen and Celko were not rendered legally insufficient by the doctors' concession that part of claimant's impairment is due to non-occupational asthma. Their opinions met the standard the administrative law judge had to apply, specifically, whether pneumoconiosis is a substantially contributing cause of

---

(COPD) arose out of his coal mine employment. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 10. Thus, we need not address employer's challenge to the administrative law judge's additional finding that employer did not rebut the presumption of Section 718.203(b), that claimant's pneumoconiosis arose out of coal mine employment. Employer's Brief at 33-36.

[8] Dr. Parker attributed claimant's severe obstruction equally to coal mine employment and smoking because claimant had the same length of coal mine employment and smoking. Claimant's Exhibit 7 at 89-90. Dr. Rasmussen testified that he could not separate coal mine employment, smoking, or asthma, as the causes of claimant's pulmonary obstruction. Employer's Exhibit 5 at 48-49. Dr. Celko testified that claimant's disability was due to both smoking and coal mine employment, but could not precisely determine the amount due to occupational dust exposure. Claimant's Exhibit 9 at 15, 18, 40.

claimant's total disability.[9] *See* 20 C.F.R. §718.204(c)(1); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989). Further, contrary to employer's contention, the administrative law judge reasonably discounted the opinions of Drs. Renn and Fino, that claimant's disability is not due to pneumoconiosis, because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that legal pneumoconiosis was established. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004). Thus, we affirm the administrative law judge's finding pursuant to Section 718.204(c). Consequently, we affirm the administrative law judge's award of benefits.

Finally, employer asserts that it should be dismissed from liability because it was prejudiced by the substitution of Dr. Rasmussen's opinion for that of Dr. Basheda. As noted, *supra*, Judge Lesniak remanded the claim to the district director for a complete pulmonary evaluation, after finding that Dr. Basheda's medical report provided to claimant by the Department of Labor was equivocal and failed to address relevant conditions of entitlement. The Director advised Judge Lesniak and advises the Board on appeal that Dr. Basheda's medical report was too equivocal on the issue of the cause of claimant's lung disease to meet the Director's statutory obligation, pursuant to 30 U.S.C. §923(b) and Section 725.406(a), to provide claimant with a complete pulmonary evaluation.

We agree with the Director, who has the duty to ensure the proper enforcement and lawful administration of the Act, that Judge Lesniak properly exercised his discretion to find that Dr. Basheda's equivocal opinion on causation did not satisfy the Director's obligation to provide a complete pulmonary evaluation because the opinion "fail[ed] to address the relevant conditions of entitlement . . . in a manner which permits resolution of the claim" pursuant to 20 C.F.R. §725.456(e). *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994); Order of Remand at 2. Moreover, we deny employer's request that it be dismissed from liability. Employer was not prejudiced by the substitution of Dr. Rasmussen's opinion for that of Dr. Basheda, after the Director had unsuccessfully sought clarification from Dr. Basheda. Moreover, the record reflects that employer

[9] Particularly, Dr. Rasmussen stated that claimant's coal mine employment was a significant contributing cause of his pulmonary impairment, Employer's Exhibit 5 at 58, and Dr. Celko stated that most of claimant's impairment was due to COPD (due to both smoking and coal mine employment) rather than asthma. Claimant's Exhibit 9 at 24.

responded to Dr. Rasmussen's opinion and was given a "fair opportunity to mount a meaningful defense." *C&K Coal Co. v. Taylor*, 165 F.3d 254, 259, 21 BLR 2-523, 2-535-36 (3d Cir. 1999); *see Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807, 21 BLR 2-302, 2-320 (4th Cir. 1998); *Hodges*, 18 BLR at 1-90-91. Consequently, we reject employer's argument that it must be dismissed as a party.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge