BRB No. 08-0148 BLA

J.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 10/30/2008
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Thomas G. Lawrence (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Emily Goldberg-Kraft (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 (06-BLA-6157) of Administrative Law Judge Ralph A. Romano 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's prior application for benefits, filed on October 19, 1997, was finally denied on May 10, 2000, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1. On December 12, 2005, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order dated September 17, 2007, the administrative law judge credited claimant with twenty-three years and three months of coal mine employment[1] and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), in the form of obstructive lung disease (COPD) due in part to coal dust exposure. Consequently, the administrative law judge determined that claimant met his burden to establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 990, 23 BLR 2-213, 2-236 (11th Cir. 2004); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 7. Reviewing the merits of entitlement, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (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 relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of claimant's totally disabling respiratory impairment pursuant to 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 filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in finding that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[2]

[1] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's finding of twenty-three years and three months of coal mine employment, and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b) are affirmed as unchallenged

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 a finding of 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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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,* 23 BLR at 1-3. 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 the miner failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 5. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement to obtain review of the merits of the miner's claim. 20 C.F.R. §725.309(d)(2), (3); *see Jones*, 386 F.3d at 990, 23 BLR at 2-236.

Employer initially contends that in finding the medical evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in according greater weight to the opinions of Drs. Davis and Batie, than to the opinion of Dr. Russakoff. We disagree.

In evaluating the medical opinion evidence relevant to the existence of pneumoconiosis, the administrative law judge properly found that Dr. Davis and Dr. Batie diagnosed claimant with COPD due in part to coal dust exposure, or legal pneumoconiosis, while, by contrast, Dr. Russakoff opined that claimant does not suffer from any coal dust-related disease of the lung.[3] Decision and Order at 5-6. The

---

on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[3] Dr. Davis, a Board-certified pulmonologist, initially performed the Department of Labor sponsored pulmonary evaluation, and later became claimant's treating

administrative law judge initially determined that both Drs. Davis and Russakoff "are highly qualified as pulmonary specialists," and, considering the factors set forth at 20 C.F.R. 718.104(d), found that Dr. Davis's report was entitled to the additional weight properly accorded to that of a treating physician. Decision and Order at 6. Weighing the opinion of Dr. Davis against the contrary opinion of Dr. Russakoff, the administrative law judge found that Dr. Davis's opinion, that claimant's COPD is due in part to coal dust exposure, was well-reasoned, well-documented, and was more persuasive than the contrary opinion of Dr. Russakoff. In addition, the administrative law judge noted that Dr. Davis's opinion was supported by Dr. Batie's opinion, which he determined was also well-reasoned and well-documented. The administrative law judge concluded, therefore, that the weight of the medical evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Initially, we reject employer's argument that the administrative law judge erred in relying on the opinion of Dr. Davis, which employer asserts is equivocal, contradictory, and not sufficiently reasoned to carry claimant's burden of proof. Employer's Brief at 8-11. Employer is asking the Board to undertake a reweighing of the evidence, which is beyond the scope of the Board's review. *See Jones*, 386 F.3d at 991, 23 BLR at 2-238; *Anderson*, 12 BLR at 1-113. In evaluating Dr. Davis's opinion, the administrative law judge noted, correctly, that Dr. Davis had considered claimant's employment and smoking histories, the physical findings on examination, and the pulmonary function study and x-ray results. Decision and Order at 5. Contrary to employer's argument, the administrative law judge fully considered that Dr. Davis's opinion was based in part on a positive x-ray that was re-read as negative, and that Dr. Russakoff had criticized Dr. Davis's diagnosis for that reason. Employer's Brief at 9-10. The administrative law judge concluded, within his discretion, that because he had found the positive and negative readings of each x-ray, as well as the x-ray evidence as a whole, to be in equipoise, Dr. Davis's reliance in part on a positive x-ray reading did not render her opinion as to the existence of legal pneumoconiosis less credible. *See Bradberry v. Director, OWCP*, 117 F.3d 1361, 1368, 21 BLR 2-166, 2-178 (11th Cir. 1997); Decision and Order at 7.

---

physician. Dr. Davis opined that both smoking and coal dust exposure contributed to claimant's chronic obstructive lung disease (COPD). Claimant's Exhibit 2; Director's Exhibit 14. Dr. Batie, a Board-certified family practitioner, also diagnosed COPD, due to coal dust exposure and smoking. Claimant's Exhibit 3. Dr. Russakoff opined that claimant's obstructive pulmonary impairment is due solely to cigarette smoking. Employer's Exhibit 1.

There is also no merit to employer's contention that Dr. Davis's opinion is contradictory or inconsistent, or that the physician "flipflops" in determining whether the cause of claimant's COPD is cigarette smoking or coal dust exposure. Employer's Brief at 8-9. Rather, in her most recent report, Dr. Davis clearly stated that she was "still of the same opinion" that the etiology of claimant's COPD was multifactorial, with both smoking and coal dust exposure being contributing factors. Claimant's Exhibit 2. Thus, the administrative law judge acted within his discretion in finding that Dr. Davis's opinion was reasoned and documented, and that it supported a finding of legal pneumoconiosis. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 8.

We further reject employer's argument that the administrative law judge erred in finding Dr. Batie's opinion sufficiently reasoned to support of a finding of legal pneumoconiosis. Employer's Brief at 12. The administrative law judge properly found that Dr. Batie treated claimant for COPD. Decision and Order at 5. In addition, Dr. Batie's treatment notes dated December 9, 2005 and March 16, 2006, clearly indicate that she attributed claimant's COPD to both coal dust exposure and tobacco abuse. Claimant's Exhibit 3. In addition, as the administrative law judge correctly noted, in a report dated May 5, 2006, when she was asked whether pneumoconiosis contributed to claimant's breathing impairment, Dr. Batie answered "yes," and reiterated her conclusion that claimant's breathing impairment was secondary to "prolonged exposure" and tobacco use. Claimant's Exhibit 3. Thus, there is no merit to employer's contentions that Dr. Batie's treatment notes do not reflect any diagnoses of pneumoconiosis, or that her May 6, 2006 report was unduly influenced by claimant's counsel's misstatement that claimant had already proved the existence of pneumoconiosis. Employer's Brief at 12. Moreover, the administrative law judge did not rely primarily on Dr. Batie's diagnosis to establish legal pneumoconiosis. Rather, the administrative law judge relied primarily on Dr. Davis's opinion, and concluded, correctly, that it was supported by the opinion of Dr. Batie. Decision and Order at 7.

Finally, as the administrative law judge reasonably analyzed the medical opinions and explained his reasons for crediting or discrediting the opinions he reviewed, there is no merit to employer's contention that the administrative law judge mechanically accorded greater weight to the opinions of Drs. Davis and Batie, based on their status as claimant's treating physicians. *See* 20 C.F.R. §718.104(d)(5); Employer's Brief at 14. Thus, as the administrative law judge properly considered all of the evidence of record, and permissibly found that the opinions of Drs. Davis and Batie outweighed the opinion of Dr. Russsakoff, we affirm the administrative law judge's conclusion that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a). *See Jones*, 386 F.3d at 991, 23 BLR at 2-237; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Employer next challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.204(c), that the medical evidence of record establishes that the miner's totally disabling respiratory impairment is due to pneumoconiosis. As the administrative law judge correctly summarized, a miner is totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *see Jones*, 386 F.3d at 990, 23 BLR at 2-236; *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1265, 13 BLR 2-277, 2-283 (11th Cir. 1990); Decision and Order at 10. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment that is caused by a disease or exposure unrelated to coal mine employment.[4] 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003).

In evaluating the evidence relevant to the issue of disability causation at 20 C.F.R. §718.204(c), the administrative law judge properly found that Drs. Davis and Batie opined that claimant's disabling respiratory impairment is due to both his coal dust exposure and smoking, while Dr. Russakoff opined that claimant's pulmonary disability is due entirely to smoking. Decision and Order at 10. Contrary to employer's contention, the administrative law judge correctly found that, while neither Dr. Davis nor Dr. Batie attempted to apportion claimant's disability due to each cause, or stated that the causative role of coal dust was "substantial," their opinions that both coal dust and smoking contributed to claimant's disabling impairment are sufficient to establish that claimant's coal mine dust exposure was a substantially contributing cause of his disability. *Gross*, 23 BLR at 1-17; Decision and Order at 10; Employer's Brief at 15-17. In addition, whether the opinions of Drs. Davis and Batie are sufficiently reasoned is for the administrative law judge to decide. *See Jones*, 386 F.3d at 991, 23 BLR at 2-238. Moreover, the administrative law judge acted within his discretion in according less weight to the opinion of Dr. Russakoff, as his conclusion that claimant did not suffer from legal pneumoconiosis was contrary to the administrative law judge's own findings. *See Clark*, 12 BLR at 1-155; Decision and Order at 10.

It is within the administrative law judge's purview to resolve inconsistencies in the evidence. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238-239. As a review of the administrative law judge's decision reveals that he considered the medical opinions under

[4] The comments to the regulations make clear that the inclusion of the words "material" or "materially" reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. 79946 (Dec. 20, 2000).

the proper disability causation standard, and, contrary to employer's arguments, as neither Dr. Davis nor Dr. Batie implied that the contribution of coal dust to claimant's impairment was *de minimus*, we hold that substantial evidence supports the administrative law judge's conclusion that Dr. Davis's opinion, together with that of Dr. Batie, outweighs the opinion of Dr. Russakoff and establishes that pneumoconiosis is a substantially contributing cause of claimant's disabling lung impairment pursuant to 20 C.F.R. §718.204(c). *See Jones*, F.3d at 993, 23 BLR at 2-241; *Lollar*, 893 F.2d at 1265, 13 BLR at 2-283; Decision and Order at 10.

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