BRB No. 09-0211 BLA

G.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/28/2009
	)	
ELK RUN 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (07-BLA-5823) of Administrative Law Judge Michael P. Lesniak 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 on September 12,

2006. Director's Exhibit 2. The administrative law judge credited claimant with twenty-seven years of coal mine employment,[1] and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1), (4), and total disability due to legal 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 permitting claimant to submit a positive x-ray reading in rebuttal of the positive x-ray interpretation that was submitted as part of the Department of Labor-sponsored pulmonary evaluation. Employer therefore argues that the administrative law judge erred in finding that the preponderance of the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Additionally, employer argues that the administrative law judge erred by failing to determine whether claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Finally, employer argues that the administrative law judge erred in finding that total disability due to pneumoconiosis pursuant Section 718.204(c) was established. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's admission of the positive rereading by Dr. Baek, submitted by claimant, in rebuttal of the positive reading of the December 6, 2006 x-ray by Dr. Rasmussen, as part of the Department of Labor-sponsored pulmonary evaluation.[2]

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

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

[2] The administrative law judge's crediting of claimant with twenty-seven years of coal mine employment, his finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3), and his finding that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b)(2) are unchallenged on appeal. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 Section 718.202(a)(1), the administrative law judge considered eight readings of two x-rays, performed on December 6, 2006, and April 4, 2007.[3] The December 6, 2006 x-ray was read as positive for pneumoconiosis by two Board-certified radiologists and B readers, Drs. Baek and Smith, and by one B reader, Dr. Rasmussen. Director's Exhibit 10; Claimant's Exhibits 3, 6. It was read as negative for pneumoconiosis by two Board-certified radiologists and B readers, Drs. Meyer and Wiot. Employer's Exhibits 1, 6. The April 4, 2007 x-ray was read as positive and negative by Drs. Smith and Wiot, respectively. Claimant's Exhibit 4; Employer's Exhibit 2. The administrative law judge found that the preponderance of the x-ray evidence was positive for clinical pneumoconiosis, finding that the December 6, 2006 x-ray was positive for pneumoconiosis, while the remaining April 4, 2007 x-ray was inconclusive for the presence or absence of pneumoconiosis. Decision and Order at 24-25.

Employer argues that the administrative law judge erred in allowing claimant to submit Dr. Baek's positive rereading in rebuttal of the x-ray read as positive for pneumoconiosis by Dr. Rasmussen, who performed the Department of Labor (DOL)-sponsored complete pulmonary evaluation. Employer asserts that it is "inequitable to allow the claimant's [positive] rebuttal interpretation" to "tip the scales" in favor of claimant since claimant was able to select Dr. Rasmussen to perform the DOL evaluation and then was able to submit an additional positive reading in rebuttal. Employer's Brief at 11.

We reject employer's argument, as the same argument was rejected in *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-82-83 (2008). There, the Board held that "rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but rather, need only refute 'the case' presented by the opposing party." *J.V.S.*, 24 BLR at 1-83. Moreover, as was noted by the Board in *J.V.S.*, 24 BLR at 1-83

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[3] One reading was a quality reading of the December 6, 2006 x-ray by Dr. Gaziano. Director's Exhibit 10.

n.5, there is no unfairness in permitting claimant to submit a positive rereading of the reading by the physician performing the DOL evaluation because both claimant and employer are allowed to submit an x-ray interpretation in rebuttal of the x-ray interpretation submitted by the Director pursuant to 20 C.F.R. §725.406. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Thus, the parties submit the same amount of evidence. *J.V.S.*, 24 BLR at 1-83 n.5. It cannot be assumed that the x-ray interpretation submitted by the Director will always be positive for pneumoconiosis. *Id.* As employer raises no other arguments at Section 718.202(a)(1), we affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Cohen, Rasmussen, Crisalli, and Zaldivar, and the doctors' qualifications. Dr. Cohen concluded that both claimant's smoking and coal mine employment "significantly contributed to the development of [claimant's] early obstructive lung disease, moderate to severe diffusion impairment, and severe gas exchange abnormalities with exercise." Claimant's Exhibit 8 at 5; *see also* Claimant's Exhibit 2 at 10. Dr. Rasmussen opined that claimant's smoking and coal dust exposure were the cause of claimant's disabling lung disease. Claimant's Exhibits 1, 7; Director's Exhibit 10. Dr. Crisalli initially opined that claimant's bullous emphysema was due to smoking, but later opined that claimant may have interstitial pulmonary fibrosis unrelated to coal mine employment. Employer's Exhibit 9 at 20; *see also* Employer's Exhibit 5. Dr. Zaldivar opined that claimant has pulmonary fibrosis that is unrelated to coal mine employment. Employer's Exhibits 4; 8 at 20.

The administrative law judge found that Dr. Cohen's opinion was "especially persuasive," since Dr. Cohen found an obstructive impairment based upon claimant's low FEV1/FVC ratio, whereas employer's doctors, Drs. Crisalli and Zaldivar, did not find an obstructive impairment. Decision and Order at 27. Moreover, the administrative law judge discounted Dr. Crisalli's opinion in light of Dr. Cohen's criticisms of Dr. Crisalli's opinion that claimant's pulmonary impairment may be related to collagen vascular disease, bronchiolitis, and idiopathic pulmonary fibrosis (IPF). *Id.* The administrative law judge found that Dr. Cohen persuasively explained that no diagnosis of collagen vascular disease was made, that there were no findings of bronchiolitis, and that a diagnosis of IPF could not be made without considering claimant's coal mine employment and smoking histories as potential causes of claimant's pulmonary disease. *Id.*

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Cohen and Rasmussen over those of Drs. Crisalli and Zaldivar, to find

that legal pneumoconiosis[4] was established. Employer first argues that the administrative law judge shifted the burden of proof to employer to establish that claimant's impairment is due to an alternate disease process, other than pneumoconiosis. Employer also argues that the administrative law judge failed to provide a sufficient explanation, in accordance with the Administrative Procedure Act (APA), for crediting the opinions of Drs. Cohen and Rasmussen over those of Drs. Crisalli and Zaldivar. Lastly, employer argues that the administrative law judge did not consider Dr. Zaldivar's criticism of Dr. Cohen's conclusion, that claimant has an obstructive defect because he has a low FEV1/FVC ratio.

We reject employer's arguments pursuant to Section 718.202(a)(4). Contrary to employer's argument, the administrative law judge did not shift the burden of proof to employer to establish that claimant does not have pneumoconiosis, but rather properly placed the burden upon claimant, in light of the administrative law judge's finding "that Claimant has demonstrated the presence of pneumoconiosis at Section 718.202(a)(4) on the basis of the medical opinion evidence . . . ." *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-6-9 (1994); *Anderson*, 12 BLR at 1-112; Decision and Order at 28. Moreover, we reject employer's contention that the administrative law judge failed to provide a sufficient explanation for his weighing of the medical opinion evidence, in accordance with the APA. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Contrary to employer's contention, the administrative law judge considered Dr. Zaldivar's disagreement with Dr. Cohen's opinion that claimant has an obstructive pulmonary impairment, but rationally found that Dr. Cohen "credibly explained," that claimant's low FEV1/FVC ratio indicated obstruction. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(*en banc*); Decision and Order at 26-27; Claimant's Exhibit 2 at 1-10; Employer's Exhibit 8 at 15-16. Despite employer's assertion to the contrary, Dr. Cohen was not the only doctor to diagnose an obstruction in claimant; Dr. Rasmussen diagnosed obstruction, and his opinion supports that of Dr. Cohen.[5] *See* Director's Exhibit 10. Further, the

[4] 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).

[5] Dr. Rasmussen stated that his pulmonary function studies revealed a slight obstructive ventilatory defect. Director's Exhibit 10.

administrative law judge permissibly discounted Dr. Crisalli's opinion because his differential diagnoses of collagen vascular disease and bronchiolitis were not supported by the record, as Dr. Cohen observed,[6] and because Dr. Crisalli's diagnosis of IPF was made without considering claimant's exposures to coal dust and smoking, and Dr. Cohen opined that those causes should have been considered before a diagnosis of a disease of unknown cause was made.[7] *See Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Decision and Order at 27; Claimant's Exhibits 8 at 4-5. In discounting Dr. Crisalli's opinion for these reasons, the administrative law judge permissibly assessed the opinion's credibility; he did not shift the burden to employer to provide the existence of alternative diseases. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

As employer's arguments lack merit, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Having affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4), we affirm the administrative law judge's additional finding that claimant established the existence of pneumoconiosis, based on all the relevant evidence pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); Decision and Order at 28.

Employer next argues that the administrative law judge erred in failing to determine whether claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). The administrative law judge noted that he was not required to evaluate the comments made on the x-ray readings by Drs. Wiot, Meyer, Zaldivar, and Crisalli because he found that clinical pneumoconiosis was not established. *See* Decision and Order at 30 n.15. Contrary to the administrative law judge's statement, he found that claimant established the existence of clinical pneumoconiosis. *See* Decision and Order at 24-25, 28.

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[6] Dr. Cohen criticized Dr. Crisalli's diagnosis of collagen vascular disease because no doctor had made such a diagnosis. Claimant's Exhibit 8 at 4. Moreover, Dr. Cohen criticized Dr. Crisalli's diagnosis of bronchiolitis because it is a disease of severe obstruction and relatively normal diffusion, whereas claimant has the opposite pattern – a mild obstruction and a severe diffusion impairment. *Id.*

[7] Dr. Cohen criticized Dr. Crisalli's opinion by stating that a "definite diagnosis of IPF [idiopathic pulmonary fibrosis] . . . requires exclusion of other known causes of interstitial lung disease such as . . . *environmental exposures*," and that "occupational and environmental exposures must be assessed before even considering an IPF diagnosis." Claimant's Exhibit 8 at 5.

Any error in this regard is harmless, since we have affirmed the administrative law judge's finding of legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). A determination that claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b) is subsumed within the legal pneumoconiosis finding. *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).

Pursuant to Section 718.204(c), employer argues that the administrative law judge erred in discounting the opinions of Drs. Crisalli and Zaldivar because they did not diagnose pneumoconiosis, and erred in relying upon the opinions of Drs. Cohen and Rasmussen without adequate explanation for his credibility determinations. The administrative law judge considered the opinions of Drs. Cohen, Rasmussen, Crisalli, and Zaldivar, and their qualifications. Drs. Cohen and Rasmussen opined that claimant's totally disabling pulmonary impairment is due to both his coal dust exposure and smoking. Claimant's Exhibits 1, 2, 7, 8; Director's Exhibit 10. Dr. Crisalli attributed claimant's totally disabling pulmonary impairment initially to emphysema due to smoking but later opined that it is due to interstitial fibrosis unrelated to coal mine employment. Employer's Exhibit 9 at 20; *see also* Employer's Exhibit 5 at 5. Dr. Zaldivar opined that claimant's totally disabling pulmonary impairment is due to pulmonary fibrosis unrelated to coal mine employment. Employer's Exhibit 4 at 3; *see also* Employer's Exhibit 8 at 20.

The administrative law judge discounted the opinions of Drs. Crisalli and Zaldivar because they did not diagnose legal pneumoconiosis. Decision and Order at 30. The administrative law judge found that the opinions of Drs. Cohen and Rasmussen, that claimant's totally disabling pulmonary impairment is due to both smoking and coal dust exposure, were well-reasoned and well-documented. *Id.* Consequently, the administrative law judge found that total disability due to legal pneumoconiosis was established, based on the opinions of Drs. Cohen and Rasmussen.

We reject employer's argument at Section 718.204(c). The administrative law judge rationally discounted the opinions of Drs. Crisalli and Zaldivar because they did not diagnose legal pneumoconiosis. *See Scott v. Mason Coal Co.,* 289 F.3d 263, 267, 269, 22 BLR 2-372, 2-379-80, 2-384 (4th Cir. 2002); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008); Decision and Order at 30; Employer's Exhibits 4-5, 8-9. Moreover, the administrative law judge rationally relied on the opinions of Drs. Cohen and Rasmussen to find that claimant is totally disabled to due legal pneumoconiosis, because he found them to be well-reasoned and well-documented. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Hughes*, 21 BLR at 1-139-40; Decision and Order at 30; Director's Exhibit 10; Claimant's Exhibits 1-2, 7-

8. Consequently, we affirm the administrative law judge's finding that claimant is totally disabled due to legal pneumoconiosis pursuant to Section 718.204(c). *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372-73 (4th Cir. 2006); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990); Decision and Order at 30. Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a) and is totally disabled due to legal pneumoconiosis pursuant to Section 718.204(c), we affirm the administrative law judge's award of benefits.

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