BRB No. 09-0230 BLA

W.A.V.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PENN ALLEGHENY COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/26/2009
	)	
and	)	
	)	
INTERNATIONAL BUSINESS AND MERCANTILE REASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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-Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (04-BLA-6688) of Administrative Law Judge Richard A. Morgan on a subsequent claim[1] 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). This case is before the Board for the second time. In the initial decision, the administrative law judge credited claimant with thirteen years of coal mine employment,[2] as stipulated. The administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), based on employer's stipulation that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Considering the merits of the claim, the administrative law judge found that the evidence established the existence of clinical coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (2), (4), 718.203(b). The administrative law judge further found that claimant established the existence of legal pneumoconiosis,[3] in the form of asbestosis arising out of coal mine employment, pursuant to Section 718.202(a)(4). Finally, the administrative law judge found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), and that both clinical and legal pneumoconiosis are substantially contributing causes of claimant's total disability

[1] Claimant's first claim, filed on November 10, 1992, was finally denied on September 14, 1995. Director's Exhibit 1. Claimant's second claim, filed on September 26, 1996, was finally denied on February 10, 1997, because claimant failed to establish total respiratory disability. Director's Exhibit 2. Claimant's third and instant claim was filed on April 14, 2003. Director's Exhibit 4.

[2] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] 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). Pneumoconiosis is "recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c).

pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Upon employer's appeal, the Board, in a split decision, affirmed the administrative law judge's award of benefits. [*W.A.V.*] *v. Penn Allegheny Coal Co.*, BRB No. 06-0368 BLA (Feb. 26, 2007)(Dolder, J., dissenting)(unpub.).[4] Thereafter, pursuant to employer's motion for reconsideration *en banc*, the entire Board, in a split decision, granted reconsideration, vacated the administrative law judge's award of benefits, and remanded the case to the administrative law judge for reconsideration. [*W.A.V.*] *v. Penn Allegheny Coal Co.*, BRB No. 06-0368 BLA (Nov. 16, 2007)(recon. *en banc*)(McGranery and Hall, JJ., dissenting)(unpub.). The Board vacated the administrative law judge's finding that legal pneumoconiosis was established pursuant to Section 718.202(a)(4), because the administrative law judge did not determine whether the evidence established that claimant's asbestosis arose out of his coal mine employment-related asbestos exposure. *Id.* Since the administrative law judge's finding that claimant's pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment pursuant to Section 718.204(c) was based on his finding that claimant has legal pneumoconiosis, the Board also vacated the administrative law judge's disability causation finding. *Id.* Further, because employer denied that it exposed claimant to asbestos, the Board instructed the administrative law judge to reconsider employer's status as the responsible operator, if the administrative law judge again awarded benefits, based on a finding that legal pneumoconiosis, in the form of asbestosis arising out of coal mine employment, substantially contributes to claimant's total disability.[5] *Id.*

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[4] The dissenting member of the Board concluded that the administrative law judge failed to adequately address the medical opinion evidence relevant to the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and further failed to properly consider whether the weight of the medical opinion evidence, as a whole, is sufficient to support claimant's burden of proof pursuant to 20 C.F.R. §718.204(c). [*W.A.V.*] *v. Penn Allegheny Coal Co.*, BRB No. 06-0368 BLA (Feb. 26, 2007)(Dolder, J., dissenting)(unpub.). Consequently, the dissenting Board member declined to address, as premature, employer's additional argument regarding employer's status as the responsible operator. *Id.*

[5] The two dissenting Board members voted to affirm the administrative law judge's award of benefits, on the grounds that substantial evidence supported the administrative law judge's determination that clinical pneumoconiosis contributes to claimant's total disability, and that employer waived the argument that it is not the responsible operator. [*W.A.V.*] *v. Penn Allegheny Coal Co.*, BRB No. 06-0368 BLA (Nov. 16, 2007)(recon. *en banc*)(McGranery and Hall, JJ., dissenting)(unpub.).

On remand, the administrative law judge found that the evidence established that claimant has "coal dust-related legal pneumoconiosis" pursuant to Section 718.202(a)(4) and that claimant's "coal dust-related legal pneumoconiosis" substantially contributes to his total respiratory disability pursuant to Section 718.204(c). Moreover, the administrative law judge found that employer is the properly designated responsible operator. 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 both the existence of legal pneumoconiosis at Section 718.202(a)(4), and disability causation at Section 718.204(c). Employer also contends that it is not liable for claimant's benefits as the responsible operator. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response brief, but notes his agreement with the dissenting members' view that employer waived any argument that it is not the responsible operator. Employer filed a reply brief, responding to claimant's brief, and noting the Director's position regarding the responsible operator issue.

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).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Cohen, Raffensperger, Fino, and Pickerill. Drs. Cohen and Raffensperger opined that claimant's restrictive defect is due to both his coal mine dust and asbestos exposures. Director's Exhibit 21; Claimant's Exhibits 1 at 12; 6 at 28, 67. Drs. Fino and Pickerill opined that claimant's totally disabling respiratory impairment is due to asbestosis unrelated to his coal dust exposure. Employer's Exhibits 13 at 2, 10; 15 at 14, 20-21. The administrative law judge credited the opinions of Drs. Cohen and Raffensperger, that claimant's restrictive impairment is due to both his coal mine dust and asbestos exposures, because he found them to be well-reasoned and documented. The administrative law judge chose to accord less weight to the contrary opinions of Drs. Fino and Pickerill, because of deficiencies in their documentation and reasoning.

Upon review of the arguments raised on appeal, the relevant medical opinion evidence, and the administrative law judge's consideration of that evidence under Section 718.202(a)(4), we affirm the administrative law judge's finding. Employer challenges the administrative law judge's consideration, on remand, of the physicians' awareness of claimant's asbestos exposure in coal mine employment. However, this issue did not affect the administrative law judge's ultimate finding that claimant has "coal dust-related legal pneumoconiosis."[6] The administrative law judge provided other reasons, besides the physicians' awareness of claimant's asbestos exposure in his coal mine employment, to credit the opinions of Drs. Cohen and Raffensperger, that claimant has a restrictive impairment due in part to coal mine dust exposure, and those reasons are valid.

The administrative law judge acted within his discretion in relying on Dr. Cohen's report, which he found to be extensive, well-reasoned, and documented, and permissibly found that Dr. Cohen had persuasively critiqued the contrary medical opinions of Drs. Fino and Pickerill.[7] *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-

[6] In view of the administrative law judge's finding that claimant has legal pneumoconiosis in the form of a restrictive impairment due in part to coal mine dust exposure, the administrative law judge found it unnecessary to address whether claimant also has asbestosis arising out of coal mine employment. Decision and Order on Remand at 11.

[7] Dr. Cohen rendered a report on December 22, 2004, and was deposed on July 28, 2005. Dr. Cohen based his opinion, that claimant's restrictive impairment is due in part to his coal dust exposure, on claimant's heavy coal dust exposure, symptoms of dyspnea, cough, and sputum production, and pulmonary function and blood gas studies showing a moderately severe restrictive defect with a moderate diffusion impairment and an abnormal gas exchange, all of which, the doctor explained, are consistent with a diagnosis of pneumoconiosis caused by coal mine employment. Claimant's Exhibits 1 at 9, 10; 6 at 18, 24, 28, 90.

Dr. Cohen disagreed with the opinions of Drs. Fino and Pickerill, that claimant's rapid progression in lung function, without further dust exposure, is more typical of asbestosis than coal workers' pneumoconiosis, as Dr. Cohen was not aware of any medical literature supporting a distinction between the rate of decline due to asbestosis as opposed to pneumoconiosis in a respiratory impairment involving a mixed exposure case, as here, and no such literature was cited by either Dr. Fino or Dr. Pickerill. Claimant's Exhibit 6 at 31-33.

Dr. Cohen also disagreed with Dr. Pickerill's opinion, that if claimant has pneumoconiosis, it likely has not caused a significant respiratory impairment, and pointed out that Dr. Pickerill did not provide any information on which he based this opinion.

1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Remand at 8-9; Claimant's Exhibits 1, 6. Moreover, Dr. Cohen's opinion that claimant's restrictive impairment is predominantly due to his heavy coal dust exposure, with additional asbestos exposure, supports the administrative law judge's finding that claimant has "coal dust-related legal pneumoconiosis."[8] *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372-73 (4th Cir. 2006); Decision and Order on Remand at 11; Claimant's Exhibit 6 at 67. Contrary to employer's argument, Dr. Cohen's opinion constitutes substantial evidence in support of the administrative law judge's finding that claimant has "coal dust-related legal pneumoconiosis," even though Dr. Cohen opined that he could not distinguish the effects of coal dust exposure and asbestos exposure in claimant's totally disabling respiratory impairment. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372-73.

Further, the administrative law judge acted within his discretion in crediting Dr. Raffensperger's opinion, that both coal mine dust and asbestos exposure play substantial roles in claimant's restrictive impairment, because it was consistent with the clinical evidence of pneumoconiosis, claimant's significant history of exposures to both asbestos and coal mine dust, and the abnormal clinical test results indicative of a totally disabling respiratory impairment.[9] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order on Remand at 7-8; Director's Exhibit 21. Dr. Raffensperger's opinion that coal mine dust plays a substantial role in

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Claimant's Exhibit 6 at 32. Dr. Cohen additionally disagreed with Dr. Fino's opinion, that claimant's current restrictive impairment is not due to pneumoconiosis, because claimant had positive x-ray evidence of pneumoconiosis without evidence of obstruction or restriction in 1997. Claimant's Exhibit 6 at 114. Dr. Cohen noted that a lack of impairment in 1997 would not rule out a pneumoconiosis or an impairment therefrom based on current testing. *Id.*

[8] Dr. Cohen's opinion that claimant's coal dust exposure was heavy was based on the fact that claimant worked as a mechanic, underground, in a low coal seam of forty-two inches. Claimant's Exhibit 6 at 61.

[9] Dr. Raffensperger, who rendered his report on February 5, 2004, based his opinion on the progression of claimant's x-ray abnormalities, the consistent restrictive pattern shown on pulmonary function testing, as well as recent testing indicating abnormalities on blood gas studies and diffusing capacity, and the slow progression of claimant's breathing complaints. Director's Exhibit 21. Dr. Raffensperger noted that claimant was exposed to asbestos, and worked underground as a coal miner, from 1977 through 1990. *Id.*

claimant's restrictive disease, supports the administrative law judge's finding that claimant has "coal dust-related legal pneumoconiosis." Contrary to employer's argument, Dr. Raffensperger's opinion, that claimant's "past exposure to coal dust is playing a substantial role in his restrictive disease which is now disabling him from his former coal mine employment," is "sufficiently definitive to be credited." *See Soubik*, 366 F.3d at 234 n.12, 23 BLR at 2-98 n.12; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Director's Exhibit 21.

Turning to the contrary medical opinions, the administrative law judge discredited Dr. Pickerill's opinion, that claimant has asbestosis unrelated to coal mine employment and no occupational lung disease due to coal dust, in part, because the administrative law judge questioned the physician's rationale for his diagnosis. Specifically, Dr. Pickerill stated on May 31, 2005, that, "[t]he worsening in [claimant's] lung function since that time [after he stopped working in coal mine employment in 1992] without any further dust exposure is more typical for asbestosis rather than coal workers' pneumoconiosis." Employer's Exhibit 13 at 10. The administrative law judge rationally discredited Dr. Pickerill's reasoning, in view of Dr. Cohen's disagreement with Dr. Pickerill's opinion, because Dr. Cohen was not aware of any medical literature supporting the notion that in mixed exposure cases, progression supports asbestosis and not coal workers' pneumoconiosis, and the absence of any citation or literature by Dr. Pickerill in support of his position.[10] *See* 20 C.F.R. §718.201(c); *see also J.O. v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 10-11; Claimant's Exhibit 6 at 31; Employer's Exhibit 13 at 10. Moreover, the administrative law judge rationally discounted Dr. Pickerill's opinion because the doctor did not consider the biopsy evidence of coal workers' pneumoconiosis, and because the doctor failed to diagnose clinical pneumoconiosis, whereas the administrative law judge found that clinical pneumoconiosis was established by x-ray, biopsy, and medical opinion evidence. *See Soubik*, 366 F.3d at 234, 23 BLR at 2-99; *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-112 (3d Cir. 1997); Decision and Order on Remand at 10-11; Employer's Exhibit 13 at 8-10. Lastly, the administrative law judge rationally discounted the opinion of Dr. Pickerill because he relied, in part, on inadmissible x-ray evidence, to support his opinion that claimant has asbestosis unrelated to coal mine employment and not coal workers' pneumoconiosis.[11] *See Brasher v. Pleasant View Mining Co., Inc.*, 23

[10] Dr. Cohen was also critical of Dr. Fino's similar belief. Claimant's Exhibit 6 at 32-33.

[11] Specifically, Dr. Pickerill relied on x-ray readings dated May 16, 2003, October 18, 2004, and May 31, 2005, which were not admitted into the record, to support his opinion that claimant has asbestosis unrelated to coal mine employment and not coal worker's pneumoconiosis. Employer's Exhibit 13 at 5, 8-9.

BLR 1-141, 1-147-48 n.7 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-115 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); Decision and Order on Remand at 10-11; Employer's Exhibit 13 at 5, 8-9.

The administrative law judge discounted Dr. Fino's opinion, that claimant has coal worker's pneumoconiosis but is totally disabled due to asbestosis unrelated to coal mine employment, because the administrative law judge found that the x-ray evidence showed a progression whereas Dr. Fino opined that a lack of progression on claimant's x-rays reflected that asbestosis, not pneumoconiosis, is the source of his current impairment. The administrative law judge rationally questioned Dr. Fino's opinion on this basis, as it tended to undermine the reliability of the physician's opinion.[12] *See Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400, 1-402 (1984); Decision and Order on Remand at 10; Employer's Exhibits 1, 2, 15 at 37, 41. The administrative law judge also discredited Dr. Fino's opinion because the doctor relied on inadmissible x-ray evidence. Dr. Fino rendered two reports on January 4, 2005 and February 17, 2005, and testified by deposition on August 31, 2005. Dr. Fino's key reason for finding that claimant did not have an impairment due to coal dust inhalation was that, despite claimant's development of a restrictive defect from 1996 to 2004, his x-ray readings of "1/0" stayed the same. Employer's Exhibit 15 at 10-17, 36-37, 40-41, 47-49. Dr. Fino had compared his 1996 x-ray reading of 1/0 rounded opacities to an x-ray that he performed in 2004, which was not admitted into the record.[13] *Id.* As Dr. Fino's opinion was called into question because of his reliance, in large part, on an inadmissible x-ray reading, the administrative law judge rationally discredited it. *See Brasher*, 23 BLR at 1-147-48 n.7; *Harris*, 23 BLR at 1-115; Decision and Order on Remand at 10; Employer's Exhibits 1, 2, 15 at 10-17, 36-37, 40-41, 47-49.

As the administrative law judge provided valid reasons for crediting the opinions of Drs. Cohen and Raffensperger and discrediting those of Drs. Fino and Pickerill, despite the administrative law judge's consideration of the physicians' awareness of claimant's asbestos exposure in coal mine employment, the administrative law judge's

[12] Dr. Fino's opinion was based, in part, on his 1996 reading of "1/0." Employer's Exhibits 1 at 5, 14, 16; 2 at 7, 9; 15 at 14. Dr. Cohen's opinion, upon which the administrative law judge relied, was based on his 2004 reading of "1/1." Claimant's Exhibits 1 at 3, 10; 6 at 16, 93. The administrative law judge noted further that five of the eight x-ray readings admitted into evidence in the current claim showed profusion ratings greater than "1/0." Decision and Order on Remand at 10, *citing* 2006 Decision and Order at 25.

[13] The administrative law judge excluded the 2004 x-ray due to employer's failure to comply with his Order dated October 26, 2005.

reliance on the former opinions is affirmed. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). We therefore affirm the administrative law judge's finding that claimant has "coal dust-related legal pneumoconiosis" pursuant to Section 718.202(a)(4). Consequently, we affirm the administrative law judge's finding that claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Williams*, 114 F.3d at 25, 21 BLR at 2-112.

Pursuant to Section 718.204(c), the administrative law judge found that the better reasoned opinions of Drs. Cohen and Raffensperger establish that claimant's "coal dust-related legal pneumoconiosis" substantially contributes to his totally disabling respiratory impairment. Based on our affirmance of the administrative law judge's finding that claimant established "coal dust-related legal pneumoconiosis" pursuant to Section 718.202(a)(4), based on the opinions of Drs. Cohen and Raffensperger, and these opinions establish that claimant's pneumoconiosis substantially contributes to his totally disabling respiratory impairment, we affirm the administrative law judge's finding pursuant to Section 718.204(c).[14] *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order on Remand at 11; Director's Exhibit 21; Claimant's Exhibits 1, 6.

[14] Because we have affirmed the administrative law judge's finding that claimant's "coal dust-related legal pneumoconiosis" substantially contributes to his totally disabling respiratory impairment, the responsible operator issue raised by employer, based on its claim that it never exposed claimant to asbestos, is moot. Consequently, we need not address it.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge