BRB No. 06-0236 BLA

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| JOSEPH R. SHEPOSH | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
| | ) | DATE ISSUED: 09/29/2006 |
| BARNES & TUCKER 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 Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, L.L.C.), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2004-BLA-6187) of Administrative Law Judge Daniel Leland with respect to a claim filed pursuant to the provisions of the Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.§901 *et seq*. (the Act). The administrative law judge determined that the claim before him was a subsequent claim pursuant to 20 C.F.R. §725.309(d).[1] The

[1] Claimant filed an application for benefits on October 27, 1986, which was denied by Administrative Law Judge Richard K. Malamphy in a Decision and Order issued on February 27, 1989. Director's Exhibit 1. Judge Malamphy found that claimant failed to

administrative law judge found that claimant established a change in an applicable condition of entitlement and that claimant proved that he is totally disabled due to pneumoconiosis on the merits. Accordingly, he awarded benefits. Employer argues on appeal that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant responds and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief in this appeal.[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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer alleges that the administrative law judge erred in discrediting the medical opinions in which Drs. Solic and Cox stated that claimant did not have pneumoconiosis on the ground that their reasoning was inconsistent with the definition of the disease set forth in 20 C.F.R. §718.201. Employer argues specifically that the administrative law judge essentially required Drs. Cox and Solic to rebut a presumption that a miner who has obstructive disease that has progressed since he left the mines has pneumoconiosis.

Employer's contention is without merit. Dr. Solic examined claimant on June 4, 2005 and diagnosed chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to cigarette smoking. He stated that claimant is totally disabled and that his impairment is due to his long history of smoking. In support of his conclusion, Dr. Solic noted that claimant's pulmonary function studies had been normal when his exposure to coal dust ceased and that he had continued to smoke for sixteen years after he left the mines. Employer's Exhibit 4.

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prove that he was totally disabled due to pneumoconiosis. *Id*. Claimant filed a second claim on June 2, 2003. Director's Exhibit 3.

[2] We affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and that the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c), as they have not been challenged on appeal. Decision and Order at 7; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

Dr. Cox examined claimant on June 8, 2004 and diagnosed COPD caused by cigarette smoking. Employer's Exhibit 5. At his deposition, Dr. Cox stated the reasons for his opinion that claimant did not have legal or clinical pneumoconiosis: the x-ray evidence is largely negative; claimant's pulmonary impairment did not arise until several years after he left the mines; and the type of impairment he has is consistent with lung disease caused by cigarette smoking. Dr. Cox also stated that even if he assumed that claimant has simple pneumoconiosis based upon a positive x-ray reading, his opinion regarding the cause of claimant's impairment would not change. Employer's Exhibit 7 at 22-25. On cross-examination, Dr. Cox indicated that in light of his experience and his understanding of the medical literature, it is his opinion that simple pneumoconiosis cannot cause or contribute to disabling obstructive lung disease. *Id*. at 59.

The administrative law judge addressed both opinions and found that:

> Drs. Solic and Cox determined that claimant's obstructive pulmonary disease is not related to coal dust exposure because his pulmonary condition has deteriorated since he left the mines while he continued to smoke for many years after his retirement. Dr. Cox stated that he has never seen the case of a miner whose pulmonary condition due to pneumoconiosis progressed after coal dust exposure ceased. The opinions of Dr. Solic and Dr. Cox contradict §718.201(c) which states that pneumoconiosis is recognized as a "latent and progressive disease which may first become detectable only after the cessation of coal dust exposure." Although claimant's severe obstructive pulmonary disease is undoubtedly due in part to his heavy cigarette smoking, Dr. Solic [*sic*] and Dr. Cox's reasons for excluding coal dust exposure as a cause of his pulmonary disease are not credible.

Decision and Order at 7. We affirm the administrative law judge's decision to discredit the opinions of Drs. Solic and Cox, as it was within his discretion as finder of fact.

The administrative law judge rationally found that in determining that claimant does not have clinical pneumoconiosis, Drs. Solic and Cox relied, in part, upon their understanding that the x-ray evidence was negative for pneumoconiosis, which is contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1). The administrative law judge acted within his discretion in according their opinions less weight on this ground. Decision and Order at 7; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The administrative law judge also rationally determined that the opinions of Drs. Solic and Cox were entitled to little weight because, contrary to the definition of pneumoconiosis set forth in Section 718.201, they believe that latent pneumoconiosis cannot become a contributing cause of a totally disabling obstructive impairment after the inhalation of coal dust ceases. 20 C.F.R. §718.201(a)(2), (c); *see Consolidation Coal Co.*

*v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *see also Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

The administrative law judge acted within his discretion in inferring that Dr. Solic relied upon this belief because Dr. Solic had cited the fact that claimant's pulmonary function studies showed no impairment one and a half years after he retired from mining as support for his determination that claimant does not have pneumoconiosis. Employer's Exhibit 4. Dr. Solic also indicated that although coal dust exposure can cause or contribute to obstructive lung disease in the form of chronic bronchitis, this condition resolves after coal dust exposure is terminated. *Id*. The record also supports the administrative law judge's finding with respect to Dr. Cox's opinion. Dr. Cox had specifically stated at his deposition that pneumoconiosis or coal dust exposure does not cause disabling obstructive lung disease. Employer's Exhibit 7 at 59.

Finally, contrary to employer's argument, the administrative law judge acted rationally in crediting the opinions in which Drs. Begley and Schaaf indicated that claimant has both legal and clinical pneumoconiosis and that pneumoconiosis is a substantial contributing factor to his totally disabling obstructive impairment, as their conclusions are supported by the x-ray evidence and objective studies of record. Decision and Order at 7; *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Bonessa v. United States Steel Corp.*, 884 F.2d 725 (3d Cir. 1989). We affirm, therefore, the administrative law judge's findings, pursuant to Sections 718.202(a)(4) and 718.204(c), that claimant established that he has pneumoconiosis and is totally disabled by it.

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

SO ORDERED.

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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