BRB No. 07-0961 BLA

J.B. Claimant-Respondent v. ISLAND CREEK COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/29/2008 DECISION and ORDER

Appeal of the Decision and Order on the Record Awarding Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on the Record Awarding Benefits (2005-BLA-06220) of Administrative Law Judge Janice K. Bullard rendered on a subsequent 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). The miner's subsequent claim was filed on May 20, 2004.[1] The administrative law judge credited claimant with at least twenty-three years of coal mine employment, based on a stipulation by the parties, and found that the claim was timely filed. The administrative law judge found the medical evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that claimant's pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203(b). The administrative law judge further found the evidence sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that claimant established both a change in one of the applicable elements of entitlement pursuant to 20 C.F.R. §725.309 and entitlement to benefits.

On appeal, employer contends that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(4), 718.204(b)(2)(iv), and (c). Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Renn and Fino on the issue of disability causation. In addition, employer contends that the administrative law judge erred in excluding the deposition testimony of Dr. Meyer because it exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), while taking no position on the ultimate merits of employer's appeal, has filed a limited response urging the Board to

[1] Claimant filed his initial claim for benefits on September 29, 1980, which was denied by the district director on May 7, 1981, because the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on November 7, 1990. Director's Exhibit 2. Administrative Law Judge Frank J. Marcellino denied benefits in a Decision and Order issued on December 29, 1992, finding that claimant failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis. *Id*. Claimant appealed the denial to the Board but failed to file a Petition for Review and brief. The Board dismissed claimant's appeal for failure to respond to the Board's Order to Show Cause. [*J.B.*] *v. Island Creek Coal Co.*, BRB No. 93-0966 BLA (Aug. 13, 1993)(unpub. Order); Director's Exhibit 2. No further action was taken until claimant filed his current application for benefits.

affirm the administrative law judge's exclusion of Dr. Meyer's deposition testimony. In addition, the Director contends that the administrative law judge's finding that Dr. Renn's opinion was contrary to the Act because he requires x-ray evidence of pneumoconiosis before he will identify coal dust exposure as a cause of an obstructive impairment is supported by substantial evidence.

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.[2] 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).

Exclusion of Dr. Meyer's Deposition

Prior to the scheduled hearing,[3] employer proffered the deposition testimony of Dr. Meyer, a Board-certified radiologist, who interpreted two chest x-rays dated June 23, 2004 and August 6, 2006, and a CT scan dated December 31, 2003. Employer's Exhibit 15. During the same period, employer also proffered the medical reports and deposition testimony of Drs. Renn and Fino. Employer's Exhibits 3, 7, 13, 16. In discussing the relevant CT scan evidence in her Decision and Order, the administrative law judge found that Dr. Meyer's deposition testimony was inadmissible under Section 725.414(c), as Dr. Meyer had reviewed only chest x-rays and a CT scan, and that he had not prepared a "medical report." Decision and Order at 12 n.7. In addition, the administrative law judge found no good cause to allow for the admission of Dr. Meyer's deposition testimony. *Id*.

Employer argues that the administrative law judge erred in excluding Dr. Meyer's testimony and in failing to provide employer with an opportunity to establish good cause for its admission. The Director urges affirmance of the administrative law judge's evidentiary ruling. We hold that the administrative law judge properly determined that Dr. Meyer's deposition testimony was not admissible in this case, as Dr. Meyer did not prepare a "medical report," as defined in Section 725.414(a)(1) and employer had submitted the medical reports of two other physicians, thereby reaching the limitation set forth in Section 725.414(a)(3)(i). 20 C.F.R. §§725.414(a)(1), (a)(3)(i), (c); 725.457(c). Moreover, we note that, under the circumstances of this case, even if there was error in

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 6.

[3] Pursuant to claimant's request, the hearing was cancelled and the administrative law judge decided this case on the evidence of record before her. Decision and Order at 2.

the administrative law judge's exclusion of Dr. Meyer's deposition testimony, including her finding that employer did not establish good cause, it is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge fully credited Dr. Meyer's negative x-ray and CT scan interpretations and reached a conclusion consistent with Dr. Meyer's findings – that the radiological evidence was insufficient to establish the existence of clinical pneumoconiosis.[4] Thus, Dr. Meyer's deposition testimony could not alter, in any material way, the administrative law judge's determination that claimant did not establish the existence of clinical pneumoconiosis.

Legal Pneumoconiosis

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Mullins, Koenig, Fino and Renn. Decision and Order at 8-11, 13-14. Dr. Mullins examined claimant and diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD), due mainly to coal dust exposure, but also attributable, "in small part," to other causes, including smoking and asthma. Director's Exhibit 13. In addition, Dr. Mullins diagnosed a moderately severe ventilatory impairment, attributing 90% of the impairment to coal workers' pneumoconiosis and 10% to other conditions. Director's Exhibit 13; Employer's Exhibit 6 at 25. Dr. Koenig noted that he has been treating claimant since February 2004 and outlined claimant's treatment history. Dr. Koenig diagnosed COPD due to coal dust exposure, indicating that it is possible to have COPD due to coal dust exposure in the absence of radiological evidence of pneumoconiosis. Director's Exhibit 20; Employer's Exhibit 5.

Based on his review of the medical evidence of record, Dr. Fino stated, "I certainly cannot exclude coal mine dust inhalation as potentially contributing to this man's obstruction." Employer's Exhibit 3. However, Dr. Fino also opined that claimant's bullous emphysema and the portion of the obstructive impairment that has improved over time cannot be attributed to coal dust exposure. Employer's Exhibits 3, 16. Based on an examination, Dr. Renn diagnosed asthma and bullous emphysema and indicated that claimant has a mild obstructive ventilatory defect. Employer's Exhibit 7. Dr. Renn further opined that coal dust exposure did not play any role in the development of claimant's emphysema. *Id*.

Upon weighing this evidence, the administrative law judge determined that all four of the physicians opined that claimant has "an obstructive ventilatory defect of varying degree." Decision and Order at 13. The administrative law judge further found that Dr.

[4] The administrative law judge, in discussing the CT scan evidence, noted that Dr. Meyer observed that CT scan evidence is more sensitive than an ordinary chest x-ray in detecting pulmonary parenchymal abnormalities. Decision and Order at 12.

Renn was the only physician to explicitly opine that pneumoconiosis or coal dust exposure was not the cause of the impairment. Decision and Order at 13; Director's Exhibits 13, 20; Employer's Exhibit 3. The administrative law judge determined that Dr. Renn's opinion was entitled to little weight because his conclusions were not supported by the objective evidence of record and because several of his comments were "contrary to the Act." Decision and Order at 14. The administrative law judge also found that Dr. Renn's opinion was outweighed by the better reasoned opinions of Drs. Mullins, Koenig and Fino. *Id*. Consequently, the administrative law judge concluded that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis under Section 718.202(a)(4). *Id*.

Employer contends that the administrative law judge failed to adequately explain her rationale for according diminished weight to Dr. Renn's opinion. In addition, employer contends that, contrary to the administrative law judge's finding, applicable law recognizes only two narrow circumstances in which an opinion is considered hostile to the Act, and Dr. Renn's opinion does not contain language conforming to either circumstance. In response, the Director contends that the administrative law judge rationally found that Dr. Renn based his conclusions on a premise that is contrary to the Act, because he indicated that there must be x-ray evidence of coal workers' pneumoconiosis in order to identify coal dust exposure as a cause of COPD.[5]

We hold that employer has not identified error requiring remand in the administrative law judge's determination that Dr. Renn's opinion, that claimant's obstructive impairment was caused by cigarette smoking, "is not supported by the record evidence" and was outweighed by the opinions of Drs. Mullins, Koenig and Fino. Decision and Order at 13. The administrative law judge noted correctly that all four physicians recorded a smoking history of one half pack of cigarettes per day for eight years; that Drs. Mullins, Koenig and Fino specifically indicated that smoking did not play a role in causing claimant's impairment; and that Dr. Renn agreed that the results of a carboxyhemoglobin test showed that claimant is not currently smoking. *Id*. Based upon these accurate factual findings, the administrative law judge rationally determined that Dr. Renn's opinion, that claimant's obstructive impairment is attributable to smoking, was entitled to little weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because the administrative law judge provided a valid alternative

[5] The Director, Office of Workers' Compensation Programs, does not take a position as to the validity of the administrative law judge's additional findings that Dr. Renn's opinion is contrary to the Act because the physician denied that chronic obstructive pulmonary disease can be a form of pneumoconiosis and that pneumoconiosis can be a latent and progressive disease. *See* Decision and Order at 14.

rationale for her discrediting of Dr. Renn's opinion, we decline to address employer's argument that the administrative law judge erred in finding that Dr. Renn's opinion was contrary to the Act. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). In the absence of any additional allegations of error by employer regarding the administrative law judge's weighing of the evidence at Section 718.202(a)(4), we affirm the administrative law judge's determination that the weight of the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis.

Total Respiratory Disability

With regard to the issue of total respiratory disability, the administrative law judge considered the opinions of Drs. Mullins, Koenig, Fino and Renn and found that the weight of the evidence is sufficient to establish a totally disabling respiratory or pulmonary impairment. The administrative law judge found that Drs. Mullins and Koenig opined that claimant was unable, from a respiratory standpoint, to perform his usual coal mine employment; whereas Drs. Renn and Fino opined that claimant had a mild impairment, which would not prevent him from performing his usual coal mine employment. In particular, the administrative law judge found the opinion of Dr. Koenig, claimant's treating physician, to be most persuasive and accorded it controlling weight. Decision and Order at 20.

Employer contends that the administrative law judge improperly accorded determinative weight to the opinion of Dr. Koenig because it was not obtained in preparation for litigation. In addition, employer argues that the administrative law judge erred in determining that Dr. Mullins's opinion supports a finding of total disability because, in her deposition testimony, Dr. Mullins opined that in view of more recent ventilatory study evidence, claimant is not totally disabled. Employer further contends that the administrative law judge erred in discrediting the medical opinion of Dr. Renn, because she failed to adequately consider the entirety of the opinion and substituted her own interpretation of the medical evidence for that of the medical expert. These arguments lack merit.

Contrary to employer's contention, the administrative law judge did not accord determinative weight to Dr. Koenig's opinion solely because his opinion was not prepared for the purposes of litigation. The administrative law judge also considered whether Dr. Koenig's opinion merits controlling weight as a result of his status as claimant's treating physician under the criteria set forth at 20 C.F.R §718.104(d). Decision and Order at 18. The administrative law judge found that Dr. Koenig began treating claimant for a pulmonary condition in February 2004 and sees him approximately every two to three months. Decision and Order at 18. In addition, the administrative law judge determined that Dr. Koenig conducted numerous physical examinations and objective tests during this time and that his treatment of claimant

resulted from a referral from claimant's primary care physician. *Id*. Noting that the other physicians had only limited contact with claimant, the administrative law judge rationally concluded that Dr. Koenig's long term and ongoing treatment of claimant provided Dr. Koenig with a "superior understanding" of claimant's pulmonary condition. Decision and Order at 18; 20 C.F.R. §718.104(d); *see Grizzle v. Pickands Mather and Co./Chisolm Mines*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). The administrative law judge also found that Dr. Koenig's opinion was well-reasoned and well-documented because he thoroughly explained his diagnosis of total disability, despite the improvement in claimant's pulmonary function test results, in light of the exertional requirements of claimant's usual coal mine work. Decision and Order at 19. We affirm the administrative law judge's decision to credit Dr. Koenig's opinion as well-reasoned and well-documented, as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Contrary to employer's allegation, therefore, the administrative law judge set forth valid rationales for according controlling weight to Dr. Koenig's opinion, and her finding is affirmed. *See* 20 C.F.R §718.104(d); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Decision and Order at 18-19.

We also reject employer's contention that the administrative law judge erred in crediting the opinion of Dr. Mullins, that claimant is totally disabled. Contrary to employer's contention, the administrative law judge did not selectively analyze Dr. Mullins's opinion or fail to consider her opinion in its entirety. Rather, in evaluating Dr. Mullins's opinion, the administrative law judge fully discussed her deposition testimony that a pulmonary function study obtained subsequent to her examination of claimant produced results indicating that claimant is not totally disabled. Decision and Order at 17-18; Employer's Exhibit 6 at 23-26. The administrative law judge rationally determined that this portion of Dr. Mullins's testimony was "speculative and inconclusive" and entitled to little weight, because Dr. Mullins was not given the opportunity to review the study in its entirety, but rather was merely informed by employer's counsel of two of the values produced on the subsequent study. Decision and Order at 17. Accordingly, the administrative law judge acted within her discretion as fact-finder in fully crediting Dr. Mullins's diagnosis of a totally disabling pulmonary impairment based upon her examination of claimant and the objective testing that she performed. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Employer further contends that the administrative law judge selectively analyzed the medical opinion of Dr. Renn and also substituted her own interpretation of the medical data for that of Dr. Renn. We hold that the administrative law judge provided a valid rationale for according little weight to Dr. Renn's opinion, that claimant is not totally disabled. The administrative law judge acted within her discretion as fact-finder in determining that the probative value of Dr. Renn's opinion was diminished by the fact

that the physician based his conclusion upon general information and did not "discuss the precise rigors of [c]laimant's past job duties in his assessment of total disability." Decision and Order at 19-20; *see Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Clark*, 12 BLR at 1-151; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). The Board is not empowered to reweigh the evidence of record or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Accordingly, we affirm the administrative law judge's finding that the opinion of Dr. Koenig, as corroborated by Dr. Mullins's opinion, was entitled to greatest weight and was sufficient to establish total respiratory disability pursuant to Section 718.204(b).

Disability Causation

Employer also challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(c), arguing that the administrative law judge failed to provide an adequate explanation of her conclusions, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §19(d) and 30 U.S.C. §932(a). Employer further contends that the administrative law judge erred in discrediting the opinions of Drs. Renn and Fino on the issue of disability causation because Dr. Renn disagreed with the administrative law judge's findings on the issues of the existence of legal pneumoconiosis and total respiratory disability, and Dr. Fino's opinion was contrary to the administrative law judge's finding on the issue of total respiratory disability. Employer concludes by asserting, "[s]hould ALJ Bullard be required to reconsider other contested issues on remand concerning [claimant], disability causation should also be revisited." Employer's Brief at 22.

Employer's allegations of error are without merit. It is proper for an administrative law judge to discredit a causation opinion in which the physician, contrary to the administrative law judge's determinations, denies either the existence of pneumoconiosis or that the miner has a totally disabling respiratory or pulmonary impairment. *See Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995)(an administrative law judge who has found pneumoconiosis and total respiratory disability established may not credit an opinion that the former did not cause the latter unless the administrative law judge identifies specific and persuasive reasons for concluding that the doctor's judgment does not rest upon his disagreement with the administrative law judge's findings as to either or both of the predicates in the causal chain). To successfully challenge an administrative law judge's decision in this regard, an employer must show that the physician's opinion is not erroneously premised upon the physician's disagreement with the administrative law judge's findings. *Id.*; *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-373, 2-383-84 (4th Cir. 2002);

Grigg v. Director, OWCP, 28 F.3d 416, 419, 18 BLR 2-299, 3-306 (4th Cir. 1994). In this case, the administrative law judge properly found that Dr. Renn based his opinion, that claimant is not totally disabled due to pneumoconiosis, upon his belief that claimant does not have pneumoconiosis, which is contrary to the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4).[6] Decision and Order at 13; Employer's Exhibits 7, 13. Similarly, the administrative law judge determined correctly that Dr. Fino's causation opinion was based upon his conclusion that claimant is not totally disabled, a premise that conflicts with the administrative law judge's finding under Section 718.204(b)(2).[7] Decision and Order at 20; Employer's Exhibit 3. We affirm, therefore, the administrative law judge's determination that the opinions of Drs. Renn and Fino were entitled to little weight pursuant to Section 718.204(c). *Toler*, 43 F.3d at 116, 19 BLR at 2-83; *see also Scott*, 289 F.3d at 269-70, 22 BLR at 2-383-84; *Grigg*, 28 F.3d at 419, 18 BLR at 3-306.

Lastly, we affirm the administrative law judge's determination that the causation opinions of Drs. Koenig and Mullins are reasoned and documented, as employer does not raise specific allegations of error with regard to this finding by the administrative law judge. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We also affirm, therefore, the administrative law judge's finding that these opinions were sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to Section 718.204(c). 20 C.F.R. §718.204(c); *see Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

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[6] Indeed, Dr. Renn reported not only the absence of clinical pneumoconiosis, but also the absence of legal pneumoconiosis or any respiratory impairment due to claimant's coal dust exposure. Employer's Exhibits 7, 13.

[7] Dr. Fino diagnosed "no more than a mild respiratory impairment" and opined that this impairment "is not disabling for [claimant's] last job, which I assume would include some heavy manual labor." Employer's Exhibit 3. Dr. Fino also indicated, "I certainly cannot exclude coal mine dust inhalation as potentially contributing to this man's obstruction. However, the obstruction that has improved over time and the bullous emphysema cannot be attributed to coal mine dust." *Id*. The administrative law judge found that Dr. Fino's opinion as to the degree of claimant's disability was entitled to little weight because the physician exhibited a "vague and speculative" knowledge of claimant's coal mine employment. Decision and Order at 20. We affirm this finding because it has not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In light of the foregoing, we affirm the administrative law judge's finding that claimant has demonstrated a change in an applicable condition of entitlement at Section 725.309(d) and entitlement to benefits on the merits.

Accordingly, the administrative law judge's Decision and Order on the Record 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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REGINA C. McGRANERY
Administrative Appeals Judge