BRB No. 07-0974 BLA

W.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABERRY COAL COMPANY	)	DATE ISSUED: 09/08/2008
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-6602) of Administrative Law Judge Alice M. Craft, 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 administrative law judge credited claimant with at least twenty-eight years of qualifying coal mine employment, and adjudicated this claim, filed on June 4, 2003, as a subsequent claim pursuant to the provisions at 20 C.F.R. Part 718. 20 C.F.R. §725.309(d).[1] The administrative law judge

[1] The instant claim is the miner's second claim for benefits. The miner's previous claim, filed on November 16, 1992, was denied on August 29, 1995. Decision and Order at 2.

found that claimant's prior claim was denied for failure to establish the existence of pneumoconiosis, pneumoconiosis caused by coal mine employment, or total disability due to a respiratory or pulmonary impairment. She determined that the evidence developed since the previous denial established that claimant is totally disabled by a respiratory impairment, and thus demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering all of the evidence of record, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's application of the regulations, and her findings of legal pneumoconiosis and disability causation at Sections 718.202(a)(4) and 718.204(c). Claimant has filed no response.[2] The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response.[3]

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.[4] 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 first challenges the administrative law judge's finding that the weight of the medical opinions of record established legal pneumoconiosis at Section 718.202(a)(4). In evaluating the evidence thereunder, the administrative law judge summarized the medical opinions of record dating from 1992, and the medical opinions of Drs. Rosenburg, Dahhan and Baker submitted in the instant claim. She determined

[2] The record reflects that claimant was represented by counsel at the hearing held in connection with this claim on April 5, 2006.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of coal mine employment, her finding that the newly submitted evidence was sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and her finding that the weight of the evidence of record established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 3; Hearing Transcript at 8.

that all three of these latter physicians provided documented and reasoned opinions supported by "at least some rationale." Decision and Order at 11-16, 21. While Dr. Baker diagnosed pneumoconiosis, Drs. Rosenberg and Dahhan found no coal dust related condition. Specifically, Dr. Rosenberg concluded that claimant does not have "the interstitial form of coal workers' pneumoconiosis," and that his chronic obstructive pulmonary disease (COPD) "was not caused or hastened by the past inhalation of coal dust," since there was no evidence of micronodules associated with focal emphysema. Employer's Exhibit 2 at 7. Dr. Rosenberg's report noted a smoking history of two packs per day from age twelve, until reducing to one-half pack daily four or five years before the (2006) hearing. Decision and Order at 13; *see* Employer's Exhibit 2 at 5, 6-7. Dr. Dahhan concluded that there were insufficient findings to justify a diagnosis of coal workers' pneumoconiosis, and specified objective findings inconsistent with either clinical or legal pneumoconiosis. Dr. Dahhan relied on a smoking history of one pack daily from age sixteen until reducing to one-half pack daily two years before the hearing. Decision and Order at 13-14; *see* Employer's Exhibits 1 at 1, 4, 20 at 8-9, 12-14.

Contrary to the opinions of Drs. Rosenberg and Dahhan, Dr. Baker's diagnoses included coal workers' pneumoconiosis based on x-ray and claimant's history of coal dust exposure, and "COPD with moderate to severe obstructive defect due to coal dust exposure and cigarette smoking, based on the pulmonary function tests." Decision and Order at 12; Director's Exhibit 9 at 4-5. In a supplemental report, Dr. Baker opined that cigarette smoking and coal dust exposure contributed equally to claimant's COPD, and cited NIOSH studies "showing that nonsmoking miners and smoking miners have about the same reduction in FEV_1 over time…(and that smokers) who are also exposed to dust or other pulmonary irritants have more damage than those who only smoke." Decision and Order at 12; *see* Director's Exhibit 27.

On appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence under Section 718.202(a)(4), asserting that Dr. Baker's opinion is neither documented nor reasoned, and was improperly credited over those of Drs. Rosenberg and Dahhan. Specifically, employer argues that Dr. Baker relied on an inaccurate smoking history, failed to review the entire record or document the type and extent of claimant's coal dust exposure, inappositely referenced research studies, and provided an equivocal opinion. Employer asserts that the administrative law judge's determination that neither Dr. Rosenberg nor Dr. Dahhan "offered any convincing explanation" for their attribution of the condition "entirely, or almost entirely, to cigarette smoke," improperly shifted the burden of proof. Employer's Brief at 16. Moreover, employer charges that the administrative law judge failed to consider that the medical opinions dating from the prior claim indicated no significant respiratory impairment at the time claimant's coal dust exposure ceased. Finally, employer contests the administrative law judge's discussion and application of the regulations, as well as her evaluation of the medical research studies referenced by the physicians.

We will address employer's contentions *seriatim*. Whether a medical opinion is documented and reasoned is a determination properly for the administrative law judge, *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987); *Lucostic v. United States Steel Corp*, 8 BLR 1-46, 1-47 (1985), within his discretion as a matter of assessing credibility. *Moseley v. Peabody Coal Co*., 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985). In the present case, the administrative law judge reviewed the objective documentation relied upon by Dr. Baker,[5] and found that the physician's diagnosis of legal pneumoconiosis was supported by its underlying documentation, consistent with the premises underlying the regulations, and in better accord with the medical evidence of record.[6] Decision and Order at 21-22; *see Minnich v. Pagnotti Enterprises, Inc*., 9 BLR 1-89, 1-90 n.1 (1986); *see also Wetzel v. Director, OWCP*, 8 BLR 139 (1985). We conclude that the administrative law judge validly examined the underlying objective bases for the physician's opinion, and evaluated the opinion in light of the other medical evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1989).

Next, our review of the record reflects that the administrative law judge properly identified and resolved the evidentiary conflict in claimant's smoking history, *see Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-89 (1993), concluding that claimant had a sixty to seventy pack year smoking history.[7] *Maypray v. Island Creek Coal Co*., 7

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[5] Employer concedes that Dr. Baker's medical examination, performed on behalf of the Department of Labor, comprised "a complete pulmonary evaluation," including history, physical examination, and "all of the necessary diagnostic testing." *See* Director's Exhibits 9, 11; Employer's Brief at 11.

[6] "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).

[7] Claimant, sixty-five years old at the time of the 2006 hearing, testified to smoking two packs per day since age fifteen until cutting back to one-half pack per day by the 1995 hearing. Accordingly, although employer argues that the prior claim reflected a seventy pack year smoking history, a review of the documentation and testimony of record demonstrates that the administrative law judge's estimation of the miner's smoking history is reasonable. *See* Decision and Order at 3-4; Hearing Transcript at 19-20; Director's Exhibits 36, 38; Employer's Brief at 3; *see also Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993).

Moreover, we reject employer's corollary assertion, respecting the smoking issue, that because claimant's coal dust exposure ceased in 1992, worsening of his pulmonary condition due to the effects of coal dust exposure would be rare. The proposition that pneumoconiosis does not progress after cessation of a coal miner's

BLR 1-683, 1-686 (1985); Decision and Order at 3, 12-15, 21. The administrative law judge specified that although "Dr. Baker found a less extensive smoking history than I have found, his reasoning still applies that both smoking and coal dust exposure contributed to the claimant's disabling COPD." Decision and Order at 14. Further, Dr. Baker opined that either the forty pack year history related by claimant or the seventy pack year history appearing elsewhere in the medical evidence would be sufficient to cause the lung condition he observed. *Id*. Accordingly, Dr. Baker's opinion adequately accounted for the conflict in the smoking history evidence, *see Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 521, 22 BLR 2-494, 504 (6th Cir. 2002), and the administrative law judge's analysis in determining to credit his opinion comports with the exercise of her discretion as finder-of-fact. Decision and Order at 21; s*ee generally Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Next, employer argues that Dr. Baker failed to "indicate any awareness of exactly what type of coal dust exposure (claimant) had in his 29 years of coal mine employment and does not appear to realize that most of claimant's years of coal mine employment were spent as a repairman which, presumably, would not cause him to be exposed to as much coal dust as, for example, an individual working exclusively at the face of the mine." Employer's Brief at 11. Employer, however, identifies no evidence of record in support of his argument, and we note that an administrative law judge's findings respecting the existence of pneumoconiosis must be factually grounded solely on the medical record. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3, 1-7 n.8 (2004). Here, a review of the record reflects that Dr. Baker relied on an occupational history of thirty-one years of underground and surface mining, with claimant last working as a repairman and general laborer. *See* Director's Exhibit 11. Dr. Rosenberg relied on a similar occupational history of "31 years of employment in the coal mines, all underground…he was working as a repairman during most of his work tenure underground …he would have to repair anything in the mines that broke down." Employer's Exhibit 2 at 5. Dr. Dahhan's occupational history reflected thirty-one years in the mining industry, "15 years as a repairman and loading trucks." Employer's Exhibits 1 at 1, 20 at 22. Finally, claimant testified that he "went back in the mines" for his last sixteen years as a repairman and that this period was spent "about all underground," and the administrative law judge noted claimant's testimony that "he was exposed to coal dust and inhaled coal dust on a daily basis." *See* Hearing Transcript at 34-35; Decision and Order at 3. Accordingly, as the relevant evidence of record is consistent and was properly evaluated by the administrative law judge, we reject employer's argument.

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employment is inimical to the tenets of the Act. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).

We also find no merit in employer's argument that the administrative law judge was obliged to discredit the opinion of Dr. Baker because, unlike Drs. Dahhan and Rosenberg, he did not review all of the medical evidence. The amount of medical data reviewed is merely one factor to be recognized and evaluated, and the administrative law judge did so here. *See Minnich*, 9 BLR 1-89; Decision and Order at 13-14, 21. Further, in diagnosing chronic obstructive pulmonary disease significantly related to coal dust exposure, Dr. Baker was not required to quantify with specificity the impact that coal dust exposure had on claimant's condition. 20 CFR 718.201(a)(2). Particularized findings on the part of medical experts is not a prerequisite to crediting medical evidence, and Dr. Baker's use of the word "probably" did not render his opinion unacceptably equivocal. Rather, it may be inferred that the physician acknowledged that the effects of smoking versus coal dust exposure cannot necessarily be medically differentiated. *See generally Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-346 (4th Cir. 2006). The interpretation of medical evidence is properly for medical experts, *see Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987), and the administrative law judge is not required to accept any particular expert opinion, but to credit that evidence found most persuasive. Accordingly, the administrative law judge reasonably chose to credit Dr. Baker's conclusion that "it is very difficult to state which condition was most prominent in causing his obstructive airway disease… both his cigarette smoking and coal dust exposure were probably equal in the production of his obstructive airway disease." *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*).

Next, contrary to employer's contention that Dr. Baker failed to provide reasoning for his opinion, the administrative law judge found that Dr. Baker's conclusion, that claimant has pneumoconiosis, is supported by the evidence underlying his opinion and better accords with the medical evidence of record than the contrary medical opinions of Drs. Dahhan and Rosenberg. Decision and Order at 22. She specified as well that the doctors who believed claimant's "COPD (was) due to smoking alone offered no explanation for excluding coal dust exposure as a contributing factor." *Id*. Employer's characterization of the administrative law judge's determination as shifting the burden of proof is unfounded; she did not require employer to prove that the COPD was due to smoking, but found Dr. Baker's opinion more persuasive on the issue. Nor does employer identify any relevant evidence provided by Drs. Rosenberg and Dahhan that was ignored by the administrative law judge. Our review of the record indicates that the inferences drawn by the administrative law judge in choosing to credit the opinion of Dr. Baker are within the "realm of rationality," *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-590 (4th Cir. 1999), and the fact that other inferences could have been validly drawn on the facts of this case is immaterial. *See Bizzarri v. Consolidation Coal Co.*, 775 F.2d 751, 753, 8 BLR 2-65 (6th Cir. 1985). Accordingly, we conclude that employer's arguments merely challenge the credence accorded to Dr.

Baker's opinion, and essentially amount to a request to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).[8]

It is the province of the finder-of-fact to evaluate and assess conflicting medical evidence, draw inferences, and assess probative value. *See Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). In the present case, the administrative law judge found that Dr. Baker best supported his medical conclusion that claimant's chronic obstructive pulmonary disease was due in part to coal dust exposure. 20 C.F.R. §718.201(a)(2); *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 251, 5 BLR at 2-99. While Drs. Rosenberg and Dahhan advanced different interpretations of the results of claimant's pulmonary function studies relating to the effects of smoking *versus* coal dust exposure, the administrative law judge chose to credit the conclusions of Dr. Baker based in part on his interpretation of the objective findings, particularly the pulmonary function studies. Weighing the old and new medical opinion evidence together, the administrative law judge thus concluded that the recent, probative, well-reasoned opinion of Dr. Baker, that claimant suffers from chronic obstructive pulmonary disease due to a combination of smoking and coal dust exposure, outweighed the contrary medical opinions of record. As to the evidence from the prior claim, the administrative law judge rationally found that those medical opinions failed to differentiate between clinical and legal pneumoconiosis. Their diagnoses of pneumoconiosis were found vitiated by reliance on positive readings of x-rays that were ultimately found negative for the existence of pneumoconiosis. Therefore, in determining that the existence of legal pneumoconiosis was established, the administrative law judge permissibly accorded little weight to the medical opinion

[8] Employer also objects to the administrative law judge's citation to 65 Fed. Reg. 79937-79945, asserting that, in quoting from comment (f) to 65 Fed. Reg. 79938, she omitted comments (d) and (k) respecting claimant's affirmative burden of proof. Decision and Order at 20-21. However, employer does not assert that the administrative law judge either misquoted or misinterpreted any specific regulation or comment. Rather, the administrative law judge related the Department of Labor's position that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. . . . [t]he risk is addictive with smoking," and that medical literature "supports the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." *See* Decision and Order at 21, citing 65 Fed. Reg. 79940, 79943 (Dec. 21, 2000). She further remarked that "medical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is not clinically significant, are, therefore, contrary to the premises underlying the regulations." *Id.*; *see* Decision and Order at 20-21. In discussing the regulatory framework of the Act in the context of evaluating the conflicting medical evidence of record, the administrative law judge's remarks were entirely proper.

evidence dating from the prior claim, and relied on the more recent evidence of record that she found to be most probative. *Cooley v. Island Creek Coal Co*., 845 F.2d 624, 11 BLR 2-147, 2-149 (6th Cir, 1988); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2002); Decision and Order at 22.

Accordingly, we reject employer's objection that the opinions of Drs. Rosenberg and Dahhan were "summarily dismiss[ed]." Employer's Brief at 15. To the contrary, the administrative law judge reviewed the physicians' reports in detail, and concluded that neither Dr. Rosenberg nor Dr. Dahhan "offered any convincing explanation why they attributed [claimant's] COPD entirely, or almost entirely, to cigarette smoke." Decision and Order at 21-22. Employer's objection to the NIOSH medical study referred to by Dr. Baker in his supplementary report is equally meritless. Employer provides no support for his assertion that the administrative law judge's reasoning indicates that every smoking miner will automatically have his COPD attributed to coal mine dust exposure. In sum, therefore, while we recognize that the record permits an alternative conclusion from that made by administrative law judge, "it would lie beyond our 'limited scope of review' to assign a different weight or meaning" to the medical opinions of Drs. Rosenberg and Dahhan. *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 484, 23 BLR 2-44, 2-50 (6th Cir. 2003). Instead, we conclude that the administrative law judge permissibly exercised her discretion to evaluate and weigh the conflicting medical evidence, draw inferences and make findings thereon. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(*en banc*); *Dillon v. Peabody Coal Co*., 11 BLR 1-113 (1988). As the administrative law judge's findings pursuant to Section 718.202(a)(4) are supported by substantial evidence, they are affirmed.

Finally, employer challenges the administrative law judge's finding of disability causation pursuant to Section 718.204(c), based on Dr. Baker's opinion. In support, employer reiterates its previous objections to the administrative law judge's determination to credit Dr. Baker's opinion over those of Drs. Rosenberg and Dahhan. Employer's arguments are without merit. The administrative law judge rationally concluded that the opinions of Drs. Rosenberg and Dahhan, that exposure to coal dust did not cause or contribute to claimant's disability, rested upon the physicians' disagreement with her finding that claimant has legal pneumoconiosis. Decision and Order at 23. Substantial evidence supports the administrative law judge's evaluation of the conflicting medical evidence, and her reliance upon the contrary opinion of Dr. Baker was permissible in the exercise of her discretion. We, therefore, affirm the administrative law judge's finding of disability causation, as consistent with 20 C.F.R. §718.204(c) and *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610-611, 22 BLR 2-288, 2-303 (6th Cir. 2001), and we affirm her award of benefits. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996).

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