

BRB No. 08-0844 BLA

J.W.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CRAFT COAL COMPANY/WEST)	
VIRGINIA COAL WORKERS')	DATE ISSUED: 09/29/2009
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Administrative Law Judge Pamela Lakes Wood, United States Department of Labor.

Timothy C. MacDonnell (Washington and Lee University), Lexington, Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (Employer) appeals the Decision and Order Granting Benefits (2006-BLA-05397) of Administrative Law Judge Pamela Lakes Wood with respect to a subsequent miner's claim filed on January 13, 2005, 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).¹ After crediting claimant with twenty and one-half years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Further, after a review of all of the evidence in the record, the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that his pneumoconiosis is totally disabling pursuant to 20 C.F.R. §§718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge's decision to discredit the opinions of Drs. Renn and Rosenberg in favor of the opinion of Dr. Cohen regarding the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability causation pursuant to 20 C.F.R. §718.204(c) is not supported by substantial evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.²

¹ Claimant filed his initial claim for benefits on January 10, 2000, which was denied by the district director on March 29, 2000 because claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. No further action was taken by claimant with regard to the denial until he filed the present subsequent claim.

² We affirm the administrative law judge's findings that the existence of pneumoconiosis is established at 20 C.F.R. §718.202(a)(1), but not at 20 C.F.R. §718.202(a)(2), (3), and that claimant is totally disabled from a pulmonary or respiratory impairment, pursuant to 20 C.F.R. §718.204(b), as they are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.³ 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In evaluating legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability causation at 20 C.F.R. §718.204(c), the administrative law judge considered the medical opinions of Drs. Scattaregia, Devabhaktuni, Renn, Rosenberg, and Cohen.

In conjunction with claimant's initial claim, Dr. Scattaregia examined claimant on February 15, 2000, at the request of the Department of Labor. Director's Exhibit 1. While Dr. Scattaregia's written opinion is primarily illegible, he diagnosed claimant with chronic bronchitis and mild chronic obstructive pulmonary disease (COPD). *Id.* As to the etiology of claimant's pulmonary impairment, Dr. Scattaregia listed genetics, environment, smoking, and coal dust. Dr. Scattaregia further found that claimant had a mild obstructive impairment based on his chronic bronchitis and COPD. *Id.*

In conjunction with claimant's current appeal, Dr. Devabhaktuni examined claimant on February 21, 2005, at the request of the Department of Labor and diagnosed claimant with COPD and coal workers' pneumoconiosis. Director's Exhibit 13. On his form report, under the section entitled "Etiology of Cardiopulmonary Diagnosis(es)," Dr. Devabhaktuni listed hypertension, coronary artery disease, COPD, and coal workers' pneumoconiosis. *Id.* Further, Dr. Devabhaktuni found that claimant suffered from a moderate pulmonary impairment due to COPD. During his deposition testimony, Dr. Devabhaktuni responded "unlikely" when asked whether there was any reason that claimant's cough and sputum production could be attributed to coal mine dust exposure, and responded "possible" and "more likely" when asked whether these problems could be

³ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibits 1, 5. 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 (1989)(*en banc*).

attributable to claimant's cigarette smoking. Employer's Exhibit 1 at 9-10, 13. In relation to whether claimant could have developed an obstruction due to coal dust exposure years after his employment ended, Dr. Devabhaktuni stated that "[i]f the pattern is restrictive and worsening, there is a possibility that it could be due to coal workers' pneumoconiosis. This obstructive impairment and history of smoking, it's more likely to be obstructive lung disease." *Id.* at 13.

In his report dated August 24, 2005, Dr. Renn diagnosed claimant with coal workers' pneumoconiosis based on the chest x-ray evidence and chronic bronchitis and a moderately severe obstructive ventilatory defect as a result of claimant's smoking. Director's Exhibit 30. His opinion was based on his own exam of claimant on August 10, 2005, and on a review of Dr. Devabhaktuni's opinion and underlying test results. Dr. Renn explained that claimant's chronic bronchitis stems from cigarette smoking, rather than coal dust exposure, because "his productive cough did not begin until 2004, some thirteen years after he was last exposed to coal mine dust." *Id.* In addition, Dr. Renn found that "the pathophysiologic pattern of his ventilatory function studies is consistent with an obstructive ventilatory defect caused by tobacco smoking but inconsistent with [a] . . . defect resulting from exposure to coal mine dust and simple [coal workers'] pneumoconiosis." *Id.* Dr. Renn also opined that claimant is totally and permanently disabled based on his tobacco smoke-induced chronic bronchitis. *Id.*

In his deposition on January 4, 2007, Dr. Renn concluded that claimant's fifteen pack year smoking history was sufficient to cause his pulmonary disease, especially in conjunction with his exposure to environmental tobacco smoke during childhood. Employer's Exhibit 9 at 9. Dr. Renn acknowledged that coal workers' pneumoconiosis can be a latent disease. He also stated that "[i]f you look at the scientific literature that is in the Federal Register in regard to progression and latency . . . the very longest . . . is about ten years after there's no longer exposure, so if this cough were related to his coal mine dust exposure, it would have had to have occurred in 2001 or before." *Id.* at 12-13. As additional support for his position that claimant's bronchitis is not due to coal dust exposure, Dr. Renn referenced claimant's use of bronchodilators, which is effective for reversible pulmonary disease but not coal workers' pneumoconiosis. *Id.* at 16. Dr. Renn opined that "[t]here's usually no pulmonary impairment" from the 1/0 profusion of opacities seen on claimant's x-ray. *Id.* at 18. Dr. Renn eliminated coal dust exposure as a cause of claimant's pulmonary impairment because if the impairment were due to coal dust, claimant "would have a proportionate reduction of the volume and flows" in the pulmonary function study results. *Id.* at 22. Claimant also "would not have bronchoreversibility of his MVV" and there would be "a relative reduction of the total lung capacity to approximately 90 percent of predicted," as well as "a relative reduction of his diffusing capacity." *Id.* at 23. Instead, Dr. Renn found that claimant's results are consistent with chronic bronchitis caused by tobacco smoking. Dr. Renn submitted a supplemental report dated July 22, 2007, based on his review of Dr. Cohen's opinion,

wherein he disagreed with Dr. Cohen's assessment of claimant and his conclusions regarding several studies relating to the significance of claimant's pulmonary function study results. Employer's Exhibit 11.

In a report dated August 25, 2006,⁴ Dr. Rosenberg, based on a review of medical evidence, diagnosed claimant with simple coal workers' pneumoconiosis and a moderately severe obstructive pulmonary impairment that would prevent claimant from performing his previous coal mine employment. Employer's Exhibit 7. After acknowledging "that coal mine dust can cause airflow obstruction," Dr. Rosenberg concluded that claimant's obstruction was due to smoking because his "decrease in FEV1% particularly in the presence of airtrapping . . . with a bronchodilator response . . . clearly is indicative of a pattern of obstruction seen with smoking, and not coal mine dust exposure." *Id.* In support of this finding, Dr. Rosenberg cited to a medical study indicating that the FEV1/FVC ratio does not generally decrease by a significant extent when a respiratory impairment is due to coal mine dust exposure. *Id.* In his deposition testimony on July 11, 2007, Dr. Rosenberg discussed claimant's pulmonary function study results, in conjunction with medical literature concerning patterns of impairment caused by coal dust exposure, and acknowledged that coal mine dust exposure can cause a significant drop in the FEV1/FVC ratio. Employer's Exhibit 10 at 20-28. Based on this analysis, and given the length of time between the end of claimant's coal mine employment and the onset of his symptoms, Dr. Rosenberg determined that claimant's disability was due to his smoking. *Id.* at 24-26.

In a report dated June 18, 2007, Dr. Cohen, based on a review of the medical evidence, diagnosed claimant with clinical and legal pneumoconiosis. Claimant's Exhibit 1. Additionally, Dr. Cohen determined that claimant is totally disabled based on his obstructive pulmonary impairment, which Dr. Cohen found, after a discussion of relevant medical literature, was caused by coal dust exposure and claimant's smoking history. *Id.* In his deposition testimony on July 5, 2007, Dr. Cohen reiterated his opinion that claimant has clinical and legal pneumoconiosis and is disabled from a pulmonary standpoint. Claimant's Exhibit 2 at 12-13, 18-19. Further, Dr. Cohen stated that he was unaware of any study that has found that it is possible for a physician to eliminate coal dust as a contributing cause of a pulmonary impairment by looking at pulmonary function study results alone. *Id.* at 27. Dr. Cohen concluded that coal dust and cigarette smoke were both causes of claimant's pulmonary impairment. *Id.* at 32. In his supplemental report dated September 17, 2007, Dr. Cohen responded to Dr. Renn's opinion and discussed medical studies regarding coal mine dust exposure and its impact on the

⁴ In her Decision and Order, the administrative law judge stated that Dr. Rosenberg's report was dated September 8, 2006, instead of the correct date of August 25, 2006. *See* Decision and Order at 5; Employer's Exhibit 7.

development of obstructive lung disease. Claimant's Exhibit 3. Dr. Cohen concluded that claimant's twenty year history of coal mine dust exposure "was significantly contributory to the development of his pulmonary dysfunction including moderately severe obstructive lung disease." *Id.*

Upon considering the medical opinion evidence, the administrative law judge noted that all of the physicians agree that claimant suffers from COPD or chronic bronchitis. Decision and Order at 13. Accordingly, the administrative law judge then addressed the opinions of Drs. Devabhaktuni, Renn, Rosenberg, and Cohen as to the etiology of the impairment.⁵ *Id.* With respect to Dr. Devabhaktuni's opinion, the administrative law judge concluded that it was "entitled to diminished weight" because it "is confusing and equivocal as to the etiology of [c]laimant's lung disorder." *Id.* at 14.

Regarding Drs. Renn and Rosenberg, the administrative law judge found that "the physicians' opinions are internally inconsistent, unreasoned, and, consequently entitled to less weight." Decision and Order at 14. The administrative law judge determined that although Dr. Renn stated that pneumoconiosis is a latent and progressive disease, his finding that claimant's obstructive pulmonary disorder is due entirely to tobacco smoke, based on the length of time between the end of his coal mine employment and claimant's onset of symptoms, contradicts this acknowledgement and the Department of Labor's comments to the regulations on the issue. *Id.* at 14-15, *citing* 65 Fed. Reg. 79,971 (Dec. 20, 2000). Further, the administrative law judge concluded that Dr. Renn, like Dr. Rosenberg, "appears to have summarily discounted the possibility that coal mine dust exposure worked in tandem with cigarette smoke inhalation to serve as a significant contributor to [c]laimant's obstructive lung disease." *Id.* at 15.

The administrative law judge found that Dr. Rosenberg's opinion is flawed because, in his written report and deposition, he "offered two inconsistent explanations of how the FEV1/FVC ratio can relate a pulmonary defect to coal mine dust exposure and/or smoking." Decision and Order at 15. Further, the administrative law judge found that Dr. Rosenberg failed to adequately address Dr. Cohen's observation that the medical survey by Attfield and Hodous, which Dr. Rosenberg cited in support of his opinion, included all individuals and did not take into account claimant's specific pulmonary sensitivities. *Id.* The administrative law judge noted that "Dr. Rosenberg simply relied upon the unwarranted inference that because [c]laimant's medical data did not conform to the results produced in a general medical survey, his pulmonary deficiency was not due

⁵ The administrative law judge also considered the opinion of Dr. Scattaregia, who examined claimant in conjunction with his initial claim, but found that his opinion was "entitled to little if any weight" due to the "illegibility of the report and its conclusory nature." Decision and Order at 16.

to coal mine dust exposure.” *Id.* at 15-16. The administrative law judge concluded that Dr. Rosenberg’s opinion “is inappropriately couched in generalities” and it does not discuss Dr. Cohen’s opinion that cigarette smoke and coal mine dust were both contributing factors to claimant’s COPD and obstructive impairment. *Id.* at 16.

The administrative law judge found that Dr. Cohen provided “the most persuasive opinion of record” because he “substantiated his link between [c]laimant’s COPD and coal mine dust exposure with a well-documented and well-reasoned opinion.” Decision and Order at 16. The administrative law judge determined that Dr. Cohen provided the documentation he relied on in forming his opinion and related the medical studies he cited to claimant’s specific circumstance. The administrative law judge further found that Dr. Cohen’s conclusion regarding the contributory effects of tobacco smoke and coal mine dust in causing claimant’s impairment is supported by the Department of Labor’s comments to the regulations. *Id.*, citing 65 Fed. Reg. 79,940 (Dec. 20, 2000). Consequently, the administrative law judge afforded Dr. Cohen’s opinion the greatest weight.

With respect to the issue of total disability causation at 20 C.F.R. §718.204(c), the administrative law judge concluded that because claimant’s pulmonary or respiratory impairment is categorized as legal pneumoconiosis, “the medical evidence of record supports a finding that [c]laimant’s pneumoconiosis rendered him totally disabled.” Decision and Order at 18.

On appeal, employer argues that the administrative law judge’s conclusion that Dr. Renn does not believe that coal dust-induced lung disease can be latent and progressive is incorrect because, to support her determination, the administrative law judge quotes from Dr. Renn’s discussion about industrial bronchitis. Further, employer states that, contrary to the administrative law judge’s determination, Dr. Renn provided references to claimant’s medical records and to medical literature in support of the proposition that coal mine dust exposure can be excluded as a contributing factor to claimant’s impairment.

Similarly, employer argues that the administrative law judge erroneously discredited Dr. Rosenberg’s opinion because he provided an inconsistent explanation as to how pulmonary function study results can be used to determine if a pulmonary impairment is due to tobacco smoke or coal dust exposure. Employer also states that the administrative law judge improperly substituted her opinion for that of Dr. Rosenberg by finding that his opinion did not take into consideration the comments to the regulations on coal mine dust and cigarette exposure as contributory causes of respiratory or pulmonary impairments. Employer observes that the administrative law judge “discredits Dr. Rosenberg’s assessment because she finds it couched in generalities but then applies

the generalities expressed in the regulatory comments to control the outcome of the claim.” Employer’s Brief at 6.

Further, employer argues that the administrative law judge’s decision to give the most weight to Dr. Cohen’s opinion is not supported by substantial evidence as the administrative law judge did not fully address the criticisms of Dr. Cohen’s opinion set forth by Drs. Renn or Rosenberg or their discussion of the studies relevant to the etiology of obstructive lung disease. Employer also alleges that the administrative law judge ignored the supplemental reports submitted by Drs. Renn and Rosenberg.

We affirm the administrative law judge’s findings regarding the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability causation pursuant to 20 C.F.R. §718.204(c), as they are rational and supported by substantial evidence. The United States Court of Appeals for the Fourth Circuit has held that the administrative law judge has the exclusive power to make credibility determinations and resolve inconsistencies in the evidence. *See Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Contrary to employer’s statement, it is evident from the administrative law judge’s summary and analysis of the medical opinion evidence that she considered the supplemental opinions of Drs. Renn and Rosenberg. Decision and Order at 5-6, 14-16. Further, as the administrative law judge accurately noted, while Dr. Renn acknowledged that pneumoconiosis can be latent and progressive, this is inconsistent with his conclusion that because claimant’s cough did not develop during his coal mine employment, it must be due to cigarette smoke rather than coal mine dust.⁶ Decision and Order at 14-15; Employer’s Exhibit 9 at 11-12. The administrative law judge also correctly stated that this finding conflicts with the Department of Labor’s comments to the amended definition of pneumoconiosis, which provide that “it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period.” 65 Fed. Reg. 79,971 (Dec. 20, 2000). Therefore, the administrative law judge acted within her discretion in finding that Dr. Renn’s opinion is internally inconsistent and entitled to little weight on that basis. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

The administrative law judge also permissibly discounted Dr. Renn’s opinion due to “flaws in his reasoning and his failure to take into account recent epidemiological

⁶ Dr. Renn noted that claimant had not been exposed to coal mine dust since 1991 but that claimant’s cough developed in 2004. Employer’s Exhibit 9 at 11-12. Dr. Renn determined that claimant’s cough could not be due to coal mine dust exposure because the literature does not support the development of symptoms relating to coal workers’ pneumoconiosis after approximately ten years. *Id.*

evidence,” as pointed out by Dr. Cohen in his supplemental report.⁷ Decision and Order at 15; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, we affirm the administrative law judge’s finding that Dr. Renn’s opinion is entitled to diminished weight.

We further affirm the administrative law judge’s determination that Dr. Rosenberg’s opinion is entitled to diminished weight. Contrary to employer’s assertion, the administrative law judge accurately noted that Dr. Rosenberg offered inconsistent explanations of how the FEV1/FVC ratio can help a physician differentiate between a pulmonary impairment caused by coal mine dust exposure and one caused by smoking. Decision and Order at 15. In addition, the administrative law judge permissibly found that this contradiction undermined Dr. Rosenberg’s credibility, given his significant reliance on this fact in forming his opinion that the sole source of claimant’s pulmonary impairment was tobacco smoke. See *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Mabe*, 9 BLR at 1-68.

We also reject employer’s allegation that the administrative law judge substituted her opinion for that of Dr. Rosenberg when she discredited his opinion based on her finding that he failed to consider that coal mine dust and cigarette smoke can both be contributing causes of claimant’s impairment. Contrary to employer’s assertions, the administrative law judge acted within her discretion, as fact-finder, in discrediting Dr. Rosenberg’s opinion because she found it “couched in generalities,” and failed to explain why coal dust exposure was not a contributory cause of claimant’s COPD. Decision and Order at 16; see *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Clark*, 12 BLR at 1-155; Decision and Order at 16 *citing* 65 Fed. Reg. 79, 940 (Dec. 20, 2000).

We also affirm the administrative law judge’s decision to assign more weight to Dr. Cohen’s opinion because it is supported by substantial evidence. Contrary to employer’s contentions, Dr. Cohen, in his deposition and supplemental report, responded to the arguments of Drs. Renn and Rosenberg, and, as the administrative law judge accurately noted, discussed the medical literature, on which he relied, as it related to the medical evidence in the record. Decision and Order at 16; Claimant’s Exhibits 1; 2 at 20-26, 32, 34; 3. Therefore, the administrative law judge permissibly determined that Dr.

⁷ In his report, Dr. Cohen discussed Dr. Renn’s practice of performing lung volumes and diffusion capacity after bronchodilators are administered, which Dr. Cohen states is not recommended by the American Thoracic Society or European Respiratory Society. See Claimant’s Exhibit 3. Dr. Cohen also pointed out that Dr. Renn, in his supplemental report, relied on outdated articles, instead of more recent studies, when making his determinations concerning whether coal dust played a factor in claimant’s impairment based on the pulmonary function study results. *Id.*

Cohen's opinion was well-documented, well-reasoned, and more persuasive. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127.

Because we have affirmed the administrative law judge's crediting of Dr. Cohen's opinion and his discrediting of the opinions of Drs. Renn, Rosenberg, and Cohen, we further affirm the administrative law judge's findings that claimant met his burden of proving the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and disability causation pursuant to 20 C.F.R. §718.204(c). As a result, we affirm the award of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge