BRB No. 08-0869 BLA

D.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 09/15/2009
LEECHBURG MINING COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD INSURANCE 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-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (07-BLA-5061) of Administrative Law Judge Michael P. Lesniak 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). This claim was filed on September

26, 2005.[1] Director's Exhibit 3. The administrative law judge credited claimant with at least ten years of coal mine employment,[2] as stipulated by the parties. Further, based on the parties' stipulations that claimant suffers from clinical coal workers' pneumoconiosis that arose from his coal mine employment and that he is totally disabled by a respiratory impairment, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that claimant established that he also suffers from legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due in part to coal dust exposure, pursuant to 20 C.F.R. §718.202(a)(4).[3] The administrative law judge further found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinion evidence relevant to the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and the cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).[4] Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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[1] Claimant's first claim, filed on July 22, 1987, was denied on January 13, 1988, because claimant did not establish any element of entitlement. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. 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).

[4] The administrative law judge's length of coal mine employment determination, as well as his findings that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (2), 718.203(b), that he is totally disabled by a pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and that he demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), are unchallenged on appeal. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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 opinions and qualifications of Drs. Cohen, Rasmussen, Celko, and Fino. Drs. Cohen, Rasmussen, and Celko diagnosed claimant with COPD due to coal dust exposure and smoking. Director's Exhibit 8; Claimant's Exhibits 5 at 4; 9; 11 at 11. Dr. Cohen testified that it was difficult to distinguish the effects of smoking from coal dust exposure, but opined that one difference is that an impairment from smoking reverts to normal after smoking cessation, but that an impairment from coal dust exposure persists, even after the coal dust exposure ends. Claimant's Exhibit 11 at 18-19. Dr. Rasmussen similarly opined that it is difficult to distinguish the effects of smoking and coal dust exposure. Claimant's Exhibit 12 at 15-16, 29. Dr. Celko agreed with Dr. Cohen that smoking cessation stops the progression of lung disease, whereas stopping work in a coal mine does not stop the progression of lung disease due to coal mine employment. Director's Exhibit 13. Dr. Fino concluded that claimant's obstructive defect was due only to smoking. Employer's Exhibit 4 at 16-18. Dr. Fino attributed claimant's restrictive defect to his lung surgery due to lung cancer. Employer's Exhibit 4 at 23-24.

The administrative law judge found that Dr. Cohen's opinion was the most credible, and further found that the opinions of Drs. Rasmussen and Celko were well-reasoned and documented, and supported Dr. Cohen's opinion. Decision and Order at 13. The administrative law judge found that Dr. Fino's opinion was less persuasive "in light of the contrary opinions of the three other physicians in this case." Decision and Order at 13-14. The administrative law judge found "that the weight of the medical opinion evidence supports a finding of legal pneumoconiosis in this case." Decision and Order at 14.

Employer challenges the administrative law judge's finding of legal pneumoconiosis pursuant to Section 718.202(a)(4). Employer's contentions lack merit. Contrary to employer's contention, the administrative law judge did not rely on the

numerical superiority of the opinions in favor of claimant to find that legal pneumoconiosis was established. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007). Rather, the administrative law judge permissibly found that Dr. Cohen's opinion was credible because his explanation that the effects of coal dust and smoking are indistinguishable, and that coal dust-induced lung disease progresses over time while a smoking-related lung disease does not progress, was reasoned and thorough. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Moreover, the administrative law judge credited the opinions of both Drs. Rasmussen and Celko because their opinions were well-reasoned and documented, and supported that of Dr. Cohen. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. We therefore reject employer's argument that the administrative law judge merely counted the doctors' opinions.

Contrary to employer's additional argument, the administrative law judge did not err in relying on Dr. Cohen's opinion, as Dr. Cohen did not underestimate claimant's smoking history, but acknowledged that claimant's smoking history was up to thirty-five pack years, and the administrative law judge considered Dr. Cohen's opinion in light of this admission.[5] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). The administrative law judge found that even acknowledging a significant smoking history of thirty-five pack years, Dr. Cohen provided a "reasoned and thorough" explanation for his opinion that claimant's COPD was caused by both his smoking and coal dust exposure. Decision and Order at 13. Specifically, the administrative law judge found that Dr. Cohen explained that the effects of smoking and coal dust are indistinguishable, that a coal dust-induced disease worsens over time, and that the pathology evidence of emphysema, associated

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[5] The administrative law judge stated:

> Contrary to Employer's argument that Dr. Cohen underestimated Claimant's smoking history, I find that Dr. Cohen acknowledged that Claimant's smoking history was up to 35 pack years, but still offered [a] reasoned and thorough explanation as to why Claimant's [chronic obstructive pulmonary disease] COPD was caused by both his smoking and coal dust exposure.

Decision and Order at 13. Claimant testified at the hearing that he has a thirty-four pack year smoking history, Hearing Transcript at 16, and although Dr. Cohen recorded a twenty pack year smoking history in his written report, Claimant's Exhibit 2 at 2, when deposed, Dr. Cohen acknowledged that claimant's smoking history was in the range of between twenty and thirty-five pack years. Claimant's Exhibit 11 at 11, 25-26, 28-29.

with claimant's coal workers' pneumoconiosis, shows that claimant's emphysema was caused, in part, by coal dust exposure. This determination was within the administrative law judge's discretion, and is supported by substantial evidence. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Additionally, we reject employer's argument that the administrative law judge erred in relying on Dr. Rasmussen's opinion even though Dr. Rasmussen did not examine claimant. As the administrative law judge found, Dr. Rasmussen is a qualified physician,[6] he interpreted medical evidence generated by Drs. Cohen and Fino, both of whom examined claimant, and he corroborated Dr. Cohen's opinion. *See Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1028, 9 BLR 2-10, 2-21 (3d Cir. 1986); Decision and Order at 15; Claimant's Exhibits 5, 12.

Lastly, contrary to employer's contention, the administrative law judge permissibly discounted Dr. Fino's opinion, as not well-reasoned when viewed in context of the other opinions, because he did not adequately explain his opinion that it would be "unusual" for claimant's twelve years of coal mine employment to have contributed to his lung problems. *See Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-21 (3d Cir. 1997); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155. As the administrative law judge rationally weighed the medical opinion evidence and substantial evidence supports his credibility determinations, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). As employer raises no other arguments at 20 C.F.R. §718.202(a), the administrative law judge's findings thereunder are affirmed. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997).

Turning to the issue of the cause of claimant's disabling respiratory impairment, pursuant to Section 718.204(c), the administrative law judge correctly stated that a miner is totally disabled due to pneumoconiosis, if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23,

[6] After recognizing that both Drs. Cohen and Fino are Board-certified in Internal Medicine and Pulmonary Disease, while Dr. Rasmussen is Board-certified in Internal Medicine only, the administrative law judge found that Dr. Rasmussen's qualifications "at least meet, if not exceed, those of Drs. Cohen and Fino" because of Dr. Rasmussen's significant experience in the study and treatment of coal dust-induced diseases. *See* Decision and Order at 13 n.10. Employer does not challenge the administrative law judge's finding with regard to Dr. Rasmussen's qualifications, and thus, we affirm it. *See Skrack*, 6 BLR at 1-711; *see also Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 286 (6th Cir. 2005).

2-37 (3d Cir. 1989); Decision and Order at 14. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003).

Pursuant to Section 718.204(c), the administrative law judge credited Dr. Cohen's opinion, as supported by the opinions of Drs. Rasmussen and Celko, that both clinical coal workers' pneumoconiosis and claimant's coal mine dust exposure are substantial contributing factors to his totally disabling pulmonary impairment. Claimant's Exhibits 5 at 4; 11 at 24, 32; Director's Exhibit 13 at 2. The administrative law judge accorded less weight to Dr. Fino's opinion that coal mine dust played no role in claimant's disability. Exhibit 2 of Employer's Exhibit 4 at 13; Employer's Exhibits 3; 4 at 18. Consequently, the administrative law judge found that claimant established total disability due to both clinical and legal pneumoconiosis.

Employer makes the same challenges to the administrative law judge's finding pursuant to Section 718.204(c) that it raised with respect to his finding of legal pneumoconiosis pursuant to Section 718.202(a)(4). Again, all of employer's arguments lack merit. As the administrative law judge rationally credited the disability causation opinions of Drs. Cohen, Rasmussen, and Celko, over that of Dr. Fino, *see Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004), we affirm the administrative law judge's finding that claimant is totally disabled due to both clinical and legal pneumoconiosis pursuant to Section 718.204(c), as it is rational and supported by substantial evidence. *See Bonessa*, 884 F.2d at 734, 13 BLR at 2-37; *Gross*, 23 BLR at 1-18-19.

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