BRB No. 09-0856 BLA

CHARLES H. BAER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	DATE ISSUED: 09/30/2010
	)	
Employer-Respondent	)	
	)	
	)	
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 L. Leland, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns, White & Hickton, LLC), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2009-BLA-5033) of Administrative Law Judge Daniel L. Leland with respect to a subsequent claim filed

on December 31, 2007,[1] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-three years and four months of coal mine employment, based on a stipulation by the parties. Noting the denial of the prior claim, the administrative law judge weighed the evidence submitted since the prior denial and found that it was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, thus, 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 the merits, the administrative law judge found that the medical evidence was sufficient to establish the existence of clinical pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a).[3] In addition, he found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) based on his length of coal mine employment, and that the presumption was not rebutted. Further, the administrative law judge found that the medical evidence was sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the medical evidence insufficient to establish rebuttal of the presumption that claimant's pneumoconiosis arose from his coal mine employment pursuant to Section 718.203(b).

[1] Claimant filed his initial claim on September 26, 1994, which was denied by the district director. Director's Exhibit 1. Claimant, however, requested withdrawal of this claim, which was granted by the district director by Order dated September 15, 1995. *Id*. Claimant filed a second claim on November 21, 2003, which was denied by the district director, who found that the evidence was insufficient to establish total respiratory disability. Director's Exhibit 2. No further action was taken on this claim.

[2] Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e*., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

[3] The administrative law judge did not make a finding as to whether the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Specifically, employer contends that the administrative law judge did not properly weigh the opinions of Drs. Fino and Schaaf at Section 718.203(b). In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not submit a formal response to employer's appeal unless requested to do so by the Board.[4]

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.[5] 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 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; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

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[4] The administrative law judge's findings of twenty-three years and four months of coal mine employment; that the new evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, thus, a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309; and, that the evidence of record was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and a total respiratory disability pursuant to 20 C.F.R. §718.204(b), are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] As claimant's coal mine employment was in Pennsylvania, the law of the United States Court of Appeals for the Third Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 6.

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *Baer v. U.S. Steel Corp.*, BRB No. 09-0856 BLA (June 18, 2010)(unpub. Order). Claimant and the Director respond, arguing that the 2010 amendments are applicable in this case. Specifically, the Director states that, initially, the Board should review the administrative law judge's decision in light of employer's arguments on appeal. Director's Supplemental Letter Brief at 2. The Director contends that, if the Board affirms the administrative law judge's award of benefits, then the Board need not remand the case for consideration of the 2010 amendments. *Id*. However, the Director maintains that, if the Board does not affirm the award of benefits, the case must be remanded for the administrative law judge to consider entitlement pursuant to the Section 411(c)(4) presumption. *Id*. If the case is remanded for consideration under Section 411(c)(4), the Director states that the administrative law judge should allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456. *Id*.

Employer responds, arguing that the new amendments are not applicable because the constitutionality of Public Law No. 111-148 is being litigated by multiple state attorneys general and, therefore, adjudication should be held in abeyance until that issue is decided.[6] Employer's Supplemental Brief at 3. In addition, employer contends that retroactive application of the regulations is unconstitutional as it is a violation of employer's right to due process. *Id*. at 3-4. Employer further argues that the new amendments are in conflict with other provisions of the Act. Employer also contends that the Department of Labor must implement regulations before application of the amendments and, therefore, the case should be held in abeyance until new regulations are promulgated. In the alternative, employer argues that, if the amendments are constitutional and are applied, they do not apply in this case because it involves a request for modification of claimant's September 26, 1994 claim.[7]

[6] Employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act. Employer's request to hold this case in abeyance, therefore, is denied.

[7] Contrary to employer's contention, the current claim is not a request for modification of claimant's September 26, 1994 claim. Rather, it is a subsequent claim filed on December 31, 2007, more than one year after the district director's denial of claimant's 2003 claim on June 24, 2004. Director's Exhibits 2, 4. Claimant's 1994 claim was withdrawn by Order dated September 15, 2005 and, thus, is deemed to have never been filed. 20 C.F.R. §725.306.

Based on the parties' responses, and our ultimate disposition of this case, *see* discussion, *infra*, we need not remand this case to the administrative law judge for consideration of the applicability of the Section 411(c)(4) presumption. We turn, therefore, to the issues raised by the parties on appeal.

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Pursuant to Section 718.203(b), after noting that claimant worked over twenty-three years in coal mine employment, the administrative law judge found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b); Decision and Order at 9. The administrative law judge then found that employer failed to rebut the presumption of causality at Section 718.203(b), based on his finding that Dr. Fino's opinion, that claimant's pneumoconiosis arose out of asbestos exposure, not coal dust exposure, was insufficient to establish rebuttal. *Id*.

In considering the evidence at Section 718.203(b) the administrative law judge considered the medical opinions of Drs. Martin, Kaplan, Begley, Fino and Schaaf. Decision and Order at 9. Because Drs. Kaplan and Begley did not indicate that they were aware of claimant's asbestos exposure, the administrative law judge accorded their opinions no weight. *Id*.; Claimant's Exhibit 4; Employer's Exhibits 1, 6. Likewise, the administrative law judge accorded little weight to the opinion of Dr. Martin, that claimant's clinical pneumoconiosis arose out of his coal mine employment, because the opinion was not well-reasoned, as the physician did not explain his conclusions.[8] Decision and Order at 9; Director's Exhibit 13. Weighing the two remaining opinions, those of Drs. Fino and Schaaf, the administrative law judge credited the opinion of Dr. Schaaf, that claimant's pneumoconiosis arose out of his coal dust exposure and that his pleural disease was due to his asbestos exposure.[9] The administrative law judge found Dr. Schaaf's opinion to be credible because he explained how claimant's pneumoconiosis arose out of his coal dust exposure and his pleural disease arose out of his asbestos exposure. The administrative law judge did not credit the opinion of Dr. Fino, that

[8] The parties do not challenge the administrative law judge's finding that the opinions of Drs. Kaplan, Begley and Martin were not credible at 20 C.F.R. §718.203(b). We, therefore, affirm the administrative law judge's weighing of these opinions as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[9] The administrative law judge noted that both Drs. Schaaf and Fino found that claimant was exposed to asbestos while he was in the Air Force and working in steel mills, and not in the course of his coal mine employment. Decision and Order at 9.

claimant's pneumoconiosis arose out of his asbestos exposure, not his coal dust exposure, because he found that Dr. Fino "relied heavily" on the fact that the x-ray evidence he reviewed contained only irregular opacities, instead of the rounded opacities more characteristic of coal workers' pneumoconiosis. Decision and Order at 9. The administrative law judge found, however, that, "there is no requirement that a chest x-ray showing only irregular opacities is not evidence of coal workers' pneumoconiosis[,]" citing 20 C.F.R. §718.102. *Id*. Further, the administrative law judge noted that Dr. Fino stated that, if he had found the presence of small, rounded opacities, he would have diagnosed mixed dust pneumoconiosis, which was due to both asbestos and coal dust exposure. *Id*. The administrative law judge concluded that, since the record contained x-rays that were read by other physicians as showing either rounded opacities or both rounded and irregular opacities, Dr. Fino's opinion on the cause of pneumoconiosis was not credible as it was based on Dr. Fino's finding that the x-ray evidence showed only irregular opacities and his admission that, had he seen both rounded and irregular opacities on x-ray, he would have attributed claimant's pneumoconiosis to both asbestos and coal dust exposure. *Id*. The administrative law judge found, therefore, that Dr. Fino's opinion was insufficient to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment at Section 718.203(b).

Employer contends that the administrative law judge erred in finding that Dr. Fino's opinion on causality was not credible because he did not consider the totality of the opinion. Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Schaaf on causality because it was based on an inaccurate history of occupational exposures.

We disagree. It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Mabe v. Bishop Coal Co*., 9 BLR 1-67, 1-68 (1986). Here, the administrative law judge considered all of the relevant medical evidence, including the medical opinions, their supporting documentation and the conflicting evidence. Decision and Order at 9. Weighing all of the evidence, the administrative law judge rationally determined that Dr. Fino's opinion, that claimant's pneumoconiosis arose out of asbestos exposure, instead of coal dust exposure, was not credible in light of medical evidence which called into question the credibility of his opinion regarding the cause of claimant's coal workers' pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983). Because the administrative law judge addressed all of the relevant evidence, assigned it appropriate weight, and provided valid reasons for his credibility determinations, the administrative law judge's finding that employer failed to rebut the Section 718.203(b) presumption was within a reasonable exercise of his discretion. *See Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Mabe*, 9 BLR at 1-68.

Moreover, we reject employer's contention that the treatment notes associated with claimant's 1994 claim support Dr. Fino's opinion that claimant's pneumoconiosis was, in fact, asbestosis and did not therefore arise out of coal mine employment.[10] Contrary to employer's argument, the treatment notes employer relies upon as supportive of Dr. Fino's opinion were submitted in conjunction with claimant's first application for benefits, dated September 26, 1994, which was withdrawn by claimant in 1995. Director's Exhibit 1. Therefore, the 1994 claim is deemed to not have been filed and the evidence associated with that claim is not formally in the record. 20 C.F.R. §725.306(b). Consequently, there is no merit to employer's contention that Dr. Fino's opinion is entitled to greater weight on this basis. Accordingly, we affirm the administrative law judge's finding that Dr. Fino's opinion was insufficient to establish the Section 718.203(b) presumption.

Further, we reject employer's contention that the administrative law judge erred in crediting the opinion of Dr. Schaaf that claimant's pneumoconiosis arose out of coal mine employment, in light of Dr. Schaaf's reliance on an incorrect occupational history. We first note that, since claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at Section 718.203(b), based on his length of coal mine employment, error, if any, in the administrative law judge's crediting of Dr. Schaaf's causality opinion would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Regarding employer's specific argument, however, we note that the administrative law judge considered the entirety of Dr. Schaaf's opinion, as contained in his written reports, Claimant's Exhibits 1, 2, and his deposition testimony, Claimant's Exhibit 8, and permissibly credited Dr. Schaaf's opinion, based on the doctor's review of claimant's medical data and occupational exposures.[11] *See Hunley v. Director, OWCP*, 8 BLR 1-

[10] Employer states that, "Dr. Fino, when asked to explain why he came to his conclusion of asbestosis versus coal workers' pneumoconiosis, stated, 'Well, he has irregular fibrosis and pleural plaques, no rounded opacities, and pure restrictive defect in the lung function studies. That's classic asbestosis and the pleural plaques are classic thickening of the pleura' (Dr. Fino, p.11)." Employer's Brief at 13-14.

[11] Specifically, employer contends that the administrative law judge should not have relied on Dr. Schaaf's opinion because when Dr. Schaaf first saw claimant and made his diagnosis of coal workers' pneumoconiosis, he was not aware of claimant's asbestos exposure. Employer's Brief at 11. As employer acknowledges, however, Dr. Schaaf was subsequently informed of claimant's asbestos exposure, while in the Air Force and working at steel mills, and amended his opinion, on deposition, to conclude that claimant's pleural disease was due to his asbestos exposure. Employer's Brief at 11.

323 (1985); Decision and Order at 9; Claimant's Exhibits 1, 2, 8. We conclude, therefore, that the administrative law judge acted within his discretion in reaching his credibility determination regarding Dr. Schaaf's opinion. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Mabe*, 9 BLR at 1-68.

In conclusion, therefore, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish rebuttal of the Section 718.203(b) presumption that claimant's pneumoconiosis arose out of his coal mine employment.[12]

[12] Employer, while raising general allegations of error with the administrative law judge's weighing of the medical opinions of record, has not identified with specificity any substantive error of law or fact in the administrative law judge's finding that the evidence of record is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Board, therefore, has no basis upon which to review his findings thereunder. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we also affirm the administrative law judge's finding that the evidence is sufficient to establish disability causation pursuant to Section 718.204(c) for this reason.

Accordingly, the administrative law judge's Decision and Order – 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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BETTY JEAN HALL
Administrative Appeals Judge