

BRB No. 09-0861 BLA

RONALD L. BARGER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LEECO, INCORPORATED)	DATE ISSUED: 09/30/2010
)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird & Baird, PSC), Pikeville, Kentucky, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (07-BLA-5715) of Administrative Law Judge Donald W. Mosser rendered on a subsequent claim¹ filed

¹ Claimant's first claim for benefits, filed on May 9, 2001, was denied on December 20, 2004, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1. Claimant filed his current claim on June 27, 2006. Director's Exhibit 3.

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). Claimant filed his current claim on June 27, 2006. Director's Exhibit 3. The administrative law judge credited claimant with nineteen years of coal mine employment,² based on the parties' stipulation. Decision and Order at 3. The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In considering the claim on the merits, based on all the evidence, the administrative law judge found that the x-ray and medical opinion evidence established the existence of clinical pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(1), (a)(4). The administrative law judge further determined that employer did not rebut the presumption of 20 C.F.R. §718.203(b), that claimant's clinical pneumoconiosis arose out of coal mine employment. Additionally, the administrative law judge found that claimant's total disability is 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 analysis of the medical opinion evidence when he determined that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, (the Director), declined to file a substantive response to employer's appeal.⁴

² The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 6, 7, 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

³ Clinical pneumoconiosis is defined as "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." 20 C.F.R. §718.201(a)(1).

⁴ Employer does not challenge the administrative law judge's finding that the new evidence established total disability and a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). Further, employer does not challenge the administrative law judge's findings that the existence of clinical pneumoconiosis arising out of coal mine employment was established pursuant to 20

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).

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded.

Employer asserts that the Section 1556 amendments should not be applied in this subsequent claim, because claimant's initial claim was filed on April 20, 2001. The Director states that, although the amendments apply to claimant's subsequent claim based on its filing date, the Board need not address their impact on this claim if the Board affirms the administrative law judge's award of benefits. The Director further asserts, however, that if the Board does not affirm the award of benefits, the case must be remanded to the administrative law judge for consideration pursuant to the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).⁵

As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried his burden to establish each element of entitlement by a preponderance of the evidence, we hold that there is no need to consider whether he could establish entitlement with the aid of the rebuttable presumption reinstated by Section 1556.

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203,

C.F.R. §§718.202(a), 718.203(b). All of those findings are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence establishes that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). According the greatest weight to the evidence submitted with the current claim, as the most probative, the administrative law judge considered the opinions of Drs. Rasmussen, Vuskovich and Broudy. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(Order on Recon. *en banc*); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); Decision and Order at 10-13. In a report dated September 29, 2006, Dr. Rasmussen opined that claimant's totally disabling respiratory impairment is due to coal workers' pneumoconiosis and cigarette smoking, with claimant's coal mine dust exposure being a significant contributing cause. Director's Exhibit 10. In his most recent medical report⁶ dated October 13, 2008, Dr. Vuskovich opined that claimant does not have coal workers' pneumoconiosis, and that his disabling pulmonary impairment was caused by asbestosis, due to inhaling asbestos fibers. Employer's Exhibit 3. In his deposition dated October 27, 2008, Dr. Vuskovich testified that claimant was disabled due to asbestosis and the narcotics he took for back and leg pain. Employer's Exhibit 4 at 6-8, 14-20. In a report dated September 22, 2006, Dr. Broudy opined that claimant has coal workers' pneumoconiosis, but that his very mild obstructive airways disease is "most likely" related to cigarette smoking. Employer's Exhibit 1.

Employer contends that the administrative law judge erred in finding the opinion of Dr. Rasmussen to be well-reasoned. We disagree. As the administrative law judge properly found, the United States Court of Appeals for the Sixth Circuit has held that claimant need establish only that pneumoconiosis is a contributing cause of some discernable consequence to his disabling respiratory impairment. *See Cornett v. Benham*

⁶ As the administrative law judge found, Dr. Vuskovich's opinion as to the cause of claimant's disabling impairment varied over time, with each review of additional medical evidence. Decision and Order at 12. In his initial report dated December 30, 2006, Dr. Vuskovich did not diagnose coal workers' pneumoconiosis or a respiratory impairment, and opined, based on arterial blood gas studies, that claimant "probably has disabling heart disease." Director's Exhibit 12. In his March 18, 2008 report, Dr. Vuskovich opined that claimant's chest x-rays were consistent with coal workers' pneumoconiosis and other diseases, that claimant did not have a disabling pulmonary impairment, but that he had a "mildly reduced diffusion capacity probably related to interstitial lung disease." Employer's Exhibit 2. In his August 13, 2008 report, Dr. Vuskovich opined that claimant did not have coal workers' pneumoconiosis, but had a totally disabling respiratory impairment due to asbestosis. Employer's Exhibit 3.

Coal, Inc., 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); Decision and Order at 10. The administrative law judge correctly noted that Dr. Rasmussen’s opinion was based on a physical examination, objective testing, and claimant’s smoking and employment histories, including his twenty years in underground coal mine employment, his ten years as an assembly line worker, and his current employment as a security guard. Decision and Order at 6; Director’s Exhibit 10. Moreover, the administrative law judge found that Dr. Rasmussen had explained his opinion that coal mine dust was a significant contributing factor to claimant’s disabling lung disease. Decision and Order at 10-11. Thus, the administrative law judge permissibly concluded that Dr. Rasmussen’s opinion was both well-reasoned and sufficient to establish that claimant’s respiratory disability is due to coal workers’ pneumoconiosis. See *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 11, 12. In asserting that Dr. Rasmussen’s opinion is not well-reasoned, employer essentially asks the Board to assess the credibility of the doctor’s opinion, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge’s determination is rational and supported by substantial evidence, we affirm the administrative law judge’s credibility determination. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Clark*, 12 BLR at 1-155.

Employer next asserts that the administrative law judge erred in discrediting the opinion of Dr. Vuskovich, that claimant’s respiratory disability is due to asbestosis and prescription narcotics use. The administrative law judge acknowledged that claimant’s hospital records indicate that claimant was a “brake part inspector and was exposed to asbestos to a limited extent,” and also raise the possibility that claimant may have asbestosis. Decision and Order at 10; Claimant’s Exhibit 1; Employer’s Exhibit 15, p.134. However, the administrative law judge permissibly found this evidence to be “questionable” and “equivocal at best” in light of the fact that claimant’s sworn testimony at two hearings and two depositions did not contain any discussion relating to asbestos exposure, despite the fact that claimant’s most recent deposition was taken after counsel had received both the hospital records, and a copy of Dr. Vuskovich’s most recent opinion. See *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); *Clark*, 12 BLR at 1-155. Thus, there is no merit to employer’s contention that the administrative law judge failed to explain why he concluded that there is very little information in the record supporting the final conclusion of Dr. Vuskovich. Employer’s Brief at 14. Moreover, as the administrative law judge noted earlier in his decision, as Dr. Vuskovich did not diagnose the existence of coal workers’ pneumoconiosis, contrary to the administrative law judge’s finding, which we have affirmed, Dr. Vuskovich’s opinion on the issue of disability causation is entitled to little probative weight. See

Smith, 127 F.3d at 507, 21 BLR at 2-185-86; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 10. We, therefore, affirm the administrative law judge's determination to discount the opinion of Dr. Vuskovich. See *Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Finally, employer contends that the administrative law judge erred by failing to apply the same standard to the opinions of Drs. Rasmussen and Broudy. Employer's Brief at 13. Employer contends that the administrative law judge discredited the opinion of Dr. Broudy because Dr. Broudy was not aware of the qualifying exercise blood gas studies of record; by contrast, the administrative law judge did not address the significance of Dr. Rasmussen's apparent lack of awareness of claimant's asbestos exposure. Employer's Brief at 13. This contention lacks merit. A review of the administrative law judge's decision reveals that he did not discredit Dr. Broudy's opinion relevant to disability causation based on Dr. Broudy's failure to review all of the blood gas study evidence. Rather, the administrative law judge simply commented on this fact in summarizing Dr. Broudy's opinion that claimant is not totally disabled. Decision and Order at 12. The administrative law judge then noted that Dr. Broudy is "also of the opinion that any respiratory impairment suffered by claimant is 'most likely' related to cigarette smoking." Decision and Order at 12. The administrative law judge permissibly concluded that Dr. Broudy's opinion was outweighed by the well-reasoned opinion of Dr. Rasmussen, who explained that claimant's significant smoking history and his twenty-year history of coal dust exposure had both contributed to claimant's disabling respiratory impairment. See *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 12. Moreover, as the administrative law judge permissibly found that the record evidence of asbestos exposure is not credible, he was not required to analyze Dr. Rasmussen's opinion in light of claimant's alleged exposure.

The Sixth Circuit court has held that a determination requiring the court to address a physician's credibility would exceed its limited scope of review. *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). Furthermore, the court has categorically emphasized that it is for the administrative law judge as fact-finder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter'." *Stephens*, 298 F.3d at 522, 22 BLR at 2-512, *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In *Stephens*, the Sixth Circuit court stated that it deferred to the administrative law judge's authority on the findings of fact. *Stephens*, 298 F.3d at 836, 22 BLR at 2-513; see *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Accordingly, as the administrative law judge rationally found the medical opinion

evidence sufficient to demonstrate disability causation by according dispositive weight to the opinion of Dr. Rasmussen, we affirm the administrative law judge's finding that claimant established that he is totally disabled due to benefits, pursuant to 20 C.F.R. §718.204(c), and we affirm the award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge