BRB No. 11-0188 BLA

JAMES M. HENSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARTIN COUNTY COAL CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 09/30/2011
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Rita Roppolo (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 (2008-BLA-05667) of Administrative Law Judge Alice M. Craft (the administrative law judge) on a miner's claim filed on September 25, 2007, 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). The administrative law judge found that, although claimant established at least twenty-eight years of surface coal mine employment, he was not entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis, 30 U.S.C. §921(c)(4), because he did not establish that the conditions of his coal mine employment were substantially similar to those of underground coal mine employment.[1] Turning to entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge found, however, that claimant established the existence of legal pneumoconiosis, that it arose out of coal mine employment, and that it is totally disabling. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and that his total disability was due to pneumoconiosis pursuant to Section 718.204(c). Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, stating that he will not address employer's substantive arguments. However, the Director contends that the administrative law judge erred in finding that claimant was not entitled to the Section 411(c)(4) presumption, without sufficiently addressing whether claimant had at least fifteen years of coal mine employment in conditions "substantially similar" to conditions in underground coal mine employment. Nonetheless, the Director contends that, if the Board affirms the administrative law judge's award of benefits pursuant to 20 C.F.R. Part

[1] 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. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner has at least fifteen years of *qualifying coal mine employment*, and has a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Qualifying coal mine employment is defined as work in an underground mine or coal mine work in conditions substantially similar to conditions in an underground mine. 30 U.S.C. §921(c)(4); *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988).

718, any error by the administrative law judge in failing to consider the claim pursuant to Section 411(c) would be harmless.[2]

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

After consideration of employer's arguments, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge properly found that legal pneumoconiosis was established at Section 718.202(a)(4) based on the medical opinion evidence.[5] Noting that all of the doctors found that claimant was a non-smoker and had twenty-nine years of coal mine employment,

[2] The administrative law judge's findings that claimant failed to establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that he established total 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).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit to this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[4] A finding that claimant's pneumoconiosis arose out of coal mine employment is subsumed in a finding that "legal" pneumoconiosis, *i.e.*, a respiratory impairment arising out of coal mine employment, is established pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201; *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

[5] Drs. Sikder and Mettu opined that claimant had chronic obstructive pulmonary disease due to coal mine employment. Director's Exhibits 13, 15 and 20. Drs. Rosenberg, Broudy and Dahhan opined that claimant's pulmonary impairment was not due to coal mine employment. Director's Exhibits 16, 19, 23, 24 and Employer's Exhibit 2.

Decision and Order at 23-25, the administrative law judge properly accorded greater weight to the opinion of Dr. Sikder, as she was claimant's treating physician, noting that Dr. Sikder had treated claimant since 2006, had the benefit of seeing claimant frequently, was familiar with claimant's history, and had access to a wide range of objective testing conducted on claimant. *See* 20 C.F.R. §718.104(d)(1)-(4); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge also permissibly accorded great weight to the opinion of Dr. Sikder because she is a Board-certified pulmonologist, practiced pulmonary and internal medicine since 1994, and was a clinical professor of medicine and pulmonology.[6] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Contrary to employer's argument, the administrative law judge did not err in crediting Dr. Sikder's opinion, even though she found some of the doctor's handwritten treatment notes to be "illegible," Decision and Order at 10, because the administrative law judge cited to several treatment records that were legible and supported Dr. Sikder's finding of chronic obstructive pulmonary disease (COPD) due to coal mine employment. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-335; Decision and Order at 10-12; Director's Exhibits 15 and 20. Further, contrary to employer's contention, the administrative law judge did not err in crediting Dr. Sikder's opinion that claimant's COPD was due to coal mine employment, even though the doctor did not read an x-ray as either positive or negative for clinical pneumoconiosis, and relied, in part, on non-qualifying blood gas studies and some pulmonary function studies that were non-qualifying. *See* 20 C.F.R. §718.201; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984). In addition, the administrative law judge permissibly credited the opinion of Dr. Mettu, a Board-certified pulmonologist, which buttressed Dr. Sikder's opinion, who attributed claimant's pulmonary impairment and chronic bronchitis to coal mine employment, as it was supported by his findings on physical examination, the results of claimant's objective testing, and claimant's history and symptoms.[7] *See Clark v. Karst-Robbins Coal Mine Co.*, 12 BLR 1-149 (1989)(*en banc*). Conversely, the administrative law judge permissibly accorded less weight to the opinions of Drs. Rosenberg, Broudy, and Dahhan because she found they were not as well-reasoned on the issue of legal pneumoconiosis.

[6] The administrative law judge also noted that Drs. Mettu, Rosenberg, Broudy and Dahhan were Board-certified pulmonologists. Decision and Order at 23-25.

[7] Employer has not challenged the administrative law judge's finding that Dr. Mettu's opinion established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge's finding regarding Dr. Mettu's opinion is, therefore, affirmed. *See Skrack*, 6 BLR at 1-711.

See 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472 (6th Cir. 2007); *Clark*, 12 BLR at 1-155.

In finding disability causation established at Section 718.204(c), the administrative law judge permissibly found that the opinions of Drs. Rosenberg and Broudy were not as credible as the opinions of Drs. Sikder and Mettu because they did not find that claimant had pneumoconiosis,[8] *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), and because their opinions were not as well-reasoned. *See*, *supra*. Instead, the administrative law judge properly credited the opinions of Drs. Sikder and Mettu, on the issue of disability causation, as both found the existence of pneumoconiosis established, *see Adams*, 886 F.2d at 826, 13 BLR at 2-63; *Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83, and their opinions were better reasoned. *See Clark*, 12 BLR at 1-155.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988). Employer's arguments on appeal are no more than a request that the Board reweigh the evidence, which it is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1985); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and disability causation pursuant to Section 718.204(c).

Because we affirm the administrative law judge's finding of entitlement pursuant to 20 C.F.R. Part 718, we need not consider the administrative law judge's finding pursuant to Section 411(c)(4). *See Coen v. Director, OWPC*, 7 BLR 1-30, 1-33 (1984).

[8] Drs. Sikder and Mettu attributed claimant's total disability to his pneumoconiosis. Director's Exhibits 13 and 15. Drs. Rosenberg and Broudy found that claimant's total disability was not due to pneumoconiosis. Director's Exhibits 16 and 24. Dr. Dahhan found that claimant was not totally disabled. Employer's Exhibit 2.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

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