BRB No. 10-0187 BLA

HERBERT L. HONEYCUTT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TAMMY ANNE, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 12/21/2010
	)	
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 – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (06-BLA-5209) of

Administrative Law Judge Thomas F. Phalen, Jr., on a subsequent claim[1] filed 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).[2] The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Parts 718 and 725, and credited claimant with at least twenty-nine years of qualifying coal mine employment. The administrative law judge found that the newly submitted evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, claimant had established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Considering the entire record, the administrative law judge also found that the weight of the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the weight of the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and total disability due to pneumoconiosis pursuant to Section 718.204(b)(2)(iv), (c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[3]

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,

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[1] Claimant, Herbert L. Honeycutt, filed his initial application for benefits on February 28, 2002, which the district director denied on July 23, 2003, based on claimant's failure to establish any element of entitlement. Director's Exhibits 1-9, 1-111. Claimant took no further action until the filing of his present claim on December 7, 2004. Director's Exhibit 3.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the current claim was filed prior to January 1, 2005. Director's Exhibit 3.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least twenty-nine years of coal mine employment, and his finding that the weight of the pulmonary function study and arterial blood gas study evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), (ii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[4] 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).

Employer initially maintains that the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4) does not comply with law or fact. Employer contends that the administrative law judge erred in crediting the opinion of Dr. Rasmussen over the contrary opinions of Drs. Castle and Broudy, and failed to explain the relative weight he accorded to the opinion of Dr. Alam, claimant's treating physician. Employer asserts that, in evaluating the medical opinions of record, the administrative law judge mischaracterized the opinions; substituted his own opinion for that of the physicians; failed to consider relevant evidence; failed to resolve conflicts in the evidence; shifted the burden of proof to employer; and subjected the opinions to inconsistent treatment. Employer also maintains that the administrative law judge failed to provide a valid basis for resolving the conflicting smoking histories provided by claimant. Employer's Brief at 10-18. We disagree.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge properly reviewed the various smoking histories contained in claimant's deposition testimony, treatment records, and medical reports, and determined that the reported histories varied in length from twenty years to thirty-seven years, with most physicians reporting that claimant smoked between one-half and one pack of cigarettes per day, and stopped smoking in 1990. Decision and Order at 15; Director's Exhibits 1-64, 13; Claimant's Exhibits 8, 9; Employer's Exhibits 1, 4. Contrary to employer's arguments, the administrative law judge rationally averaged the reported quantities of claimant's daily cigarette consumption, and did not mechanically credit claimant's treatment records. Rather, he permissibly found that claimant's treatment records, documenting a thirty-year smoking history, constituted the most reliable evidence of the length of time that claimant smoked, as that history was obtained during the course of claimant's treatment for his pulmonary condition, rather than for purposes of litigation. *See generally Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); Decision and Order at 15. As the length and extent of claimant's smoking history is a factual, not medical, determination that is committed to the administrative law judge's discretion, and

[4] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

as no abuse of discretion has been demonstrated, we affirm the administrative law judge's conclusion that claimant smoked three-quarters of a pack of cigarettes per day for thirty years, for a total smoking history of twenty-two and one-half pack-years, ending in 1990.[5] *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 15.

In evaluating the conflicting medical opinions of record on the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge accurately summarized the explanations and bases for the various physicians' conclusions, and acted within his discretion in finding that Dr. Rasmussen's opinion,[6] that claimant suffers from disabling chronic obstructive pulmonary disease/emphysema and restrictive lung disease caused primarily by coal mine dust exposure and cigarette smoking, was well-reasoned, well-documented, and entitled to full probative weight. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 7-12, 21-22. In so finding, the administrative law judge determined that Dr. Rasmussen's diagnosis was based on claimant's symptomatology of sputum production,

[5] We reject employer's assertion that the administrative law judge failed to consider relevant evidence showing that claimant continued to smoke after 1990. While employer maintains that Dr. Oesterling specifically stated that claimant's April 2005 bronchoscopy specimens showed that claimant "was inhaling tobacco smoke, either primarily or secondarily," Employer's Brief at 11, Employer's Exhibit 5 at 2, claimant's counsel correctly responds that at no point does Dr. Oesterling state that his pathological findings show that claimant was smoking after 1990. Rather, Dr. Oesterling indicated that "macrophages with the finely stippled cytoplasm are typically seen in individuals who are exposed to tobacco smoking. . . .[b]ased on this there is suggestion that [claimant] was inhaling tobacco smoke, either primarily or secondarily." Claimant's Brief at 8; Employer's Exhibit 5 at 2.

[6] With respect to Dr. Rasmussen's opinion, employer specifically asserts that the administrative law judge impermissibly substituted his opinion for that of the physician by finding that Dr. Rasmussen's consideration of an inaccurate smoking history, as well as his reliance on inadmissible pulmonary function studies, would not affect his overall conclusion that claimant had legal pneumoconiosis. Employer also avers that the administrative law judge's crediting of the opinion was improper because Dr. Rasmussen failed to explain how coal dust exposure contributed to claimant's pulmonary impairment and mistakenly believed that there was no evidence of significant cardiac disease or congestive heart failure. Employer argues, therefore, that Dr. Rasmussen's opinion is unreasoned and undocumented and, as such, it is insufficient to establish legal pneumoconiosis. Employer's Brief at 11-14.

wheezing, and dyspnea; an overstated coal mine employment history of thirty-six years; a "slightly overstated" cigarette smoking history of twenty-seven pack-years in his first report and a "slightly understated" sixteen and one-half pack-year history in his second report; physical examination findings of markedly reduced breath sounds and bilateral inspiratory crackles; positive chest x-ray interpretations; pulmonary function studies; and arterial blood gas studies indicating marked impairment in oxygen transfer during exercise. Decision and Order at 7-9, 21-22; Director's Exhibit 13; Claimant's Exhibit 1. The administrative law judge determined that Dr. Rasmussen adequately explained why he opined that coal mine dust exposure and cigarette smoke predominantly caused claimant's disabling chronic lung disease, and why he excluded other medical conditions as contributing factors. Specifically, Dr. Rasmussen considered claimant's "significant history of cardiac disease with coronary artery insufficiency," but did not find current evidence of congestive heart failure, noting claimant's ability "to exercise within a normal anaerobic threshold" and the absence of "evidence of excessive metabolic acidosis, which would be expected with reduced cardiac output." Decision and Order at 21; Director's Exhibit 13; Claimant's Exhibit 1. Similarly, the administrative law judge noted that Dr. Rasmussen acknowledged that claimant's elevated right hemidiaphragm could contribute to a reduction in total lung capacity and FVC, but he ruled it out as a significant factor in claimant's disabling lung disease, since "it would have no bearing on [claimant's] airway obstruction." Decision and Order at 21; Director's Exhibit 13. In addition, the administrative law judge did not err in finding that the discrepancy between his 22.5 pack-year smoking history determination and Dr. Rasmussen's reliance on a "slightly overstated" 27 pack-year history in the March 23, 2005 report and a "slightly understated" 16.5 pack-year history in the December 7, 2005 report did not diminish the probative value of Dr. Rasmussen's opinion. The administrative law judge rationally found that Dr. Rasmussen considered "significant" smoking and coal mine employment histories, and concluded that both were contributing causes of claimant's respiratory impairment. *See Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Bobick*, 13 BLR at 1-54; *Maypray*, 7 BLR at 1-686; Decision and Order at 21-22. Finally, the administrative law judge permissibly redacted those portions of Dr. Rasmussen's December 7, 2005 report that referenced inadmissible evidence, *i.e.*, a pulmonary function study obtained on that date. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*); Decision and Order at 9 n.16. As the administrative law judge determined that Dr. Rasmussen also relied on an admissible blood gas study that supported his findings in that report, and relied solely on admissible evidence in his March 23, 2005 report, the administrative law judge did not err in finding that Dr. Rasmussen's opinion suffered no loss of probative value. Thus, within a proper exercise of his discretion, the administrative law judge found that Dr. Rasmussen's opinion was sufficient to affirmatively establish the existence of legal pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *accord*

Consolidation Coal Co. v. Williams, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); Decision and Order at 7-9, 21-22; Director's Exhibit 13; Claimant's Exhibit 1.

By contrast, the administrative law judge determined that that Dr. Castle attributed claimant's obstructive impairment solely to smoking, based on a "significant degree of reversibility," but in so doing, Dr. Castle failed to specify the objective test or tests that demonstrated reversibility, and he did not discuss claimant's "residual disabling impairment," as demonstrated by the March 2005 pulmonary function study that produced qualifying pre-bronchodilator and post-bronchodilator values. *See Trumbo*, 17 BLR at 1-88; *Clark*, 12 BLR at 1-155. The administrative law judge reasonably found that Dr. Castle's statement, that claimant's restrictive process was "most likely" due to "dysfunctional right hemidiaphragm, obesity, and cardiac disease including congestive heart failure," was equivocal and, as such, it rendered his opinion less reliable. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order 24. The administrative law judge found further that Dr. Castle failed to "sufficiently explain *how* the objective evidence supports his conclusion that Claimant's restriction is due to the causal factors he cited rather than Claimant's 29 years of coal dust exposure," and failed to specifically address why he believed claimant's "cardiac condition caused the abnormal blood gas studies as opposed to [claimant's] 29 years of coal mine employment." Decision and Order at 24. Hence, the administrative law judge acted within his discretion in finding that Dr. Castle's failure to consider the effect on claimant's pulmonary condition of 29 years of coal dust exposure undermined the probative value of his opinion. *See Clark*, 12 BLR at 1-155; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

The administrative law judge similarly found that Dr. Broudy's statements, that claimant's restrictive ventilatory defect was "*probabl*y related to obesity and cardiac disease" and that the considerable decrease in claimant's exercise pO_2 "*may* be related to the rather significant cardiovascular disease," were equivocal. *See Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19; Decision and Order at 23 [emphasis in original]; Employer's Exhibit 1. The administrative law judge was not persuaded by Dr. Broudy's opinion that there was "*no evidence*" of coal workers' pneumoconiosis or coal dust-induced chronic lung disease, as the physician failed to discuss how the underlying documentation supported his conclusions, and he did not explain why claimant's ventilatory defect and decrease in pO_2 "could not be related to Claimant's 29 years of coal mine employment." Further, although Dr. Broudy stated that the additional medical evidence he considered, *i.e.*, Dr. Alam's bronchoscopy results reporting minimal anthracosilicosis deposition in the bronchial tree and recent pulmonary function testing that revealed moderate to severe restriction, was "consistent with my own findings," the administrative law judge noted that Dr. Broudy did not explain how this evidence supported his conclusions, rather than lending support to a diagnosis of pneumoconiosis. Decision and Order at 23; Employer's Exhibits 1-3. As the administrative law judge

critically examined the various bases supporting the opinions of Drs. Castle and Broudy, and acted within his discretion in finding that these physicians' opinions were inadequately explained and insufficiently reasoned, we reject employer's contention that the administrative law judge erred in finding the opinions of Drs. Castle and Broudy to be worthy of little weight. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

We also reject employer's assertion that the administrative law judge's weighing of Dr. Alam's opinion fails to comport with the Administrative Procedure Act, (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). While employer maintains that it could not clearly discern the relative weight the administrative law judge assigned to the opinions of Drs. Castle, Broudy and Alam, as he accorded "little weight" to the opinions of Drs. Castle and Broudy, and "less weight" to the opinion of Dr. Alam, the administrative law judge concluded that all three opinions were insufficiently reasoned, and he ultimately found that Dr. Rasmussen provided the only opinion entitled to full probative weight.[7] As substantial evidence supports the administrative law judge's findings, we affirm his determination that the weight of the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4).

Employer next contends that, because Dr. Castle opined that claimant was totally disabled by his cardiac condition rather than by a respiratory condition, the administrative law judge erred in finding that the medical opinions unanimously supported a finding of total disability at Section 718.204(b)(2)(iv). Employer's Brief at 19. While employer is correct in maintaining that Dr. Castle's opinion does not support a finding of total *respiratory* disability, the administrative law judge determined that the more recent pulmonary function studies and blood gas studies produced qualifying values and constituted persuasive evidence regarding claimant's current pulmonary condition. Decision and Order at 26. The administrative law judge further determined that the exertional requirements of claimant's usual coal mine employment were very heavy; that Dr. Rasmussen based his opinion, that claimant was totally disabled from performing his mining job, on claimant's airflow obstruction, reduced SBDLCO, reduced FVC and total lung capacity; that Dr. Alam found claimant to be totally disabled based on his pulmonary function study results; that Dr. Broudy opined that claimant did not retain the

[7] The administrative law judge acknowledged that Dr. Alam was claimant's treating physician, but he found that Dr. Alam's "heavy" reliance on inaccurate coal mine employment and smoking histories diminished the probative value of his diagnoses of clinical and legal pneumoconiosis. *See Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-308 (1985); Decision and Order at 23; Claimant's Exhibits 8, 9.

respiratory capacity to perform mining or similar work based on his significant drop in PO_2 with exercise; and that Dr. Castle referenced claimant's abnormal blood gas studies in concluding that claimant was totally disabled.[8] Decision and Order at 27. As the administrative law judge did not credit Dr. Castle's opinion regarding the cause of claimant's disabling impairment, and employer has not challenged the administrative law judge's finding that the weight of the evidence, like and unlike, was sufficient to establish total respiratory disability pursuant to Section 718.204(b), any error in the administrative law judge's characterization of Dr. Castle's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, we affirm the administrative law judge's finding that the preponderance of the medical opinion evidence established total disability under Section 718.204(b)(2)(iv), and his finding that claimant established total respiratory disability pursuant to Section 718.204(b).

Lastly, employer maintains that the administrative law judge's finding of disability causation at Section 718.204(c) lacks any support in the record. Specifically, employer argues that the administrative law judge's assignment of determinative weight to Dr. Rasmussen's opinion was irrational because it was based, in part, on Dr. Rasmussen's diagnosis of clinical pneumoconiosis, which was contrary to the administrative law judge's determination that the evidence of record was insufficient to establish clinical pneumoconiosis. Employer also avers that Dr. Rasmussen's March 2005 and December 2005 reports are inconsistent because Dr. Rasmussen concluded that both clinical and legal pneumoconiosis contributed to claimant's total disability in the March 2005 report, whereas he opined that clinical pneumoconiosis/silicosis caused claimant's total disability in the December 2005 report. Conversely, employer contends that the administrative law judge's rejection of the opinions of Drs. Castle and Broudy on the basis that they did not diagnose legal pneumoconiosis was flawed because neither physician based his opinion on an absence of the disease. Employer's arguments lack merit.

In his December 2005 report, similar to his March 2005 report, Dr. Rasmussen consistently opined, "cigarette smoking is obviously a significant cause of [claimant's] impaired lung function as is his coal mine dust exposure," and that claimant's "occupational dust exposure is the predominant cause of his disabling chronic lung disease." Claimant's Exhibit 1. Contrary to employer's argument, therefore, Dr. Rasmussen's opinion is neither inconsistent nor predicated on his diagnosis of clinical

[8] In his September 18, 2008 report, Dr. Castle opined that claimant "is not permanently and totally disabled as a result of coal workers' pneumoconiosis or a coal mine dust induced lung disease," but rather, he "is permanently and totally disabled as a result of his severe cardiac disease due to atherosclerotic coronary artery disease with resultant ischemic cardiomyopathy and congestive heart failure." Employer's Exhibit 4.

pneumoconiosis. Accordingly, the administrative law judge permissibly relied on the opinion of Dr. Rasmussen, that both legal pneumoconiosis and cigarette smoking were substantially contributing causes of claimant's total disability, to support his finding that the evidence affirmatively established disability causation at Section 718.204(c), and accordingly, we affirm his finding as supported by substantial evidence. *See Gross v. Dominion Coal Corp.*, 23 BLR at 1-17, 1-18 (2003). Because Drs. Castle and Broudy did not diagnose pneumoconiosis, in direct contradiction to the administrative law judge's finding that legal pneumoconiosis was established, the administrative law judge properly accorded little weight to their opinions, that claimant's disabling respiratory impairment was unrelated to pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 27. Consequently, we affirm the administrative law judge's finding that claimant established disability causation at Section 718.204(c), and his finding that claimant is entitled to benefits.

Accordingly, the Decision and Order – Award of Benefits of the administrative law judge 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