

BRB No. 03-0365 BLA

THOMAS DELASKO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INC.	)	DATE ISSUED: 02/17/2004
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (02-BLA-0154) of Administrative Law Judge Daniel L. Leland (the administrative law judge) on a duplicate claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

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<sup>1</sup> Claimant filed the instant claim on October 30, 2000. Director's Exhibit 1. Claimant's prior claim, filed October 12, 1988 was denied by Administrative Law Judge Joan Huddy Rosenzweig by Decision and Order dated September 6, 1989. Director's Exhibit 47.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> The administrative law judge found, based on the parties' stipulations, that claimant established twenty-one years of coal mine employment and a material change in conditions at 20 C.F.R. §725.309(d) (2000) since the prior denial of benefits. The administrative law judge further noted employer's concession to the existence of pneumoconiosis.<sup>3</sup> Decision and Order at 3; *see* Hearing Transcript at 7-8. Considering the claim on its merits under 20 C.F.R. Part 718, the administrative law judge found that the weight of the evidence demonstrates total disability due to a respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence establishes that pneumoconiosis has a material adverse effect on claimant's totally disabling pulmonary condition at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded. On appeal, employer challenges the administrative law judge's finding on disability causation at 20 C.F.R. §718.204(c). Claimant responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 challenges the administrative law judge's reliance on the opinions of Drs. Csikos and Munoz in determining that claimant established disability causation at 20 C.F.R. §718.204(c).<sup>4</sup> The administrative law judge found, by placing particular reliance on the opinions of Drs. Csikos and Munoz, claimant's treating physicians, that "coal dust exposure was a substantial factor in the development of [claimant's] chronic obstructive pulmonary

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Judge Rosenzweig found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). *Id.*

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> In its brief, employer states, "[T]he parties stipulated in these proceedings that pneumoconiosis exists on the basis of pathologic evidence." Employer's Brief at 2.

<sup>4</sup> We affirm the administrative law judge's finding of total respiratory or pulmonary disability at 20 C.F.R. §718.204(c) as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disease which has rendered him totally disabled from performing his usual coal mine work. [footnote omitted] Pneumoconiosis has had a materially adverse effect on the miner's totally disabling pulmonary condition and he is therefore entitled to benefits." Decision and Order at 9. The administrative law judge applied the newly promulgated regulation at 20 C.F.R. §718.104(d), and found that Drs. Csikos and Munoz were in a superior position to render an opinion on the cause of claimant's pulmonary impairment due to their frequent treatment of claimant. Employer asserts that although Dr. Csikos has treated claimant since 1997, Dr. Csikos' "deposition clearly reflects that pneumoconiosis never entered this man's chart until after this claim was filed and the man had already had his lung resected because of lung cancer." Claimant's Brief at 4. Employer specifically refers to Dr. Csikos' testimony that claimant was on no medications for his pulmonary condition in 1997 and part of 1998, and was asymptomatic in June and October of 1998; that for several months prior to claimant's lung cancer diagnosis in 2001, and once claimant stopped smoking in 1998, claimant was characterized by Dr. Csikos as having stable chronic obstructive pulmonary disease and was asymptomatic.

Employer's contentions lack merit. It is the duty of the administrative law judge as fact-finder to weigh the medical opinion evidence and determine its credibility. *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990), citing *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983). To the extent employer seeks a reweighing of the medical opinion evidence, its arguments are rejected. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In the instant case, the administrative law judge properly relied on the opinions of Drs. Csikos and Munoz, that claimant's coal dust exposure substantially contributes to his total pulmonary disability, because Dr. Csikos has treated claimant for his pulmonary condition since 1997, and Dr. Munoz, a pulmonary specialist, has treated claimant for his pulmonary condition since 2000 and has seen him every three months since May 2001. Specifically, the administrative law judge found that Drs. Csikos and Munoz, based on their "frequent treatment of claimant over the past few years," Decision and Order at 8, are "in a superior position to render an opinion regarding the cause of [claimant's] pulmonary impairment than Drs. Solic, Pickerell, Fino, and Bush, whose relationship with claimant has been infrequent and limited. See [20 C.F.R.] §718.104(d)." *Id.* The administrative law judge further properly found that it was not only their status as treating physicians that renders the medical opinions of Drs. Csikos and Munoz more credible than the opinions of the other physicians of record. The administrative law judge explained:

[Drs. Csikos and Munoz] attributed claimant's pulmonary disability to chronic obstructive pulmonary disease caused in part by coal dust exposure. Although both Dr. Csikos and Dr. Munoz agreed that cigarette smoke played a part in claimant's pulmonary dysfunction, they concluded that his inhalation of coal dust is also implicated as a cause. This finding is consistent with claimant's

twenty[-]one years of underground coal mine employment and [20 C.F.R.] §718.202(a)(2) (sic) which states that chronic obstructive pulmonary disease can arise out of coal mine employment. Dr. Munoz, as well as Dr. Rizkalla, also referred to medical studies supporting a link between coal dust inhalation and emphysema and airflow obstruction.

Decision and Order at 8-9. The administrative law judge thereby properly assessed the weight of the opinions of Drs. Csikos and Munoz and provided reasons for finding credible their opinions relevant to the cause of claimant's total pulmonary disability at 20 C.F.R. §718.204(c). *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); see 20 C.F.R. §718.104(d).

Further, employer's reliance on the testimony of Dr. Csikos to the effect that claimant's chronic obstructive pulmonary disease was "stable" and that claimant was "asymptomatic" in 1997 and part of 1998, prior to his 2001 upper left lobectomy, is unavailing. Dr. Csikos explained that "stable" means "no worse," Claimant's Exhibit 13 at 26, and that "[a]symptomatic is when a patient tells me he does not have any symptoms. Now, the patient may [] relate [] to his base line, and he may say [] that he's no worse or that he's no different. But that does not mean that he doesn't have the disease, it means that he's stable," *id.* at 27. Moreover, Dr. Csikos testified that claimant had a diagnosis of occupationally related lung disease prior to the 2001 lobectomy, and that he had treated claimant for pulmonary impairment and dysfunction prior to the development of claimant's lung tumor and subsequent lobectomy. Claimant's Exhibit 13 at 9-11; see also July 1, 1997 medical report of Dr. Csikos that includes a diagnosis of occupationally related silicosis (Unmarked Exhibit).

Employer next contends that the administrative law judge's reliance on the opinion of Dr. Munoz is flawed because the physician did not treat claimant until after he was diagnosed with lung cancer and that treatment was for lung cancer.

Employer's contention lacks merit. The administrative law judge noted that Dr. Munoz, a pulmonary specialist, first saw claimant in December of 2000 for evaluation of a lung mass. Decision and Order at 4; Claimant's Exhibit 14. The fact that Dr. Munoz first saw claimant for evaluation of a lung mass that was ultimately diagnosed as cancer, does not taint the administrative law judge's decision to credit Dr. Munoz's opinion regarding the cause of claimant's pulmonary disability. Employer asserts no persuasive argument to the contrary.

Employer next contends that, contrary to the assertions of Drs. Munoz and Csikos, the record shows that claimant was being treated for conditions related to cigarette smoking, that

claimant was encouraged to stop smoking, and that once claimant stopped smoking he was asymptomatic, unmedicated, and did not have any recurrent pulmonary trouble until his cigarette smoking-induced cancer further compromised his lungs. Employer's Brief at 9.

Employer's contention lacks merit. The record shows that both Drs. Csikos<sup>5</sup> and Munoz<sup>6</sup> specifically attributed claimant's chronic obstructive pulmonary disease to *both*

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<sup>5</sup> By report dated May 28, 2002, Dr. Csikos opined, in pertinent part:

In my medical opinion, Mr. Delasko is currently afflicted with coalworker's (sic) pneumoconiosis contributed by coal dust exposure encountered in the coal mining industry. His prior smoking also contributed to his pulmonary impairment. The effect of cigarette smoking is additive to coalworker's (sic) pneumoconiosis in the development of chronic bronchitis and obstructive lung disease. Smoking cessation for more than a year leads an improvement (sic) in lung function with FEV1 decline equal to that of non-smokers. He also had left upper lung surgery for cancer. Biopsies and pathology report revealed: large cell carcinoma (lung cancer), micronodular pneumoconiosis, and lymph nodes with nodular fibrosis and anthracotic pigment deposits. Chest x-ray show interstitial and fibrotic pneumoconiosis, post surgical changes, and no sign of recurrent lung cancer.

In my medical opinion, with a reasonable degree of medical certainty, coalworker's (sic) pneumoconiosis is currently contributing to Mr. Delasko's pulmonary impairment. His pulmonary impairment precludes him from performing his prior coal mining employment or any other job. Prognosis is guarded.

Claimant's Exhibit 1.

<sup>6</sup> By report dated June 4, 2002, Dr. Munoz opined, in pertinent part:

1. From the pulmonary standpoint, Mr. Delasko has evidence of Chronic Obstructive Pulmonary Disease most likely the result of the combined effects of cigarette smoking and long-standing exposure to inorganic dusts, mainly coal, as he worked as a miner for 24 years.

[paragraph omitted]

[paragraph omitted]

Mr. Delasko's COPD is multifactorial. Industrial bronchitis owing to chronic exposure to coal dust is definitely a major contributing factor for his current

smoking and coal mine employment. Neither physician was able to exclude cigarette smoking or coal mine employment as a cause of claimant's pulmonary disability. Claimant's Exhibits 1, 2, 13, 14. Moreover, as set forth above, the record contains evidence that claimant was treated for occupationally related silicosis by Dr. Csikos as early as 1997. *See* discussion, *supra*.

Employer next contends that the administrative law judge, by crediting the opinions of Drs. Munoz and Csikos, expanded the definition of pneumoconiosis to include a "mandatory concept" or "presumption" that if a coal miner has chronic obstructive pulmonary disease, it is attributable to coal mine employment unless employer establishes to the contrary. Employer asserts that Drs. Munoz and Csikos did not explain why they attributed to coal mine employment "the development of a condition that did not medically appear until nearly ten years after [claimant's] last exposure and during the period in which he continued to smoke." Employer's Brief at 10.<sup>7</sup>

Employer's contentions are contrary to the record. In the instant case, the administrative law judge did not apply any presumption to determine the cause of claimant's chronic obstructive pulmonary disease or total pulmonary disability. Rather, the administrative law judge considered the relevant evidence and determined that claimant carried his burden at 20 C.F.R. §718.204(c). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Furthermore, Drs. Csikos and Munoz each discussed claimant's cigarette smoking and coal mine employment histories in diagnosing his condition and identifying the causes of his total pulmonary disability. Claimant's Exhibits 1, 2, 13, 14.

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disease.

Because of the co-morbidities (lung cancer, status post left upper lobe resection, cigarette smoking) it is impossible for me to determine specifically the severity of his pulmonary disability induced by coal dust exposure.

Mr. Delasko's pulmonary impairment is again multifactorial and is severe enough to prohibit him from performing heavy labor duties (as coal mining.)

Claimant's Exhibit 3.

<sup>7</sup>The administrative law judge found that claimant retired for coal mining in 1984 with twenty-one years of coal mine employment, and that claimant smoked cigarettes for fifty years at a rate of one-half pack per day, quitting in 1998. Decision and Order at 2-3.

Employer next contends that the administrative law judge erred in discrediting the opinions of Drs. Solic, Pickerill, Bush, and Fino, who determined, *inter alia*, that claimant's total pulmonary disability was exclusively due to cigarette smoking either as a cause of his cancer or chronic obstructive pulmonary disease. The administrative law judge found that these physicians focused on clinical pneumoconiosis, referring to the relatively small amount of pneumoconiosis they found on x-ray or biopsy and discounting the likelihood that claimant's chronic obstructive pulmonary disease was partly due to coal dust exposure. Decision and Order at 9. Employer asserts that the administrative law judge erroneously required that a medical expert focus on the fact that the regulatory definition of pneumoconiosis includes a chronic obstructive pulmonary disease arising out of coal mine employment, *see* 20 C.F.R. §718.201(a)(2). Employer also asserts that the administrative law judge applied the regulation at 20 C.F.R. §718.201(a)(2) as a presumption to find that claimant's exposure to coal dust was a substantial factor in the development of his chronic obstructive pulmonary disease that renders him unable to perform his usual coal mine work. Employer further argues that the administrative law judge's findings are contrary to the record.

Employer correctly contends that the administrative law judge erred in finding that Drs. Solic, Pickerill, Bush, and Fino focused on clinical versus legal pneumoconiosis, and that Drs. Bush and Fino arrived at their opinions by ignoring the legal definition of pneumoconiosis in favor of the clinical definition. The record shows that Drs. Solic, Pickerill, Bush, and Fino each considered what impact claimant's coal mine employment has on his condition. Director's Exhibits 35-38, 43, Employer's Exhibit 4. Thus, the administrative law judge mischaracterized the opinions of Drs. Solic, Pickerill, Bush, and Fino, which are supportive of a finding that claimant's chronic obstructive pulmonary disease and total pulmonary disability are due exclusively to cigarette smoking. In light of the administrative law judge's error in weighing the opinions of Drs. Solic, Pickerill, Bush, and Fino, we vacate his finding of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case. On remand, the administrative law judge must reconsider the weight and credibility of the opinions of Drs. Solic, Pickerill, Bush, and Fino, to determine whether claimant has met his burden to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further findings consistent with this opinion.

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