BRB No. 09-0862 BLA

ALVIS L. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTLAND ELKHORN COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 10/28/2010
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 – 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.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), 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 – Award of Benefits (2003-BLA-6524) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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*)).[2] The administrative law judge accepted the parties' stipulation that claimant worked thirty years in coal mine employment, as supported by the record, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge indicated that, because the evidence from the prior claims was over fifteen years old, he would focus on whether the newly submitted evidence was sufficient to establish entitlement to benefits. The administrative law judge found that, while claimant did not prove that he has clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Thus, the administrative law judge determined that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that the evidence was sufficient

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[1] Claimant filed two prior claims for benefits on June 7, 1973 and August 19, 1987, respectively. Director's Exhibit 1. The August 19, 1987 claim was denied by Administrative Law Judge Bernard J. Gilday, Jr., on October 10, 2002, because the evidence failed to establish the existence of pneumoconiosis. *Id*. On appeal, the Board affirmed the denial of benefits, and further denied claimant's request for reconsideration. *See* S*mith v. Kentland Elkhorn Coal Corp.*, BRB No. 91-0595 BLA (Oct. 23, 1991) (unpub.); *Smith v. Kentland Elkhorn Coal Corp.*, BRB No. 91-0595 BLA (Jan. 10, 1992) (unpub. Order); Director's Exhibit 1. Claimant subsequently filed a request for modification, which was also denied by the district director on May 19, 1992, for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial, until he filed the current subsequent claim on September 5, 2001. Director's Exhibit 3.

[2] By Order dated April 27, 2010, the Board gave the parties 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 filed after January 1, 2005, that were pending on or after March 23, 2010. *Smith v. Kentland Elkhorn Coal Corp*., BRB No. 09-0862 BLA (Apr. 27, 2010) (unpub. Order). The Director, Office of Workers' Compensation, and employer have responded, agreeing that the amendments do not apply, as the claim at issue in this case was filed before January 1, 2005. Claimant has not responded. We conclude that the recent amendments to the Act are not applicable, based on the filing date of the claim. Director's Exhibit 3.

to establish that claimant is totally disabled due pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c), asserting that the administrative law judge impermissibly shifted the burden to employer to prove that coal dust exposure was not a factor in claimant's disabling respiratory condition. Employer asserts that the administrative law judge mischaracterized Dr. Rosenberg's opinion, that claimant's disabling respiratory condition was unrelated to coal dust exposure, and erred in discrediting it as contrary to the regulations. Employer also contends that the administrative law judge erred in relying on the opinion of Dr. Rasmussen to find that claimant is totally disabled by a respiratory condition arising from his coal dust exposure. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the administrative law judge mischaracterized the opinion of Dr. Rosenberg. Employer has also filed a reply brief, reiterating its arguments with regard to the administrative law judge's weighing of the evidence at Sections 718.202(a)(4), 718.204(c).[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, 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, it must be established that the miner suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner is totally disabled due to pneumoconiosis *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant worked thirty years in coal mine employment and that he established total disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

Employer asserts that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis[5] based on the medical opinion evidence. Pursuant to Section 718.202(a)(4), the administrative law judge focused his analysis on the conflicting medical opinions of Drs. Rosenberg and Rasmussen[6] regarding the etiology of claimant's chronic obstructive pulmonary disease (COPD). Dr. Rosenberg examined claimant on June 15, 2004 and prepared a report dated September 25, 2006, in which he reviewed the medical record. Employer's Exhibit 1. Dr. Rosenberg noted that claimant's total lung capacity and post-bronchodilator "vital capacity measurements are normal, thus, he does not have restriction." *Id*. He further noted that claimant had a normal diffusion capacity and that his chest x-ray "did not reveal micronodularity." *Id*. Although Dr. Rosenberg opined that claimant's pulmonary function testing showed severe obstruction, he did not attribute claimant's respiratory condition to coal dust exposure and stated:

> There is no question that coal dust exposure is associated with the presence of obstructive lung disease. When this occurs, the coal macule which develops in the terminal bronchiole is associated with the development of focal emphysema (Kleinerman). As the associated macule evolves into micronodular disease, macronodular disease and potentially complicated [coal worker's pneumoconiosis], the associated COPD can also progress. With respect to [claimant], with his severe impairment based on his markedly decreased FEV1% (FEV1/FVC) in the absence of complicated [coal workers' pneumoconiosis], and for that matter any micronodularity,

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[5] Legal pneumoconiosis is defined in the regulations at 20 C.F.R. §718.202(a)(2), which provides, in relevant part:

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §718.201(a)(2).

[6] There are four newly submitted medical opinions of record by Drs. Baker, Forehand, Rosenberg and Rasmussen. Although both Dr. Baker and Dr. Forehand opined that claimant is totally disabled as a result of legal pneumoconiosis, the administrative law judge determined that their opinions were not sufficiently reasoned and that they were entitled to less weight at 20 C.F.R. §§718.202(a)(4), 718.204(c). Decision and Order at 23; Director's Exhibit 12; Claimant's Exhibit 4.

> his disabling COPD would not have been caused or hastened by the past inhalation of coal mine dust exposure.

Id. Dr. Rosenberg also noted that claimant had marked air trapping and a "very significant bronchodilator response," consistent with impairment from smoking, as "with impairment related to [coal workers' pneumoconiosis], fixed functional abnormalities would be expected." *Id*. Dr. Rosenberg concluded that claimant is severely disabled by COPD due entirely to smoking. *Id*.

Dr. Rasmussen examined claimant on March 22, 2007, and recorded a work history of thirty-two years in coal mine employment and a smoking history of about one pack per day for twenty years. Claimant's Exhibit 1. Dr. Rasmussen diagnosed clinical pneumoconiosis,[7] by x-ray, and COPD in the form of emphysema. *Id*. He opined that claimant's incremental treadmill exercise test showed marked loss of lung function, that pulmonary function testing showed a severe, partially reversible obstruction, and that there was minimal hypoxia based on an arterial blood gas test. *Id*. He opined that claimant was totally disabled for his usual coal mine work and attributed claimant's disabling chronic lung disease to a combination of smoking and coal dust exposure. *Id*. Dr. Rasmussen explained that, because smoking and coal dust exposure cause identical forms of emphysema, it was reasonable to conclude that claimant has "both legal pneumoconiosis, i.e., COPD/emphysema caused at least in part by coal mine dust exposure, and clinical pneumoconiosis, both of which are material contributing causes of [claimant's] disabling chronic lung disease." *Id*.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that while Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, he made statements that were contrary to the regulations, and did not fully explain why coal dust exposure was excluded as a causative factor for claimant's respiratory condition. The administrative law judge found, therefore, that Dr. Rosenberg's opinion was

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[7] Clinical pneumoconiosis is defined in the regulations at 20 C.F.R. §718.201(a)(1), which provides, in relevant part:

> "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. The 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).

"insufficiently well-reasoned" and entitled to less weight. Decision and Order at 24-25. In contrast, the administrative law judge found that Dr. Rasmussen's opinion was well-reasoned and entitled to probative weight and concluded that claimant established the existence of legal pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a)(4). *Id*. at 24, 26.

Employer argues that the administrative law judge erred in relying on the preamble to the revised regulations to discredit Dr. Rosenberg's opinion, and erred in concluding that it was inconsistent with the regulations. Employer contends that the administrative law judge mischaracterized Dr. Rosenberg's opinion, "based on holdings from other cases," and "mistakenly found that Dr. Rosenberg suggested that coal dust exposure does not cause a decreased FEV1/FVC." Employer's Memorandum in Support of Petition for Review at 13. Employer's arguments are rejected as without merit.

Contrary to employer's assertions, the administrative law judge had discretion to consider the preamble to the revised regulations in assessing the credibility of the medical experts in this case. The administrative law judge did not treat the preamble as medical evidence, or as a presumption that all obstructive lung disease is pneumoconiosis; rather, he permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor (DOL). *See Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Furthermore, we agree with the administrative law judge that, to the extent that Dr. Rosenberg relied upon the absence of radiographic evidence of complicated pneumoconiosis to rule out coal dust exposure as a cause of the miner's pulmonary impairment, his opinion is inconsistent with the regulations. The regulations do not require a finding of complicated pneumoconiosis before a miner's disabling or fatal chronic obstructive pulmonary disease can be found to be attributable to coal dust exposure. 65 Fed. Reg. 79,951 (2000) ("The statute contemplates an award of benefits based upon proof of pneumoconiosis as defined in the statute . . . and not just upon proof of complicated pneumoconiosis."). In fact, as the United States Court of Appeals for the Sixth Circuit observed in *Prokes v. Mathews*, 559 F.2d 1057, 1060 (6th Cir. 1977), Congress prohibited the denial of claims based solely on negative x-ray evidence after concluding "that many claims were being denied on the basis of negative [x]-rays where other evidence indicated the existence of coal miner's pneumoconiosis." *Id*., *citing* S.Rep. No. 92-743, 92d Cong., 2d Sess., 2 U.S. Code Cong. & Admin. News (1972) at 2306.

Furthermore, we reject employer's assertion that the administrative law judge mischaracterized Dr. Rosenberg's opinion. Employer states that, contrary to the administrative law judge's finding, "Dr. Rosenberg never . . . suggested that coal dust exposure does not cause a decreased FEV1/FVC and to find otherwise is to do an injustice to the record." Employer's Memorandum in Support of Petition for Review at 13. However, the administrative law judge correctly quoted the statement, from Dr.

Rosenberg's September 25, 2006 report, that "coal mine dust exposure does not generally cause a significant reduction in FEV1%." Employer's Exhibit 1. The administrative law judge properly found Dr. Rosenberg's opinion, that a "marked decrement in FEV1%" is inconsistent with coal dust exposure, to be contrary to the regulations, noting that "it would not have made sense for the [DOL] to permit miners to use a decreased FEV1/FVC to establish total disability if, as Dr. Rosenberg believes, a substantially decreased FEV1/FVC rules out pneumoconiosis." Decision and Order at 25, *quoting M.A. v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009) (unpub.).[8] Thus, we conclude that the administrative law judge properly discounted Dr. Rosenberg's opinion as he expressed views that are contrary to the science relied upon by the DOL in promulgating the regulations pertaining to the definition of legal pneumoconiosis. *See* 65 Fed. Reg. 79938-42 (2000); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

Additionally, the administrative law judge reasonably found that that, while Dr. Rosenberg asserts that a bronchodilator response is not a pattern consistent with coal mine dust-related obstruction, he "does not address the fact that claimant's post-bronchodilator results are qualifying, indicating that claimant is experiencing residual impairment which suggests that a combination of factors is causing his respiratory impairment." Decision and Order at 25, *citing Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. May 11, 2004) (unpub.) (the fact that some of the pulmonary function studies showed reversibility does not necessarily preclude the presence of coal workers' pneumoconiosis). Because the credibility of the medical experts is within the discretion of the trier-of-fact, we affirm the administrative law judge's decision to accord Dr. Rosenberg's opinion less weight under Section 718.202(a)(4). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

We also reject employer contention that the administrative law judge erred in relying on Dr. Rasmussen's opinion to find that claimant has legal pneumoconiosis. Employer asserts that Dr. Rasmussen's opinion is not sufficient to satisfy claimant's burden of proof because Dr. Rasmussen failed to scientifically explain the basis for his conclusion that coal dust exposure caused claimant's disabling respiratory condition, and did not provide any rationale, "beyond the additive effects of cigarette smoking and coal dust exposure," as to why he attributed claimant's obstruction to his coal mine employment. Employer's Memorandum in Support of Petition for Review at 16. As

[8] Contrary to employer's assertion, the administrative law judge did not base his conclusions on the holdings of the Board with regard to Dr. Rosenberg in other cases. He properly evaluated Dr. Rosenberg's opinion based on the facts of this case and permissibly cited to *M.A. v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009) (unpub.), as support for his credibility determination.

such, employer maintains that claimant received an impermissible presumption in this case that his COPD arose from his coal mine employment. *Id*. These arguments are without merit.

Contrary to employer's contention, Dr. Rasmussen was not required to specifically apportion the exact percentage of respiratory impairment due to smoking and coal dust exposure, and his failure to do so does not render his opinion insufficiently reasoned. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Because the administrative law judge specifically found that Dr. Rasmussen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's disabling respiratory condition was due to both smoking and coal dust exposure, we affirm his finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis is "well-reasoned." Decision and Order at 24. Moreover, because Dr. Rasmussen specifically opined that claimant's coal dust exposure remains "a material contributing cause of his disabling chronic lung disease," we affirm the administrative law judge's conclusion that Dr. Rasmussen's opinion is sufficient to satisfy claimant's burden of proof. Claimant's Exhibit 1; *see* 20 C.F.R §718.201; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *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); Decision and Order at 29. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Clark*, 12 BLR at 1-151.

As to the issue of disability causation under Section 718.204(c), employer argues that the administrative law judge erred in rejecting Dr. Rosenberg's opinion that claimant is not totally disabled due to pneumoconiosis. However, the administrative law judge permissibly gave Dr. Rosenberg's opinion less weight as to the etiology of claimant's disability because the doctor did not diagnose pneumoconiosis. *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 n. 15 (2002) (*en banc*). Moreover, we reject employer's argument that Dr. Rasmussen's opinion is not legally sufficient to establish disability causation. As discussed *supra*, the administrative law judge permissibly found Dr. Rasmussen's opinion to be well-reasoned and well-documented, and sufficient to establish that claimant is totally disabled due, at least in part, to coal dust exposure. *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark*, 12 BLR at 1-151; Decision and Order at 29. Thus, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis under Section 718.204(c), and the award of 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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REGINA C. McGRANERY
Administrative Appeals Judge