BRB No. 09-0841 BLA

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| ALAN L. ADKINS | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| SOUTHERN APPALACHIAN COAL COMPANY | ) | 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 Award of Benefits of Daniel F. Solomon Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

David L. Yaussey (Robinson & McElwee), Charleston, West Virginia, for employer.

Emily Kraft-Goldberg (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 Award of Benefits (2008-BLA-05502) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) on a

claim filed on June 28, 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 claimant established fifteen years of coal mine employment.[1] Decision and Order at 6. Addressing the merits of entitlement, the administrative law judge found that while the evidence failed to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), it did establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b).[2] The administrative law judge further found that claimant established a totally disabling respiratory impairment based on the blood gas study and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(ii) and (iv), and that his total disability was due to pneumoconiosis (disability causation) at 20 C.F.R. §718.204(c). Benefits were, accordingly, awarded.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief addressing employer's arguments on appeal.[3]

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. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his

[1] The administrative law judge also noted that employer conceded that claimant had over ten years of coal mine employment. Decision and Order at 3; Hearing Transcript at 8.

[2] A finding that pneumoconiosis arose out of coal mine employment, *see* 20 C.F.R. §718.203(a), is subsumed in a finding of legal pneumoconiosis at 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); *Kiser v. L & J Equipment Co.*, 23 BLR 1-246 (2006).

[3] The administrative law judge's findings that the evidence failed to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), but that a total respiratory disability was established at 20 C.F.R. §718.204(b)(2)(ii) and (iv) are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated June 29, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *Adkins v. Southern Appalachian Coal Co.*, BRB No. 09-0841 BLA (June 29, 2010)(unpub. Order). The Director responds, arguing that the Board need not consider the effect of the 2010 amendments on this case, if it affirms the administrative law judge's Decision and Order awarding benefits. If, however, the Board does not affirm the administrative law judge's Decision and Order awarding benefits, the Director argues that this case must be remanded for consideration under Section 411(c)(4) and the administrative law judge must specifically consider whether fifteen years of qualifying coal mine employment were established. *See* 30 U.S.C. §921(c)(4); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). Further, the Director contends that, if the case is remanded for consideration under Section 411(c)(4), the administrative law judge should allow the parties the opportunity to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456. Employer responds, arguing that Section 411(c)(4) is not applicable as the evidence in this case does not establish fifteen years of qualifying coal mine employment. *See* 30 U.S.C. §921(c)(4).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4] Because claimant was last employed in the coal mining industry in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

After consideration of the administrative law judge's Decision and Order awarding benefits, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order awarding benefits is rational, supported by substantial evidence and in accordance with applicable law. It is, accordingly, affirmed. In finding that legal pneumoconiosis was established at Section 718.202(a)(4), the administrative law judge found that all of the physicians, Drs. Rasmussen, Forehand, Baker, Hippensteel and Zaldivar, found that claimant's respiratory impairment was due, in part, to smoking, while Drs. Rasmussen, Forehand and Baker also found that the respiratory impairment was due, in part, to coal mine employment.

Contrary to employer's arguments, in weighing the opinions of Drs. Rasmussen, Hippensteel and Zaldivar, the administrative law judge properly accorded greater weight to the opinion of Dr. Rasmussen, that claimant's respiratory impairment was due to both coal mine employment and smoking, because he found it "more clearly explained" than the contrary opinions of Drs. Hippensteel and Zaldivar. Decision and Order at 12. Specifically, the administrative law judge permissibly found Dr. Rasmussen's opinion more credible because Dr. Rasmussen explained how claimant's chronic obstructive pulmonary disease (COPD) was caused by both coal mine employment and smoking and how it was not possible to separate the effects of either smoking or coal dust exposure on claimant's respiratory impairment. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004); Decision and Order at 12. The administrative law judge noted that Dr. Rasmussen's opinion was in keeping with the 2001 amended regulations, 68 Fed. Reg. 69930 (Dec. 15, 2003), which stated that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and [t]he risk [is] additive with cigarette smoking." Decision and Order at 11. Contrary to employer's argument, the administrative law judge did not, in effect, find that the 2001 amended regulations created a presumption that an obstructive impairment is always due to coal dust exposure, since the administrative law judge stated that Dr. Rasmussen's opinion was more persuasive than the opinions of Drs. Hippensteel and Zaldivar because Dr. Rasmussen explained how claimant's COPD was due to both coal mine employment and smoking. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

Further, contrary to employer's assertion, the administrative law judge did not err in crediting Dr. Rasmussen's opinion based on his qualifications. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). The administrative law judge acknowledged that Drs. Forehand, Baker, Hippensteel and Zaldivar were Board-certified pulmonologists, while Dr. Rasmussen was not. Decision and Order at 9, 12. Nonetheless, the administrative law judge permissibly credited the opinion of Dr. Rasmussen based on his qualifications, because "[a] review of [Dr. Rasmussen's] credentials shows that in this record, only he has performed extensive research in pneumoconiosis and has written on COPD." Decision and Order at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

(1989)(*en banc*). The administrative law judge further noted that the United States Court of Appeals for the Sixth Circuit, in *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005), specifically stated that "Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis." Decision and Order at 12. Additionally, the administrative law judge did not err in according Dr. Rasmussen's opinion greater weight because he found it "substantiated" by the opinions of Drs. Baker and Forehand, who also found that claimant's respiratory impairment was due to both coal dust exposure and smoking. Contrary to employer's assertion, it is not necessary that the opinions of Drs. Baker and Forehand mirror Dr. Rasmussen's opinion, as to how coal dust exposure caused claimant's respiratory impairment, in order for the administrative law judge to find, within his discretion as fact-finder, that they "substantiated" the opinion of Dr. Rasmussen, as both physicians opined that claimant's respiratory impairment was due to coal dust exposure and smoking. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Further, contrary to employer's assertion, the administrative law judge acted properly in crediting the opinions of Drs. Rasmussen, Forehand and Baker, as they found, like himself, that claimant had fifteen years of coal mine employment.[5] *See Clark*, 12 BLR at 1-155.

Turning to the opinions of Drs. Hippensteel and Zaldivar, that claimant's respiratory impairment was due solely to smoking, the administrative law judge accorded them less weight because Dr. Hippensteel opined that a chronic obstructive disease "usually subsides within a period of several months after leaving work in the mines and this [claimant] left work in 1987[,]" Decision and Order at 11, and less weight to the opinion of Dr. Zaldivar because Dr. Zaldivar's finding of no legal pneumoconiosis was based on the absence of x-ray evidence of clinical pneumoconiosis. *See* 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 11. Because pneumoconiosis is a latent and progressive disease, the administrative law judge properly accorded little weight to the opinion of Dr. Hippensteel. *See* 20 C.F.R. §718.201; *Roberts v. Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Similarly, the administrative law judge properly accorded little weight to the opinion of Dr. Zaldivar, that claimant did not have legal pneumoconiosis, because it was based on Dr. Zaldivar's finding that claimant did not have x-ray evidence of clinical pneumoconiosis. *See* 20 C.F.R. §718.201; *Anderson*, 12 BLR at 1-113. In conclusion, therefore, the

[5] Although employer asserts that claimant had at most only twelve or thirteen years of coal mine employment, Employer's Brief at 16, it does not explain how the administrative law judge erred in finding that fifteen years of coal mine employment were established.

administrative law judge properly found the existence of legal pneumoconiosis established at Section 718.202(a)(4), based on his evaluation of the medical opinion evidence. Further, the administrative law judge properly found that, on weighing all of the evidence together, the existence of legal pneumoconiosis was established at Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Accordingly, we affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established at Section 718.202(a)(4).

Finally, contrary to employer's arguments, the administrative law judge properly found that disability causation was established at Section 718.204(c), based on the better reasoned opinions of Drs. Rasmussen, Forehand and Baker, that claimant's total disability was due to legal pneumoconiosis. *See Clark*, 12 BLR at 1-155. The administrative law judge properly accorded less weight to the opinions of Drs. Hippensteel and Zaldivar because neither physician diagnosed the existence of legal pneumoconiosis. *See Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 13. Accordingly, we affirm the administrative law judge's finding that disability causation was established at Section 718.204(c). Because we affirm the administrative law judge's Decision and Order awarding benefits, we need not remand the case for consideration under Section 411(c)(4). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

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