BRB No. 07-0522 BLA

B.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRITCHARD MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONISIS FUND	)	DATE ISSUED: 02/29/2008
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-5826) of Administrative Law Judge Michael P. Lesniak on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30

U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with 23.42 years of coal mine employment[1] and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b), in the form of obstructive lung disease due in part to coal dust exposure. The administrative law judge further found that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of the miner's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[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. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer initially contends that the administrative law judge erred in finding the medical opinion evidence, consisting of the reports of Drs. Gaziano, Rasmussen,

[1] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's finding of 23.42 years of coal mine employment, and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Zaldivar, and Farney, sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree.

In evaluating the medical opinion evidence relevant to the existence of pneumoconiosis, the administrative law judge properly found that Drs. Rasmussen, Gaziano, and Zaldivar all diagnosed claimant with either clinical pneumoconiosis, legal pneumoconiosis, or both, while, by contrast, only Dr. Farney opined that claimant does not suffer from clinical pneumoconiosis or any coal dust-related disease of the lung.[3] Decision and Order at 12-13. The administrative law judge credited, as well-reasoned and documented, the opinion of Dr. Rasmussen that claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due in part to coal dust exposure, and concluded that, as the opinions of Drs. Zaldivar and Gaziano also supported a finding of pneumoconiosis, claimant had established the existence of the disease by a preponderance of the medical opinion evidence. Decision and Order at 13.

Initially, we reject employer's argument that the administrative law judge erred in relying on the opinion of Dr. Rasmussen, which employer asserts is not sufficiently reasoned to carry claimant's burden of proof. Employer's Brief at 9-11. In evaluating Dr. Rasmussen's opinion, the administrative law judge noted, correctly, that Dr. Rasmussen had considered claimant's employment and smoking histories, the physical findings on examination, and the x-ray, pulmonary function, and blood gas study results, in addition to epidemiological, experimental, and mortality studies. Decision and Order at 11-13. Contrary to employer's argument, the administrative law judge acted within his discretion in finding that because Dr. Rasmussen had considered "the constellation of medical findings and exposure history specific to this case," and relevant epidemiological studies relating obstruction with coal dust exposure, his opinion was reasoned and documented, and supported a finding of legal pneumoconiosis. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 12-13.

[3] Dr. Rasmussen diagnosed legal pneumoconiosis, stating that occupational dust must be considered a significant contributing factor of claimant's chronic obstructive lung disease. Claimant's Exhibit 1. Dr. Gaziano diagnosed coal workers' pneumoconiosis due to coal dust exposure, and chronic bronchitis, due to a combination of coal dust exposure and smoking. Director's Exhibit 12. Dr. Zaldivar diagnosed simple coal workers' pneumoconiosis, and further opined that claimant's obstructive pulmonary impairment is due to smoking-related emphysema, with a small contribution from claimant's coal mine work. Director's Exhibit 13.

We further reject employer's argument that the administrative law judge erred in finding Dr. Zaldivar's opinion supportive of a finding of legal pneumoconiosis. Employer's Brief at 9 n.1. In a report dated August 27, 2003, Dr. Zaldivar diagnosed coal workers' pneumoconiosis and emphysema, and opined that claimant has a pulmonary impairment. Director's Exhibit 13. Dr. Zaldivar further opined that claimant's pulmonary impairment is due to his emphysema, caused by claimant's lifelong history of smoking with a small contribution from his mine work, although the contribution of the mining work could not be precisely quantified. Director's Exhibit 13. In a supplemental report dated June 5, 2006, Dr. Zaldivar stated that his opinion, "which is that the great portion of the airway obstruction . . . is due to emphysema," was unchanged. Employer's Exhibit 6. Employer states that "Dr. Zaldivar's acknowledgement of a *de minimus* contribution of coal dust exposure to [claimant's] obstructive disease and impairment . . . is insufficient to qualify as a diagnosis of legal pneumoconiosis . . . ." Employer's Brief at 9 n.1. Contrary to employer's assertion, the administrative law judge did not rely on Dr. Zaldivar's diagnosis to establish legal pneumoconiosis. Rather, the administrative law judge relied primarily on Dr. Rasmussen's opinion, and concluded that "[a]s Dr. Zaldivar felt the role coal mine dust exposure contributed, though small, was significant enough to be mentioned, . . . Dr. Zaldivar's opinion would not be inconsistent with a finding of legal pneumoconiosis." Decision and Order at 12.

As the administrative law judge reasonably analyzed the medical opinions and explained his reasons for crediting or discrediting the opinions he reviewed, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Finally, the administrative law judge weighed together all of the evidence pertinent to the existence of pneumoconiosis, and permissibly concluded that claimant established the existence of legal pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-173-4 (4th Cir. 2000); Decision and Order at 13.

Employer next challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.204(c), that the medical evidence of record establishes that the miner's totally disabling respiratory impairment is due to pneumoconiosis. As the administrative law judge correctly summarized, a miner is totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see also Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-77 (4th Cir. 1990). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment which is

caused by a disease or exposure unrelated to coal mine employment.[4] 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003); Decision and Order at 13.

In evaluating the evidence relevant to the issue of disability causation at 20 C.F.R. §718.204(c), the administrative law judge initially discredited the opinion of Dr. Farney, because the physician did not diagnose pneumoconiosis, contrary to the administrative law judge's own findings. The administrative law judge then credited the opinion of Dr. Rasmussen, that legal pneumoconiosis is a substantially contributing cause of the miner's disabling lung impairment, and found that the opinions of Drs. Zaldivar and Gaziano[5] "len[t] credence to [Dr. Rasmussen's] conclusions." Decision and Order at 13-14.

Employer contends that the administrative law judge's finding, pursuant to 20 C.F.R. §718.204(c), that legal pneumoconiosis is a substantially contributing cause of the miner's disabling pulmonary impairment, is not supported by substantial evidence. Employer asserts that only Dr. Rasmussen attributes a significant degree of claimant's disabling obstructive impairment to coal dust exposure, and that Dr. Rasmussen's opinion is insufficient to carry claimant's burden of proof. Employers Brief at 9. Employer contends that, by contrast, Drs. Zaldivar and Farney offer reasoned opinions attributing claimant's disabling pulmonary impairment solely to cigarette smoking. Employer's Brief at 9.

Initially, we reject employer's contention that the administrative law judge erred in finding Dr. Rasmussen's opinion sufficient to support a finding that legal pneumoconiosis is a substantially contributing cause of claimant's disabling pulmonary impairment. Employer's Brief at 10. In evaluating Dr. Rasmussen's opinion, the administrative law judge properly found that, in his report dated August 18, 2005, Dr. Rasmussen specifically opined that "legal pneumoconiosis[ ]contributes significantly or in a material way to [claimant's] disabling chronic obstructive lung disease." Decision

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[4] As the administrative law judge further properly noted, the comments to the regulations make clear that the inclusion of the words "material" or "materially" reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. 79946 (Dec. 20, 2000); Decision and Order at 13.

[5] Dr. Gaziano opined that claimant has a moderately severe pulmonary impairment, and that both claimant's coal workers' pneumoconiosis and his chronic bronchitis due to coal dust exposure contributed to a moderate degree. Director's Exhibit 12.

and Order at 10-12; Claimant's Exhibit 1. The administrative law judge also noted that while, in his subsequent deposition, Dr. Rasmussen acknowledged that smoking was probably the more significant cause of claimant's disabling impairment, Dr. Rasmussen maintained that coal dust exposure was nonetheless a "potent" cause. Decision and Order at 11-12; Employer's Exhibit 7 at 17-18, 23. Thus, the administrative law judge permissibly concluded that Dr. Rasmussen's opinion supports a finding that claimant's legal pneumoconiosis is a substantially contributing cause of his disabling pulmonary impairment. 20 C.F.R. §718.204(c); *see also Robinson*, 914 F.2d at 38, 14 BLR at 2-77; *Gross*, 23 BLR at 1-18; Decision and Order at 14; Claimant's Exhibit 1. Contrary to employer's arguments, whether Dr. Rasmussen's apportionment of the causes of claimant's disability is sufficiently reasoned is for the administrative law judge to decide. *See Underwood*, 105 F.3d at 949, 21 BLR 2-23; *Clark*, 12 BLR at 1-155; Employer's Brief at 10. Therefore, we affirm the administrative law judge's crediting of Dr. Rasmussen's opinion, as supported by substantial evidence. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997).

We also reject employer's contention that the administrative law judge erred in his evaluation of Dr. Zaldivar's opinion. Employer contends that "Dr. Zaldivar specifically stated that [claimant] would be disabled to the same degree, even if he never worked as a coal miner" and that "Dr. Zaldivar's acknowledgement of a *de minimus* contribution of coal dust exposure to [claimant's] obstructive disease and impairment" is insufficient to support the administrative law judge's finding of disability causation. Employer's Brief at 9 n.1, 11. We disagree. In considering Dr. Zaldivar's opinion, the administrative law judge correctly noted that while, as employer contends, Dr. Zaldivar testified that claimant's smoking habit alone could have produced the same degree of impairment, Dr. Zaldivar also stated that there was a "small contribution" to claimant's impairment from his coal dust exposure. Decision and Order at 13-14 Director's Exhibit 13; Employer's Exhibits 5, 6 at p. 18-19. Contrary to employer's assertion, Dr. Zaldivar did not describe the contribution of coal dust exposure to claimant's impairment as *de minimus*. Considering Dr. Zaldivar's entire opinion, as expressed in both his testimony and his written reports, the administrative law judge acted within his discretion in concluding that because "Dr. Zaldivar felt the role coal mine dust exposure contributed, though small, was significant enough to be mentioned," Dr. Zaldivar's opinion supported a finding that pneumoconiosis was a substantially contributing cause of claimant's disabling obstructive lung disease. 20 C.F.R. §718.204(c); *see Mays*, 176 F.3d at 763, 21 BLR at 2-605; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *Robinson*, 914 F.2d at 38, 14 BLR at 2-77; Decision and Order at 14.

It is within the administrative law judge's purview to resolve inconsistencies in the evidence. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). As a review of the administrative law judge's decision reveals that he

considered Dr. Zaldivar's complete opinion under the proper disability causation standard, and, contrary to employer's arguments, as Dr. Zaldivar simply described the contribution of coal dust to claimant's impairment as "small," not *de minimus*, we hold that substantial evidence supports the administrative law judge's conclusion that Dr. Zaldivar's opinion, together with Dr. Gaziano's opinion, "lend[s] credence" to Dr. Rasmussen's opinion that pneumoconiosis was a substantially contributing cause of claimant's disabling lung impairment. *See Mays*, 176 F.3d at 763, 21 BLR at 2-605; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; Decision and Order at 14.

Finally, employer asserts that in evaluating the medical opinion evidence relevant to the issue of disability causation, the administrative law judge erred in discrediting the opinion of Dr. Farney on the ground that the physician did not diagnose coal workers' pneumoconiosis, contrary to the administrative law judge's own findings. Employer asserts that because Dr. Farney "found symptoms consistent with legal pneumoconiosis," the physician's opinion is not in direct contradiction to the administrative law judge's own finding of pneumoconiosis. Employer concludes that, therefore, the administrative law judge erred in finding, pursuant to *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), that Dr. Farney's opinion could not be credited at 20 C.F.R. §718.204(c). Employer's Brief at 13-17. Employer's argument is without merit.

While Dr. Farney diagnosed COPD, he did not state that claimant's symptoms were consistent with legal pneumoconiosis, but, rather, specifically opined that it was the result of smoking and not the result of coal mine dust inhalation. Employer's Exhibits 1, 8. Therefore, as Dr. Farney specifically stated that he could not diagnose either legal or medical pneumoconiosis, and that claimant's physical findings were consistent solely with smoking, Dr. Farney's opinion is in direct contradiction to the administrative law judge's finding that claimant suffers from pneumoconiosis arising out of his coal mine employment. *Scott*, 289 F.3d at 269, 22 BLR 2-384. Thus, we hold that the administrative law judge properly declined to credit Dr. Farney's opinion at 20 C.F.R. §718.204(c).

The administrative law judge is tasked with evaluating the physicians' opinions, s*ee Compton*, 211 F.3d at 211, 22 BLR at 2-175, and the Board will not substitute its inferences for those of the administrative law judge. *See Mays*, 176 F.3d at 763, 21 BLR at 2-605; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *Anderson*, 12 BLR at 1-113; Decision and Order at 14. Therefore, as the administrative law judge considered all of the relevant medical opinion evidence, and permissibly concluded that the preponderance of the medical opinions establishes that claimant's occupational dust exposure is a substantially contributing cause of his totally disabling respiratory impairment, and substantial evidence supports the administrative law judge's finding, we affirm the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge