

BRB No. 09-0316 BLA

JIMMY KIKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY	)	
	)	DATE ISSUED: 01/27/2010
and	)	
	)	
ZURICH AMERICAN INSURANCE	)	
GROUP	)	
	)	
Employer/Carrier-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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judges, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2006-BLA-6058) of Administrative Law Judge Alice M. Craft on a miner's claim filed on March 31, 2005, 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). In a

Decision and Order dated December 16, 2008, the administrative law judge credited claimant with twenty-one years of coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the x-ray evidence was negative for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that the record does not contain any biopsy evidence under 20 C.F.R. §718.202(a)(2), and that the presumptions described at 20 C.F.R. §718.202(a)(3) are not applicable. The administrative law judge further found, however, that the medical reports supported a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that, weighing all the evidence together, claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant satisfied his burden of establishing the existence of legal pneumoconiosis and disability causation pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.<sup>1</sup>

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.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203,

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<sup>1</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of twenty-one years of coal mine employment, that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) and that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *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).

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because claimant's coal mine employment occurred in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3, 7.

718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer argues that the administrative law judge erred in finding that claimant satisfied his burden of proving legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). There are five medical opinions of record addressing the existence of legal pneumoconiosis.

Dr. Harris examined claimant on September 26, 2005, at the request of the Department of Labor. Director's Exhibit 13. Dr. Harris noted claimant's coal mine employment history of twenty-one years, a smoking history of one-half pack of cigarettes a day from 1965 to 1995, and described claimant's symptoms of daily cough, sputum production, wheezing and dyspnea on exertion. *Id.* Dr. Harris reviewed an x-ray that revealed "hyperinflation and a small area of scar in the left upper lobe." *Id.* He described pulmonary function testing that revealed a "severe, partially reversible obstructive ventilatory defect," while an exercise arterial blood gas study showed "severe hypoxemia with very minimal exertion." *Id.* Under the heading of "Cardiopulmonary Diagnosis" he wrote:

[Chronic Obstructive Pulmonary Disease (COPD)] and chronic bronchitis. This is based on [claimant's] symptoms of chronic cough and sputum, dyspnea with minimal exertion. In addition he has severe hypoxemia with minimal exertion and severe obstructive ventilatory defect on spirometry.

*Id.* Under the heading of "Etiology of Cardiopulmonary Diagnosis," Dr. Harris indicated that claimant's pulmonary disease is related to coal dust exposure and tobacco smoking. *Id.* He opined that claimant was totally disabled and that "COPD is responsible for [one hundred percent] of his impairment." *Id.*

Dr. Castle prepared a consultative report dated March 14, 2006, based on his review of the examination report and testing obtained by Dr. Harris. Director's Exhibit 23. Dr. Castle noted that claimant "worked in or around the underground mining industry for a sufficient enough time to have developed coalworkers' pneumoconiosis if he were a susceptible host." *Id.* He further noted that claimant smoked one-half pack of cigarettes a day for thirty years, and that this was "sufficient enough exposure to have caused [claimant] to develop [COPD]." *Id.* Dr. Castle noted no physical findings of rales, crackles or crepitations that were consistent with interstitial lung disease and no radiographic evidence of coal workers' pneumoconiosis. He indicated that pulmonary function testing showed "severe airway obstruction with a very significant degree of reversibility" but explained that "when coal[]workers' pneumoconiosis causes impairment, it generally does so by causing a mixed, *irreversible* obstructive and restrictive ventilatory defect." *Id.* (emphasis added).

Dr. Castle concluded that claimant suffers from significant ventilatory impairment due to pulmonary emphysema caused by smoking. Director's Exhibit 23. Although Dr. Harris did not obtain a diffusion capacity, Dr. Castle opined that it is "most likely that [claimant] would have a significant reduction in the diffusing capacity," which is not typical of impairment related to coal dust exposure "in the absence of a high degree of profusion of either r or p type opacities" on x-ray. *Id.* He also attributed claimant's hypoxemia during exercise arterial blood gas testing to smoking and not to coal dust exposure. Dr. Castle diagnosed that claimant suffers from totally disabling emphysema due to smoking, and he does not have a coal mine induced lung disease or coal workers' pneumoconiosis.

Dr. Repsher examined claimant on March 28, 2006, at the request of the employer. Employer's Exhibit 1. Dr. Repsher noted that claimant was a coal miner for twenty-three and three-quarter years, who had also smoked up to one-half pack of cigarettes a day for thirty years, quitting in 1995. On physical examination, he found no evidence of rales, rhonchi or wheezing. An x-ray was obtained and read as negative for pneumoconiosis, while pulmonary function testing was described as showing significant COPD, and arterial blood gas testing was described as showing mild hypoxemia. He opined that the testing showed a "pure obstructive disease, which is characteristic of cigarette smoking induced COPD, but is very atypical" for a coal dust-related respiratory disease. *Id.* Dr. Repsher concluded that claimant has no pulmonary function or arterial blood gas study evidence of coal workers' pneumoconiosis.

Dr. Repsher specifically opined that claimant does not suffer "from either medical or legal coal workers (sic) pneumoconiosis or any other pulmonary or respiratory disease or condition, either caused by or aggravated by . . . inhalation of coal mine dust." Employer's Exhibit 1. He explained:

Cigarette smoking is the most common and powerful cause of COPD and centrilobular emphysema.

The majority of coal miners exposed to coal mine dust . . . may also develop COPD. However, on the average, non-smoking and non-asthmatic coal miners with 0/0 through 3/3 simple CWP will have normal pulmonary function, including a normal diffusing capacity. Further, the average loss of FEV1 is so small, that it is not detectable in an individual miner . . . [and] only discernible by comparing a large group of coal miners exposed to coal mine dust with an equally large group of non-dust exposed workers in a different industry.

That is, the average loss of FEV1 is so small, that it is only a small fraction of the anticipated test to test and day to day variation . . . .

Therefore, in this individual coal miner, to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma, but not the result of the inhalation of coal mine dust.

*Id.*

Dr. Cohen reviewed numerous medical records, including the reports of Drs. Harris, Repsher and Castle, and prepared a consultative report dated January 7, 2008. Claimant's Exhibit 3. He opined that claimant suffers from coal workers' pneumoconiosis. This conclusion was based on a twenty-one year history of coal mine employment with significant coal dust exposure along with "symptoms consistent with chronic lung disease, including cough, sputum production, dyspnea, and wheezing." *Id.* He noted that the "physical examinations consistently show signs of chronic lung disease[,] including decreased breath sounds and wheezes." *Id.* He further noted that pulmonary function testing revealed a "very severe obstructive lung defect" with a "significant response to bronchodilators, however the FEV1 still remained extremely impaired." *Id.* He also considered arterial blood gas testing that revealed "severe abnormal gas exchange in exercise," and concluded that both the obstructive defect and abnormal gas exchange were due to claimant's twenty-one years of coal dust exposure and thirty years of cigarette smoking. *Id.*

In support of his opinion, Dr. Cohen cited several medical studies describing a connection between the inhalation of coal dust and the development of an obstructive impairment. Claimant's Exhibit 3. When asked whether a reversible component of claimant's obstructive impairment rules out coal mine dust as a cause, Dr. Cohen noted that on "no study did [claimant's] FEV1 normalize" and stated the following:

The presence of a response to bronchodilators or broncho-reversibility does not in and of itself mean asthma or that COPD is due to tobacco exposure.

This response in no way rules out coal mine dust induced lung disease. [Claimant] also has no evidence of asthma. If he had asthma he would have complete or near complete reversibility of obstruction. Instead his spirometry shows only partial reversibility and even then he is still left with very severe impairment of the FEV1.

*Id.*

In a report dated March 31, 2008, Dr. Houser noted that he has been claimant's treating physician since March 20, 2006, and that he concurred with the findings of his associate, Dr. Harris.<sup>3</sup> Claimant's Exhibit 4. Dr. Houser noted that claimant smoked one-half pack of cigarettes per day from 1965 to 1995. Dr. Houser further noted that "a chest radiograph shows severe emphysema," and concluded that claimant "has legal pneumoconiosis as defined by the Department of Labor." *Id.* He further opined that "all three sets of pulmonary function data clearly show a disabling respiratory impairment which is at least in part secondary to the inhalation of coal and rock dust arising from his [twenty-one] year history of coal mine employment." *Id.*

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge initially found that the medical opinion evidence was insufficient to establish that claimant has clinical pneumoconiosis. As to the issue of legal pneumoconiosis, the administrative law judge found that the opinions of Drs. Houser and Harris were reasoned and documented, and therefore entitled to probative weight. With respect to Dr. Cohen, the administrative law judge determined that Dr. Cohen's opinion was not only "well-documented and well-reasoned," but that he is "superbly qualified in the field of pulmonary disease" and his opinion, therefore, is entitled to the greatest weight. Decision and Order at 18, 20.

Although the administrative law judge considered Dr. Castle to be "highly qualified," she assigned his opinion less weight because he did not "credibly [explain] why [twenty-one] years of coal dust exposure was not a factor in [c]laimant's obstructive disease." *Id.* at 21. The administrative law judge also noted Dr. Repsher's qualifications and found Dr. Repsher to be "highly qualified." *Id.* at 20-21. However, the administrative law judge concluded that his opinion was "not as well reasoned as the contrary opinions of Drs. Harris, Houser and Cohen." *Id.* at 20-21.

Accordingly, the administrative law judge concluded that the opinions of Drs. Harris, Houser and Cohen were "better in accord with the evidence underlying their opinions and the overall weight of the medical evidence of record." *Id.* at 21. Therefore the administrative law judge concluded that "the weight of the medical opinion evidence supports a finding that [c]laimant has legal pneumoconiosis." *Id.* at 21.

Employer contends that the administrative law judge erred in assigning less weight to the opinions of Drs. Castle and Repsher, that claimant does not have legal pneumoconiosis. Employer's Brief at 4-5. Contrary to employer's argument, the

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<sup>3</sup> The record also includes a treatment note by Dr. Houser dated July 10, 2006, in which Dr. Houser diagnosed acute bronchitis and emphysema and ordered pulmonary function testing. Claimant's Exhibit 4.

administrative law judge permissibly gave Dr. Repsher's opinion less weight on the issue of whether claimant has legal pneumoconiosis because she found that the doctor did not appear to accept "the proposition that coal dust exposure causes clinically significant obstructive lung disease."<sup>4</sup> Decision and Order at 21; *see* 20 C.F.R. §718.201(a)(2); *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). Dr. Repsher found that claimant's pulmonary function studies "show a pure obstructive disease, which is characteristic of cigarette smoking induced COPD, but is very atypical for coal workers pneumoconiosis." Employer's Exhibit 1. Dr. Repsher also suggested in his report that "the average loss of FEV1 due to coal dust is so small that it is not detectable in an individual miner." Decision and Order at 21. However, as noted by the administrative law judge, "although Dr. Repsher says the concept that clinically significant obstruction due to coal dust exposure is unlikely" such an opinion is "contrary to conclusions of NIOSH and the Department of Labor." Decision and Order at 21; 65 Fed.Reg. 79,938, 79,940; *see Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Moreover, the administrative law judge reasonably found Dr. Repsher's analysis to be flawed by his application of statistical averages to support his opinion, rather the specifics of this case. We therefore affirm the administrative law judge's finding that Dr. Repsher's opinion was entitled to less weight pursuant to 20 C.F.R. §718.202(a)(4).

We also affirm the administrative law judge's treatment of Dr. Castle's opinion. The administrative law judge permissibly found that Dr. Castle's opinion was entitled to less weight at 20 C.F.R. §718.202(a)(4) because he "focused exclusively" on the absence of clinical pneumoconiosis. Decision and Order at 20; *see Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7 (7th Cir. 2001); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). To support his opinion that claimant does not have pneumoconiosis, Dr. Castle referenced "the absence of physical or x-ray findings consistent with interstitial conditions, or findings of restriction, as opposed to obstruction, on pulmonary function testing" which are "all findings associated with clinical pneumoconiosis." *See* Decision and Order at 20; *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.). Furthermore, the administrative law judge acted within her discretion in rejecting Dr. Castle's opinion at 20 C.F.R.

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<sup>4</sup> The administrative law judge correctly noted that the Department of Labor has taken the position that coal dust exposure may induce obstructive lung disease even in the absence of fibrosis or complicated pneumoconiosis and "that '[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airway obstruction and chronic bronchitis.'" Decision and Order at 19, *citing* 65 Fed. Reg. 79920, 79938, 79940 (Dec. 20, 2000).

§718.202(a)(4), as to the existence of legal pneumoconiosis, since Dr. Castle opined that claimant's respiratory impairment was consistent with smoking but failed to "credibly explain why [twenty-one] years of coal dust exposure was not [also] a factor in [c]laimant's obstructive disease." Decision and Order at 21; *see Clark*, 12 BLR at 1-155. Because determining the credibility of the medical experts is a matter within the sound discretion of the administrative law judge, we affirm the administrative law judge's finding that the opinions of Drs. Repsher and Castle were not persuasive. *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*).

Employer also contends that the administrative law judge erred in finding that Dr. Cohen's opinion was sufficient to support a finding that claimant suffers from legal pneumoconiosis. Decision and Order at 21; Employer's Brief at 2-5. Employer argues that while Dr. Cohen "cited a number of scientific journal articles in support of his general opinion," the doctor "pointed to nothing in the medical data concerning this specific claimant that supports his opinion" that claimant's COPD is due in part to coal dust exposure. Employer's Brief at 2-4. Employer notes that "it is incumbent upon the [c]laimant to demonstrate that his legal pneumoconiosis is the result of his coal mine dust exposure," and further asserts that Dr. Cohen's conclusion that "coal mine dust exposure *can not be ruled out* as a cause of COPD is insufficient to prove that coal dust is in fact a cause of this [c]laimant's COPD." Employer's Brief at 3-4 (emphasis in original). Employer's argument with respect to Dr. Cohen is without merit.

The administrative law judge permissibly found Dr. Cohen's opinion to be "well-documented and well-reasoned" since Dr. Cohen reviewed all of the medical records available in this case and explained why "[c]laimant's history of exposure to coal dust, symptoms, physical findings, and test results, all support a finding of pneumoconiosis." Decision and Order at 20; *see Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge was also persuaded by Dr. Cohen's explanation as to why claimant's pulmonary function studies were consistent with exposure to coal dust, stating:

[Dr. Cohen] explained that the reversible component of [claimant's] obstructive disease does not rule out coal mine dust as a cause of his obstructive disease, because his function did not normalize with the administration of bronchodilators, but rather showed a fixed and permanent defect.

*See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Swiger*, 98 Fed. Appx. at 237; *Clark*, 12 BLR at 1-155; Decision and Order at 20.

Moreover, the administrative law judge acted within her discretion in finding that Dr. Cohen's opinion is entitled to "greatest weight" in this case because "he possesses the strongest qualifications of all of the doctors who offered opinions." *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). The administrative law judge accurately summarized Dr. Cohen's qualifications as follows:

Dr. Cohen is also a board-certified pulmonologist, who currently practices as a Senior Attending Physician in the Division of Pulmonary Medicine/Critical Care at Cook County Hospital in Chicago, Illinois. He is also the Medical Director of the Pulmonary Physiology and Rehabilitation Divisions of Pulmonary and Occupational Medicine and the Black Lung Clinics Program. He is an assistant professor of Environmental and Occupational Health and Safety at the University of Illinois. He has published 35 articles or abstracts, the latest in 2006, nearly all of which involved the treatment of coal workers' pneumoconiosis, silicosis, sarcoidosis or tuberculosis. He is the course director for NIOSH certification in spirometry.

Decision and Order at 18. We affirm the administrative law judge conclusion that Dr. Cohen "possess[es] excellent credentials in the field of pulmonary disease" and that his opinion is sufficient to satisfy claimant's burden to establish that he suffers from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>5</sup>

Lastly, we reject employer's contention that the administrative law judge erred in finding that claimant established that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). The administrative law judge permissibly credited Dr. Cohen's opinion as to the etiology of claimant's disabling COPD based on his superior qualifications, as discussed *supra*. Moreover, the administrative law judge properly assigned no weight to the opinions of Drs. Repsher and Castle at 20 C.F.R. §718.204(c), as they did not diagnose either clinical or legal pneumoconiosis. *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Insofar as the administrative law judge found that Dr. Cohen provided a reasoned and documented opinion that claimant is totally disabled due, at least in part, to coal dust exposure, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c). *See Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991)

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<sup>5</sup> Because the administrative law judge acted within her discretion in assigning greater weight to Dr. Cohen's opinion, in comparison to the contrary opinions of Drs. Repsher and Castle, it is not necessary that we address employer's assertion that the diagnoses of pneumoconiosis by Drs. Harris and Houser are not reasoned.

In light of our affirmance of the administrative law judge's finding that claimant has established all of the elements of entitlement under 20 C.F.R. Part 718, we also affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding 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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REGINA C. McGRANERY  
Administrative Appeals Judge