BRB No. 09-0652 BLA

FLOYD HOWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRACY COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 06/23/2010
	)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY	)	
	)	
	)	
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

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

Emily Goldberg-Kraft (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2006-BLA-06135) of Administrative Law Judge Pamela Lakes Wood rendered on a subsequent claim[1] filed pursuant to 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). In a Decision and Order dated May 14, 2009, the administrative law judge found that the record established twelve years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, thus, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Adjudicating the claim on its merits, the administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of his coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203 and 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 contends that the administrative law judge erred in weighing the conflicting medical opinions as to whether claimant has pneumoconiosis and, therefore, erred in concluding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer further asserts that the administrative law judge erred in finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging

[1] Claimant has filed three previous claims for benefits. Claimant's initial claim was filed on May 23, 1988, and was denied by the district director on October 20, 1988, because the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on November 22, 1996, which was denied by the district director on March 17, 1997, because the evidence was insufficient to establish total disability. Director's Exhibit 2. Claimant filed a third claim on May 15, 2002. Director's Exhibit 3. In a Proposed Decision and Order dated August 31, 2004, the district director denied benefits on the grounds that the evidence was insufficient to establish the existence of pneumoconiosis and total disability claim on October 4, 2005. Director's Exhibit 4. . *Id.* Claimant took no action with regard to the denial of his claim until he filed the current subsequent

affirmance of the award of benefits.[2] The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe 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, 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*).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of

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[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but that he established total disability pursuant to 20 C.F.R. §718.204(b). *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).

[3] By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Black Lung Benefits Act (the Act) with respect to the entitlement criteria for certain claims. *Howell v. Tracy Coal Co.*, BRB No. 09-0652 BLA (Mar. 30, 2010) (unpub. Order). Employer, and the Director, Office of Workers' Compensation Programs (the Director), have responded and assert that Section 1556 is inapplicable to this claim because the administrative law judge only credited claimant with twelve years of coal mine employment.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 6.

entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim, filed on May 15, 2002, was denied because the evidence did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing either the existence of pneumoconiosis or total disability in order to have his subsequent claim reviewed on the merits. *See White*, 23 BLR at 1-3.

Employer contends that the administrative law judge's findings, that claimant established the existence of legal pneumoconiosis and a change in an applicable condition of entitlement, are "not supported by well-reasoned and documented medical opinions."[5] Employer's Brief at 6. We disagree.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Forehand, Dahhan and Rasmussen.[6] Decision and Order at 13-16. Dr. Forehand examined claimant on November 29, 2005, at the request of the Department of Labor, and reported that claimant worked for fifteen years in the coal mines and smoked cigarettes for thirty-nine years. Director's Exhibit 16. He opined that a pulmonary function study showed an obstructive respiratory impairment, while an arterial blood gas study showed normal values at rest, but revealed exercise-induced arterial hypoxemia. *Id*. Dr. Forehand diagnosed coal workers' pneumoconiosis, based on claimant's "occupational history, review of [symptoms], physical examination, chest x-ray and arterial blood gas study." *Id*. He also diagnosed "cigarette smoker's lung disease" based on claimant's social history and the results of the pulmonary function study. *Id*. Dr. Forehand opined that claimant had a significant respiratory impairment, "much more consistent with a history of exposure to silica dust from roof bolting," than a condition caused by smoking, based on evidence of scarring in the lungs and the exercise-induced arterial hypoxemia demonstrated on arterial blood gas testing. *Id*.

In a deposition conducted on June 26, 2006, Dr. Forehand testified that, during his physical examination of claimant, he "heard crackles in the chest" suggesting "some type of interstitial lung disease." Employer's Exhibit 3 at 6. He also explained why claimant's blood gas study results were consistent with coal dust exposure and not smoking. He described the following as a pattern of impairment seen with smokers:

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[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id*.

[6] Dr. Broudy did not provide an opinion as to whether claimant had pneumoconiosis. Decision and Order at 7; Employer's Exhibit 7.

> They come in. They're abnormal at rest. They're borderline abnormal. They're already impaired. And then the exercise just makes that impairment that much worse. And along with that, you see an elevated carbon dioxide level because they're CO2 retainers. That's just the nature of impairment that arises from cigarette smoking.

Id. at 10-12, 15. In contrast, Dr. Forehand stated that claimant's pattern of impairment, with a "a perfectly normal resting blood gas, and then . . . a significant fall with exercise, yet his carbon dioxide remains normal," is a pattern of impairment associated more with coal dust exposure. *Id*. at 12-13. Dr. Forehand further noted, "[I]f you look at the type of coal mining [claimant] did, his entire underground tenure was that of a roof bolter. These are the people who develop these types of impairments. He's not breathing coal dust. He's a guy that breathed silica the whole time because he's drilling into hard rock." *Id*.

Dr. Dahhan examined claimant on March 4, 2006, and reported that a pulmonary function study was consistent with an "extra parenchymal restrictive ventilatory defect," while the arterial blood gas study showed normal values at rest and during exercise. Director's Exhibit 18. He noted that claimant worked in the mining industry for fifteen years as an underground roof bolter and smoked a pack of cigarettes a day for thirty-seven years. *Id*. Dr. Dahhan diagnosed chronic obstructive pulmonary disease (COPD) and coronary artery disease, and opined that claimant's "pulmonary disability was not caused by, related to, or contributed to or aggravated by the inhalation of coal dust." *Id*. In support of this opinion, Dr. Dahhan noted that claimant had not had any exposure to coal dust since 1987, "a duration of absence sufficient to cause cessation of any industrial bronchitis," and that there was no evidence of a restrictive impairment. *Id*.

Dr. Rasmussen examined claimant on March 22, 2007, and reported that claimant had radiographic evidence for coal workers' pneumoconiosis. Claimant's Exhibit 1. He noted that claimant worked in coal mines for fifteen years and smoked cigarettes for thirty-nine years. *Id*. Dr. Rasmussen reported that a pulmonary function study revealed moderate, irreversible restrictive and obstructive ventilatory impairment, while an exercise arterial blood gas study revealed moderate impairment of oxygen transfer. *Id*. He opined that claimant suffers from a moderate loss of lung function, as reflected by the impairment in oxygen transfer during exercise, and that claimant is totally disabled. *Id*. Dr. Rasmussen opined that both smoking and coal mine dust exposure contribute to "claimant's disabling lung disease." *Id*. He also concluded that claimant has clinical pneumoconiosis, which contributes in a significant fashion to his disabling chronic lung disease." *Id*.

In weighing the conflicting medical opinions at 20 C.F.R §718.202(a)(4), the administrative law judge first stated that she did "not find a basis for discrediting any of the opinions based upon the employment or smoking histories considered by the

physicians." Decision and Order at 14. The administrative law judge found Dr. Forehand's opinion to be better reasoned than the opinion of Dr. Dahhan because Dr. Forehand provided a "detailed explanation" as to why claimant's "pattern of impairment" is most consistent with coal dust exposure. *Id*. at 15. The administrative law judge also found that, "[w]hile not as clearly stated," Dr. Rasmussen's opinion was corroborative of Dr. Forehand's opinion. *Id*. at 18. Thus, the administrative law judge concluded that the newly submitted medical opinions of Drs. Forehand and Rasmussen were sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also determined, based on a review of all of the record evidence, that claimant satisfied his burden to establish that he has pneumoconiosis. Crediting the opinion of Dr. Forehand on the issue of disability causation, the administrative law judge further found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and awarded benefits.

Employer argues that the administrative law judge erred in finding the opinions of Drs. Forehand and Rasmussen to be reasoned and documented and sufficient to meet claimant's burden of proof. Employer's Brief at 3-5. Initially, we reject employer's contention that, because Dr. Forehand did not have an accurate history of claimant's coal mine dust exposure, the administrative law judge was required to assign Dr. Forehand's opinion little weight. *Id*. at 4. Contrary to employer's assertion, the weight and credibility of a physician's opinion is within the sound discretion of the trier of fact. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). In this case, the administrative law judge specifically addressed the fact that Dr. Forehand relied on a fifteen year coal mine employment history, which conflicted with her finding of twelve years of coal mine employment, and rationally determined that "in view of the fact that [claimant's] employment occurred during a period of [fifteen] years, extending from 1974 to 1988," the difference was not significant "or a basis for discrediting [his] opinion." Decision and Order at 14.

Employer also argues that the administrative law judge erred in relying on "Dr. Forehand's statement that [c]laimant's pulmonary condition was 'consistent with' a history of exposure to silica dust" to find that claimant established legal pneumoconiosis. Employer's Brief at 4. Employer maintains that "silicosis can only be diagnosed by positive x-ray findings" and points to the fact that the administrative law judge found the x-ray evidence to be negative for pneumoconiosis. *Id*. Employer's assertion of error has no merit.

The administrative law judge properly recognized that the legal definition of pneumoconiosis encompasses any respiratory or pulmonary condition arising out of coal

mine employment. 20 C.F.R. §718.201. To the extent that Dr. Forehand diagnosed that claimant developed a respiratory condition as a result of working in coal mine employment as a roof bolter, where he was exposed to both coal dust and silica, we affirm the administrative law judge's determination that Dr. Forehand's opinion is supportive of a finding of legal pneumoconiosis. *See Crockett Collieries, Inc., v. Director, OWCP* [*Barrett*], 478 F.3d 350, 355, 23 BLR 2-472, 2-482 (6th Cir. 2007); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002).

We also reject employer's assertion that the administrative law judge erred in finding Dr. Forehand's opinion to be reasoned and documented. The administrative law judge specifically explained why she found Dr. Forehand's opinion to be the most persuasive of record:

> At his deposition, [Dr. Forehand] discussed in great detail why the pattern of impairment suggested that it was caused by coal mine dust, and particularly silica that was a byproduct of roof bolting. Rather than reproduce it here, I merely incorporate by reference Dr. Forehand's testimony at pages 5 to 16 of his deposition transcript. With respect to his physical, he found the presence of crackles and the absence of outward signs of congestive heart failure to be of significance. . . . He noted that the pattern of exercise arterial hypoxemia (coupled with normal resting blood gases) that he found was more consistent with a coal mine employment history than with smoking, which usually involves resting impairment. He also noted that [c]laimant's employment as a roof bolter resulted in his exposure to significant amounts of silica, and roof bolters were therefore likely to develop the kinds of impairment that [c]laimant has. Dr. Forehand relied in part upon [c]laimant's pattern of response to exercise, and, while the exercise oxygen transfer abnormalities he found during his examination were not found during Dr. Dahhan's exercise testing, they were found during Dr. Rasmussen's exam. It is worth noting that Dr. Dahhan's exercise testing was prematurely terminated. . . . Dr. Forehand['s] diagnosis is stated in a manner that would satisfy the definition for legal pneumoconiosis

Decision and Order at 14. Because the administrative law judge permissibly exercised her discretion in finding that Dr. Forehand provided a credible rationale for attributing claimant's respiratory condition to coal dust exposure, we affirm the administrative law judge's determination to accord Dr. Forehand's opinion controlling weight as to the existence of legal pneumoconiosis. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek*

Coal Co., 10 BLR 1-19 (1987). Moreover, contrary to employer's contention, although the administrative law judge did not find Dr. Rasmussen's opinion to be "as clearly stated" as Dr. Forehand's opinion, she reasonably found that Dr. Rasmussen's opinion was "corroborative" of a finding of legal pneumoconiosis as "he has explained how the two etiological factors of occupational dust exposure and cigarette smoking were both contributors to the [c]laimant's impairment." Decision and Order at 15; *see Barrett*, 478 F.3d at 355, 23 BLR at 2-482.

The administrative law judge has broad discretion in assessing the credibility of the medical experts and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). We therefore affirm the administrative law judge's finding that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[7] We further affirm the administrative law judge's overall finding that claimant established the existence of legal pneumoconiosis, based on her review of the record evidence as a whole. *Id*.

Employer's final argument is that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer asserts that the administrative law judge erred in relying on Dr. Forehand's "statement that [c]laimant's oxygen transfer abnormality was 'consistent' with silica exposure," in concluding that claimant satisfied his burden of proof. Employer's Brief at 6. Employer's assertion of error, however, is identical to the argument raised by employer at 20 C.F.R. §718.202(a)(4), and is rejected. We therefore affirm the administrative law judge's finding that Dr. Forehand's opinion is reasoned and documented and sufficient to establish that claimant is totally disabled due, in part, to coal dust exposure. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Clark*, 12 BLR at 1-151. Thus, we affirm, as supported by

[7] Employer has summarized the opinions of Drs. Dahhan and Broudy in its brief, but has not identified any error on the part of administrative law judge in according the opinions of Drs. Dahhan and Broudy less weight at 20 C.F.R. §718.202(a)(4). Thus, we affirm the administrative law judge's credibility findings with regard to these physicians. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

substantial evidence, the administrative law judge's finding at 20 C.F.R. §718.204(c) and the award of benefits.[8]

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[8] In light of the foregoing, we hold that application of the recent amendments to the Act, which became effective on March 23, 2010, would not alter the outcome of this case**.** *See* 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*)).