BRB No. 12-0534 BLA

GEORGE W. FLENNIKEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 05/20/2013
	)	
CYPRUS EMERALD RESOURCES CORPORATION	)	
	)	
	)	
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 on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2008-BLA-5029) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944

(Supp. 2011) (the Act).[1] This case involves a miner's claim filed on November 7, 2006, and is before the Board for the second time.

In a Decision and Order dated May 6, 2010, Administrative Law Judge Daniel L. Leland credited claimant with fourteen and one-half years of coal mine employment,[2] based on the parties' stipulation and his review of the evidence, and found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Leland denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Leland's findings that claimant worked for fourteen and one-half years in coal mine employment, that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that the medical opinion evidence did not establish clinical pneumoconiosis[3] at 20 C.F.R. §718.202(a)(4). *Flenniken v. Cyprus Emerald Resources Corp.*, BRB No. 10-0502 BLA, slip op. at 2, n.2 (May 19, 2011) (unpub.). The Board vacated, however, Judge Leland's finding that claimant did not establish the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for him to reconsider the medical opinion evidence on that issue. *Id.* at 6. The Board instructed Judge Leland that, in order to establish legal pneumoconiosis, claimant need not prove that coal mine dust exposure is the only cause of his chronic obstructive pulmonary disease (COPD). *Id.* The Board further noted the contention, raised by the Director, Office of Workers' Compensation Programs (the Director), that Judge Leland should reconsider the credibility of the opinions of Drs. Altmeyer and Fino in light of 20 C.F.R. §718.201(c), because these physicians used the delayed onset of claimant's

[1] The 2010 amendments to the Act, which became effective on March 23, 2010, do not apply to this case, since claimant did not establish fifteen years of coal mine employment.

[2] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] "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." 20 C.F.R. §718.201(a)(1).

[4] "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).

COPD, after he left coal mining, as a reason to exclude coal mine employment as a cause. *Id.* The Board directed Judge Leland to address the Director's contention on remand. *Id.* at 6-7. Finally, because the Board vacated Judge Leland's finding of no legal pneumoconiosis, it also vacated his finding that claimant did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

On remand, due to Judge Leland's retirement, the case was reassigned, without objection, to Administrative Law Judge Thomas M. Burke (the administrative law judge). In a Decision and Order on Remand issued on June 26, 2012, the administrative law judge considered the medical opinions of Drs. Celko, Parker, Rasmussen, Fino, and Altmeyer, and found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 2-7. The administrative law judge further found that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). *Id.* at 8. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis, and that claimant is totally disabled due to legal pneumoconiosis.[5] Claimant responds in support of the administrative law judge's award of benefits. The Director has not filed a response brief.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In considering, on remand, whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge evaluated the opinions of Drs. Celko, Parker, Rasmussen, Fino, and Altmeyer, as instructed by the Board. While all of the physicians agreed that claimant is totally

[5] Because employer does not challenge the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disabled due to COPD, they disagreed as to the etiology of claimant's COPD. Drs. Celko, Parker, and Rasmussen opined that claimant's COPD is due to his smoking history and coal mine dust exposure, with Drs. Celko and Rasmussen noting asthma as an additional contributing cause. Director's Exhibit 12; Claimant's Exhibits 2, 3, 7; Employer's Exhibit 6. In contrast, Drs. Altmeyer and Fino concluded that claimant's COPD is caused by asthma, unrelated to his coal mine employment. Director's Exhibit 15; Employer's Exhibits 1, 9, 11. Dr. Altmeyer further believed that smoking may be an additional cause of claimant's COPD, and noted that, while he could not diagnose legal pneumoconiosis "with certainty," he recognized the "possibility that there could be some in [claimant's lungs]." Employer's Exhibit 9 at 28, 33. In excluding coal mine dust exposure as a contributing cause, Drs. Altmeyer and Fino opined that it would be unusual for claimant to have developed symptoms as a result of such exposure more than ten years after leaving coal mining, and indicated that they believed clinical pneumoconiosis, but not legal pneumoconiosis, may be latent and progressive. Employer's Exhibit 1 at 6-7; Employer's Exhibit 9 at 30, 34, 40-41; Employer's Exhibit 11 at 20-22, 25.

On remand, the administrative law judge found that Dr. Parker's opinion, that claimant's COPD is due to smoking and coal mine dust exposure, was well-reasoned and documented, because the physician explained why claimant's coal mine employment history, smoking history, and objective test results supported his conclusion that claimant's severe airflow obstruction is substantially contributed to by coal mine dust. Decision and Order on Remand at 5. The administrative law judge further noted that Dr. Parker referred to several medical studies supporting his opinion. *Id.* The administrative law judge also found that Dr. Parker's opinion was supported by the opinions of Drs. Celko and Rasmussen, who similarly opined that coal mine dust contributed to claimant's pulmonary impairment.[6] *Id.* In contrast, the administrative law judge found the opinions of Drs. Fino and Altmeyer to be contrary to the plain language of the regulations and based on premises contrary to the findings of the Department of Labor (the Department), as set forth in the preamble to the revised regulations, as each physician "ruled out coal mine dust as a contributing factor [to claimant's pulmonary impairment] primarily because [c]laimant's symptoms did not begin until ten years after he left coal mine employment," and further "appear[ed] to opine that only simple [clinical] or complicated pneumoconiosis is latent and progressive." *Id.* at 5-6. Therefore, the administrative law judge gave their opinions less weight. *Id.* Relying on the opinion of Dr. Parker, as supported by the opinions of Drs. Celko and Rasmussen, the administrative law judge concluded that the medical opinion evidence established the existence of legal pneumoconiosis, at 20 C.F.R. §718.202(a)(4). *Id.* at 7.

[6] Additionally, the administrative law judge found that Drs. Rasmussen and Parker are the most qualified physicians, based on their credentials and experience. Decision and Order on Remand at 6-7.

Employer asserts that the administrative law judge erred in relying on language from the preamble to the regulations to discount the opinions of Drs. Fino and Altmeyer. Initially, to the extent employer challenges the administrative law judge's references to the preamble, employer's contention lacks merit. Employer's Brief at 9. The administrative law judge had the discretion to consult the preamble to the regulations as setting forth the bases for the Department's revision of the definition of pneumoconiosis to include obstructive respiratory or pulmonary impairments arising out of coal mine dust exposure. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *see also A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). We therefore reject any contention by employer that the administrative law judge erred by referring to the preamble.

We also reject employer's alternative contention that the administrative law judge erred in finding that Drs. Fino and Altmeyer relied on reasoning that was contrary to the medical and scientific premises set forth in the preamble to the regulations. Employer's Brief at 10-13. The regulations define legal pneumoconiosis as including any chronic lung disease or impairment arising out of coal mine employment, and recognize it as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(a)(2), (c); *see* 65 Fed. Reg. 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."). The administrative law judge properly found that Drs. Fino and Altmeyer, in ruling out the existence of legal pneumoconiosis, primarily relied on the fact that claimant had been out of the coal mines for over ten years before reporting symptoms associated with a respiratory impairment.[7] Decision and Order on Remand at 5-6; Employer's Exhibit 1 at 6-7; Employer's Exhibit 9 at 34; Employer's Exhibit 11 at 21, 29-30. Moreover, the administrative law judge correctly noted that while both Dr. Fino and Dr. Altmeyer acknowledged that coal dust-induced lung disease can be latent

[7] Specifically, the administrative law judge noted Dr. Fino's testimony that he "put[] a lot of weight" on the fact that claimant's symptoms began long after he left the mines, and that "it would be really unusual" for coal dust to be a cause of the miner's chronic obstructive pulmonary disease (COPD). Decision and Order at 5-6; Employer's Exhibit 11 at 21, 29-30. The administrative law judge also noted Dr. Altmeyer's similar opinion that "[i]t would be most unusual" for claimant's respiratory symptoms to have developed over ten years since his last exposure, and for that reason "in particular" he does not believe coal dust contributed to claimant's impairment. Decision and Order at 6; Employer's Exhibits 1, 9 at 34.

and progressive, each physician opined that latency and progressivity occurs with simple clinical, or complicated, coal workers' pneumoconiosis, but not with legal pneumoconiosis. Decision and Order at 6; Employer's Exhibits 9 at 34, 40-41, 11 at 20-22. The administrative law judge acted within his discretion in finding that the reasoning utilized by Drs. Fino and Altmeyer, that only simple clinical or complicated pneumoconiosis may be latent and progressive, cannot be reconciled with the Act or its implementing regulations.[8] *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-34-35 (2004), *citing National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). We therefore conclude that the administrative law judge permissibly found the reasoning of Drs. Fino and Altmeyer, regarding the etiology of claimant's COPD, to be contrary to the plain language of the regulations and the preamble, and we affirm his determination to discount their opinions. *Obush*, 650 F.3d at 256-57, 24 BLR at 2-383; *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009).

Employer next asserts that the administrative law judge erred in crediting the opinions of Drs. Celko, Parker, and Rasmussen, that claimant suffers from legal pneumoconiosis. Employer's arguments regarding the administrative law judge's consideration of the opinions of Drs. Celko, Parker, and Rasmussen amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In weighing the conflicting medical opinion evidence, the administrative law judge properly addressed the explanations provided by the physicians for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[9] *See Kertesz v. Crescent Hills Coal Co.*,

[8] Specifically, the administrative law judge found, correctly, that the definition of pneumoconiosis at 20 C.F.R. §718.201(c) does not limit its latent and progressive language to simple clinical or complicated pneumoconiosis, and that the preamble to the regulations explicitly recognizes that impairments that arise from coal mine employment may arise after a latent period "regardless of whether a miner shows [x]-ray evidence of pneumoconiosis." 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,971 (Dec. 20, 2000); Decision and Order at 6.

[9] As we have affirmed the administrative law judge's determination that the opinions of Drs. Fino and Altmeyer are unreasoned, we need not address employer's contention that the administrative law judge erred in also finding them to be less highly qualified than Drs. Parker and Rasmussen. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 17.

788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order on Remand at 5-7. The administrative law judge's decision to accord the greatest weight to Dr. Parker's opinion, as supported by the opinions of Drs. Celko and Rasmussen, is supported by substantial evidence. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004). We therefore affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD due in part to coal mine dust exposure. 20 C.F.R. §718.202(a)(4).[10]

Employer next asserts that, in considering the cause of the miner's totally disabling impairment pursuant to 20 C.F.R. §718.204(c), the administrative law judge erred in crediting the opinions of Drs. Parker, Celko, and Rasmussen, over those of Drs. Fino and Altmeyer. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Fino and Altmeyer, finding that the same reasons for which he discredited their opinions as to the existence of legal pneumoconiosis also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Soubik*, 366 F.3d at 234, 23 BLR at 2-99; *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 8. Moreover, having discredited the only contrary evidence of record, and having rationally relied on the reasoned and documented opinion of Dr. Parker, as corroborated by the opinions of Drs. Celko and Rasmussen, to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on their opinions to find that claimant is totally disabled due, in part, to legal pneumoconiosis. *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Because the administrative law judge's finding at 20 C.F.R. §718.204(c) is supported by substantial evidence, it is affirmed. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97. As claimant has established each element of entitlement, we affirm the award of benefits.

[10] The administrative law judge properly recognized that his finding of legal pneumoconiosis necessarily subsumed the inquiry of whether claimant's pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203; *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order on Remand at 8.

Accordingly, the administrative law judge's Decision and Order on Remand awarding 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