BRB No. 06-0981 BLA

D.P.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
H & P COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	DATE ISSUED: 09/25/2007
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-5233) of Administrative Law Judge Adele Higgins Odegard on a claim[1] filed pursuant to the

[1] Claimant filed the instant claim, which is pending herein on appeal, on December 1, 2003. Director's Exhibit 3.

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 the Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and, after crediting the parties' stipulation that claimant worked in qualifying coal mine employment for seventeen years, found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded, commencing October 2003, the first day of the month in which the administrative law judge found the miner became totally disabled.

On appeal, employer argues that the administrative law judge erred in her analysis of the medical evidence when she found that claimant affirmatively established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Specifically, employer argues that the administrative law judge failed to properly resolve the conflict in the medical opinions or provide an adequate explanation for crediting the opinion of Dr. Baker, that claimant had coal workers' pneumoconiosis, chronic obstructive pulmonary disease and chronic bronchitis attributable to coal dust exposure, over the contrary opinions of Drs. Westerfield and Broudy, who opined that claimant does not suffer from clinical or legal pneumoconiosis. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 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).[3]

Challenging the administrative law judge's weighing of the conflicting medical opinions of record, employer argues that the administrative law judge erred in finding

[2] We affirm the administrative law judge's determinations with respect to length of coal mine employment and that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2 n.1,13-16; *see* Employer's Brief in Support of Petition for Review at 13.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

that Dr. Westerfield's opinion was "based on speculation and inaccurate information," since Dr. Westerfield's conclusion was based on his review of hospital medical records, a physical examination of claimant, a chest x-ray interpretation, pulmonary function studies, and arterial blood gas studies yielding results that were not demonstrative of simple pneumoconiosis. Employer further asserts that the administrative law judge's determination that Dr. Westerfield based his opinion purely on the recency of claimant's symptoms is unfounded, because Dr. Westerfield observed that the nature of claimant's acute symptomotology was sudden and severe, and that it neither precluded claimant from working in comparable jobs nor required any treatment until fourteen years after claimant left the coal mines. Employer asserts, likewise, that Dr. Westerfield's opinion that the sudden occurrence of claimant's symptoms was not tantamount to a belief that pneumoconiosis cannot be progressive. Finally, employer contends that the administrative law judge impermissibly shifted the burden of proof to employer to prove that coal mine employment did not cause claimant's respiratory impairment when he discounted Dr. Westerfield's opinion based on the physician's initial speculation as to potential causes of claimant's pulmonary impairment. Employer's arguments are without merit.

In assessing the probative value of the conflicting medical opinion evidence, the administrative law judge found that the opinion of Dr. Westerfield, that claimant's ventilatory dysfunction was due to repeated respiratory infections unrelated to coal dust exposure, was unpersuasive due to the inconsistency between Dr. Westerfield's deposition testimony that claimant had no respiratory symptoms upon cessation of his coal mine employment compared to Dr. Westerfield's own recordation in his July 21, 2004 report that claimant "worked in mining until 1989 when he reports he quit because of his breathing." *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984); Decision and Order at 10-11; Director's Exhibit 35 at 4. Noting that pneumoconiosis is consistently characterized as a latent and progressive disease, the administrative law judge was not persuaded by Dr. Westerfield's opinion that claimant's respiratory impairment was unrelated to his coal dust exposure in view of the time that elapsed (fourteen years) between the cessation of claimant's coal mine employment and the onset of his severe respiratory disability. Because it is well established that a miner may develop pneumoconiosis after a period of years during which he was not employed as a coal miner, the administrative law judge reasonably found Dr. Westerfield's opinion less persuasive on this basis. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); Decision and Order at 9; Director's Exhibit 35; Employer's Exhibit 1 at 12-13, 15, Employer's Exhibit 3. The administrative law judge found further that the

probative value of Dr. Westerfield's opinion was undermined because Dr. Westerfield not only overstated the length of claimant's employment as a mechanic in a motorcycle dealership, but also speculated that claimant's pulmonary disease may be the result of exposure to hazardous fumes while he worked as a mechanic, despite the absence of any evidence in the record demonstrating such exposure in his post-coal mine employment. Decision and Order at 9 n.12, 13, 14. In addition, the administrative law judge found that Dr. Westerfield's supplemental report dated March 11, 2005 failed to rehabilitate his opinion because he did not attribute claimant's pulmonary condition to congestive heart failure after he had administered a physical examination to claimant in 2004, notwithstanding that claimant was hospitalized for this condition in 2003. Lastly, the administrative law judge found that Dr. Westerfield's attribution of claimant's pulmonary condition to repeated respiratory infections was unconvincing since the physician could neither identify the etiology of such infections nor resolve why they precluded improvement in claimant's condition. Decision and Order at 12 n. 17. Accordingly, contrary to employer's contention that the administrative law judge shifted the burden of proof to employer, the administrative law judge, instead, found the opinion of Dr. Westerfield entitled to little weight as it was inconsistent, speculative, and contradictory. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); *Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984); Decision and Order at 11. Because the administrative law judge's analysis constitutes a proper evaluation of Dr. Westerfield's opinion, employer's arguments are rejected.

Employer next asserts that the administrative law judge erred in finding that Dr. Broudy's opinion was conclusory since, employer argues, Dr. Broudy based his opinion on a review of claimant's chest x-ray interpretations, pulmonary function studies, arterial blood gas studies, and other diagnostic tests. Employer avers further that Dr. Broudy's observation, that claimant's performance on the pulmonary function studies was suboptimal, was not necessarily inconsistent with the results obtained on the actual studies, and therefore, was an insufficient basis for rejecting his opinion.

Employer's contentions again lack merit. While the administrative law judge noted that Dr. Broudy's June 14, 2004 narrative report contained a "complete description of the Claimant's physical condition," it was not irrational for the administrative law judge to find that Dr. Broudy's opinion, that he did not "believe that [claimant] has coal workers' pneumoconiosis, silicosis, or any chronic lung disease caused by the inhalation of coal mine dust," was conclusory, as the physician provided no accompanying rationale. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 10; Director's Exhibit 29. Further, consistent with the administrative law judge's finding, Dr. Broudy's report indicated that claimant's effort on spirometry was "somewhat lacking" and "not good,"

contrary to the technician's comments that claimant provided a "fairly good effort." Director's Exhibit 29. After reviewing Dr. Broudy's testimony from his deposition taken on July 22, 2004, the administrative law judge, likewise, permissibly discounted Dr. Broudy's attribution of claimant's restrictive ventilatory defect to non-occupational diseases such as morbid obesity, diseases of the chest wall, neuromuscular diseases, or heart disease because she rationally found the opinion speculative. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Director's Exhibit 37 at 12-13, 15. Because the administrative law judge's determination, that Dr. Broudy's opinion was conclusory and unexplained, is rational and supported by substantial evidence, we affirm her rejection of Dr. Broudy's opinion as not well- reasoned. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 10.

Finally, employer avers that the medical opinion of Dr. Baker is insufficient to establish the existence of pneumoconiosis and disability causation. Specifically, employer argues that Dr. Baker's opinion is not well-reasoned because Dr. Baker relied upon pulmonary function studies that were subsequently invalidated and failed to adequately address alternate causes of claimant's pulmonary impairment, other than coal dust exposure.

After administering a complete pulmonary evaluation of claimant, Dr. Baker wrote a narrative report on January 9, 2004 and diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis, all attributable to coal dust exposure, resulting in severe hypoxemia and a moderate obstructive defect. Director's Exhibit 12. Pursuant to the request of the district director for further clarification on certain issues, Dr. Baker reiterated his prior diagnoses of coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis in a supplemental report dated August 9, 2004. He further opined that while the pulmonary impairment of claimant, who is a non-smoker, could be the result of asthma or other related causes, "the only obvious cause is that of coal dust exposure." Director's Exhibit 38.

Employer is correct that Dr. Baker's January 2004 examination of claimant was accompanied by a pulmonary function study that yielded qualifying values and was subsequently invalidated by Dr. Burki. Director's Exhibit 12 at 6-7. However, Dr. Baker administered a second pulmonary function study to claimant on April 19, 2004 that, likewise, resulted in qualifying values but was not invalidated. Director's Exhibit 12 at 2. A review of the Decision and Order reveals that, after analyzing Dr. Baker's January 9, 2004 report, the administrative law judge criticized Dr. Baker's diagnosis of a moderate obstructive defect and severe resting arterial hypoxemia based on the physician's failure to "specifically articulate how coal dust exposure caused these conditions" or to "explain how the objective medical tests demonstrated that claimant's conditions were due to coal

dust exposure rather than some other source." Decision and Order at 10. However, after examining Dr. Baker's August 9, 2004 supplemental report, the administrative law judge, within a permissible exercise of her discretion, determined that Dr. Baker's clarification of his original opinion that coal dust exposure was "the only obvious cause" was sufficient to cure the deficiencies in his January 2004 report. Hence, the administrative law judge rationally found that Dr. Baker's opinion was worthy of determinative weight as Dr. Baker was familiar with claimant's three hospitalizations in 2003, claimant's symptoms of wheezing and dyspnea attributable to no particular source, his coal mine employment history of seventeen years, his medical history, his physical examination, and the results of the diagnostic studies performed. This was rational. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002), *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (court has categorically emphasized that it is for the administrative law judge as factfinder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter'."); *Fagg*, 12 BLR at 1-79; *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). To further bolster Dr. Baker's opinion, the administrative law judge accorded "some weight" to the opinion of Dr. Vaezy, claimant's treating physician, as Dr. Vaezy observed claimant over a period of months, administered objective medical tests, and documented the deterioration of claimant's pulmonary condition.[4] Relying on the opinion of Dr. Baker, and in part, on the opinion of Dr. Vaezy, the administrative law judge rationally determined that the compelling medical evidence of record established that claimant exhibited indications of severe chronic lung disease, particularly chronic bronchitis, which preceded his hospitalizations in 2003 and that no alternate etiology, other than coal mine employment, was plausible to account for his respiratory disability. Hence, the administrative law judge reasonably concluded that claimant's marked deterioration and progressive decline resulted from a "pre-existing respiratory impairment" directly attributable to the inhalation of coal dust in his coal mine employment. Decision and Order at 12. As this determination is rational and within the purview of the administrative law judge's discretion, we affirm the administrative law judge's findings pursuant to Sections 718.202(a), 718.203(b), and 718.204(c). *See Stephens*, 298 F.3d at 522, 22 BLR at 2-513.

Accordingly, because we affirm the administrative law judge's finding that claimant satisfied his burden of establishing that he suffers from coal workers' pneumoconiosis and is totally disabled due to pneumoconiosis, we affirm the administrative law judge's determination that claimant is entitled to benefits in this case.

[4] After performing a bronchoscopy on September 12, 2003, Dr. Vaezy reported that claimant "seems to have stage 1 coal workers' pneumoconiosis and a severe degree of chronic bronchitis." Director's Exhibit 14.

See Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge 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