BRB No. 09-0766 BLA

BILLY COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LITTLE DAVID COAL COMPANY	)	DATE ISSUED: 09/30/2010
	)	
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 Granting Modification and Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Modification and Awarding Benefits (2006-BLA-5277) of Administrative Law Judge Daniel F. Solomon rendered on a miner's claim filed pursuant to the provisions of 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). This case is before the Board for the second time. In his Decision and Order dated April 12, 2007, the administrative law judge credited claimant with seven years of qualifying coal mine employment, and adjudicated the claim, filed on February 2, 1991, pursuant to the provisions at 20 C.F.R. Parts 718 and 725, after determining that claimant's 2004 application for benefits was not a subsequent claim, but rather, a timely request for modification. The administrative law judge found no mistake in a prior determination of fact, but found that the evidence submitted in support of modification, considered in conjunction with the earlier evidence, was sufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in conditions pursuant to 20 C.F.R. §718.310 (2000).[1] The administrative law judge further found that the weight of the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's length of coal mine employment determination, and his findings that claimant's 2004 application for benefits constituted a timely request for modification, that there was no mistake in a prior determination of fact pursuant to Section 725.310 (2000), and that claimant established total disability pursuant to Section 718.204(b). The Board also affirmed the administrative law judge's award of attorney's fees to claimant's counsel, contingent on the successful prosecution of claimant's case. However, the Board vacated the administrative law judge's findings of legal pneumoconiosis at Section 718.202(a)(4), a change in conditions pursuant to Section 725.310 (2000), and disability causation at Section 718.204(c), and remanded the case for further consideration and discussion of the appropriate relevant evidence in compliance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). While the Board affirmed the administrative law judge's credibility determinations with respect to the opinions of Drs. Nida, Agarwal and Fino, the Board vacated his findings with respect to the opinions of Drs. Rasmussen and Hippensteel. The Board instructed the administrative law judge to reassess the opinions of Drs. Rasmussen and Hippensteel, and determine whether claimant satisfied his burden to establish the existence of legal pneumoconiosis based on

[1] The Department of Labor previously amended the regulations implementing the Black Lung Benefits Act. These regulations, found at 20 C.F.R. Parts 718, 722, 725 and 726 (2009), became effective on January 19, 2001. All citations to the regulations, unless otherwise noted, refer to the amended regulations. The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as the miner's claim herein, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

reasoned and documented medical opinion evidence at Section 718.202(a)(4), and disability causation at Section 718.204(c), if reached, taking into consideration the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. The Board further directed the administrative law judge to consider employer's assertion that granting modification does not render justice under the Act. *B.C.* [*Collins*] *v. Little David Coal Co*., BRB Nos. 07-0696 and 08-0184 (Nov. 26, 2008)(unpub.).

On remand, the administrative law judge found that the weight of the evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). The administrative law judge concluded, therefore, that claimant had established a change in conditions pursuant to Section 725.310 (2000), and that granting modification was appropriate. Consequently, the administrative law judge awarded benefits.

In the present appeal, employer contends that the administrative law judge applied an improper standard for assessing the modification petition, and failed to comply with the Board's instruction to consider whether granting modification would render justice under the Act. Employer further challenges the administrative law judge's weighing of the medical opinion evidence on the issues of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c), and alleges that he failed to comply with the provisions of the APA in crediting the opinion of Dr. Rasmussen. Arguing that the administrative law judge's actions raise questions as to his impartiality or ability to provide "just" proceedings, employer urges the Board to vacate the award of benefits and direct that this case be assigned to a different administrative law judge on remand. Employer further argues that in no event should benefits be payable prior to October 2004. Claimant and the Director, Office of Workers' Compensation Programs (the Director), both respond, urging affirmance of the award of benefits. The Director also asserts that the administrative law judge's grant of modification implicitly encompasses a determination that granting modification renders justice under the Act.[2] Employer has filed a reply in support of its position. By supplemental briefs, employer and the Director maintain that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the miner's claim was filed before January 1, 2005.

[2] The Director asserts that, contrary to employer's contention, "bad intent should [not] be inferred [merely] from the number of times [claimant] has requested modification." Director's Brief at 5.

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.[3] 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).

Employer contends that, in evaluating the medical opinion evidence relevant to the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge provided invalid reasons for crediting the opinion of Dr. Rasmussen over that of Dr. Hippensteel. Employer asserts that the administrative law judge substituted his view for the experts; failed to conduct the inquiry into the medical opinions as directed by the Board; and erroneously considered non-record material in making his determinations. Employer further maintains that the administrative law judge applied an incorrect legal standard in according less weight to the opinion of Dr. Hippensteel, by requiring him to rule out aggravation of claimant's condition by coal dust exposure. Lastly, employer asserts that the administrative law judge failed to adequately explain his rationale, in compliance with the provisions of the APA, for crediting the opinion of Dr. Rasmussen. Employer's Brief at 14-25.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the evidence sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge noted a consensus among the physicians rendering medical opinions, that claimant suffers from chronic obstructive pulmonary disease (COPD), but that the physicians disagreed as to the etiology of the disease.[4] The administrative law judge summarized the conflicting medical opinions of Dr. Rasmussen and Dr. Hippensteel, noting their underlying documentation, the employment and smoking histories relied upon, the relative qualifications of the physicians, and the physicians' explanations for their respective conclusions. Decision and Order on Remand at 3-4. The administrative law judge determined that Dr.

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was last employed in the coal mining industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

[4] The Board affirmed the administrative law judge's prior determination that the opinions of Drs. Nida, Agarwal, and Fino were entitled to diminished weight. *B.C.* [*Collins*] *v. Little David Coal Co.*, BRB Nos. 07-0696 and 08-0184, slip op. at 7, 8 (Nov. 26, 2008)(unpub.).

Rasmussen, while not Board-certified in pulmonary medicine was, nonetheless, "an acknowledged expert in the field of pulmonary impairments of coal miners" and the best qualified physician in this record to render an opinion, as he has significant experience in that field, and has done more recent research and writing on the subjects of pneumoconiosis and COPD than has Dr. Hippensteel. The administrative law judge further determined that Dr. Rasmussen's opinion was consistent with claimant's work history, medical history, objective testing, and the discussion of prevailing medical science in the preamble to the revised regulations. The administrative law judge therefore acted within his discretion in finding that Dr. Rasmussen's opinion, that claimant's hypoxia and disabling COPD/emphysema were related to both smoking and coal dust exposure, was cogent, persuasive, well-reasoned, and entitled to greater probative weight. Decision and Order on Remand at 5; Director's Exhibit 10, Claimant's Exhibit 1; *see* 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Contrary to employer's arguments, the administrative law judge could properly examine whether medical rationales are consistent with the conclusions contained in medical literature and scientific studies relied upon by the Department of Labor (DOL) in drafting the definition of legal pneumoconiosis. Thus, we reject employer's assertion that the administrative law judge's review of the medical opinions in light of such studies constituted use of non-record evidence, an untimely evidentiary ruling, or a denial of due process. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). The administrative law judge also permissibly accorded Dr. Rasmussen's opinion greater probative weight based, in part, on his expertise in the area of respiratory diseases in general, and coal dust-induced lung diseases in particular.[5] Decision and Order on Remand 3; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). By contrast, the administrative law judge acted within his discretion in finding that the opinion of Dr. Hippensteel, that claimant's COPD/bullous emphysema, was congenital and was aggravated by smoking, merited less weight because the doctor did not discuss the effects that claimant's coal dust exposure had on this condition, or whether claimant's bullous emphysema was aggravated by his coal dust exposure, as well as by his smoking. 20 C.F.R. §718.201(a)(2); Employer's Exhibits 1, 3; Decision and Order on Remand at 5; *Clark*, 12 BLR at 1-155. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330

[5] The administrative law judge noted that Dr. Rasmussen is an acknowledged expert in the field of pulmonary impairments of coal miners. Decision and Order on Remand at 3, *citing* 1972 U.S. Code Cong. Adm. News 2305, 2314; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

(6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) *citing Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77, 1-79 (1988). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4), and a change in conditions at Section 725.310 (2000).

We next address employer's contention that, in considering the cause of claimant's disabling impairment pursuant to Section 718.204(c), the administrative law judge erred in crediting the opinion of Dr. Rasmussen, which, employer asserts, is not legally sufficient to support a finding of disability causation. Employer's Brief at 25-26. We disagree. The administrative law judge permissibly discounted the opinions of Drs. Fino and Hippensteel, that claimant's disability is unrelated to pneumoconiosis, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). Furthermore, contrary to employer's contention, the administrative law judge properly relied on the opinion of Dr. Rasmussen, that coal dust exposure "contributed significantly" to claimant's disabling respiratory impairment, to support his finding that the evidence established disability causation. *See* 20 C.F.R. §718.201; *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989) (holding that a miner "must affirmatively establish only that his totally disabling respiratory impairment . . . was due 'at least in part' to his pneumoconiosis."); Director's Exhibit 10; Claimant's Exhibit 1. Consequently, we affirm the administrative law judge's findings at Section 718.204(c), as supported by substantial evidence, and affirm his award of benefits, notwithstanding his failure to consider employer's argument that granting modification would not render justice under the Act. In this regard, we agree with the Director's position, that a determination that granting modification renders justice under the Act is implicit in the administrative law judge's finding that new evidence established claimant's entitlement to benefits. As a modification request cannot be denied based solely on the number of times modification has been requested, and employer has not shown that claimant's prior actions were egregious, we affirm the administrative law judge's finding that granting modification herein was appropriate. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

Lastly, we agree with employer's contention that the administrative law judge's Decision and Order on Remand reflects a clerical error regarding the date from which benefit payments commence herein. Because the administrative law judge initially determined that the date from which benefits commence was October 2004, "based on Dr. Rasmussen's medical exam and report dated October 25, 2004, [as this was] the first

determination of claimant's disability due to pneumoconiosis," and that "no other evidence prior to this date demonstrates that claimant was totally disabled due to pneumoconiosis," Decision and Order at 19, it is clear that the administrative law judge's Decision and Order on Remand contains a clerical error by awarding benefits as of October 2002. *See* 20 C.F.R. §725.503(b); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993), *citing Johnson v. Director, OWCP*, 7 BLR 1-206 (1984); *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103 (1979). Accordingly, we modify the administrative law judge's Decision and Order on Remand to reflect the correct date from which benefits commence as October 2004.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Modification and Awarding Benefits is affirmed, as modified.

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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BETTY JEAN HALL
Administrative Appeals Judge