BRB No. 08-0528 BLA

F. S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GABRIEL MINING, INCORPORATED/KENTUCKY COAL PRODUCERS' SELF INSURANCE FUND	)	DATE ISSUED: 04/28/2009
	)	
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 on Remand Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (2004-BLA-05399) of Administrative Law Judge Pamela Lakes Wood on a subsequent claim filed 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). This case is before the Board for the second time. In a Decision and Order dated September 28, 2006, the administrative law judge accepted the parties' stipulation to twenty 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

was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (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.

Employer appealed and the Board affirmed the administrative law judge's findings that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), and thus a change in an applicable condition of entitlement pursuant to Section 725.309(d). [*F.S.*] *v. Gabriel Mining Co.*, BRB No. 07-0170 BLA, slip op. at 3 (Oct. 30, 2007)(unpub.). The Board also affirmed the administrative law judge's findings at Sections 718.202(a)(1), 718.203(b), 718.204(b). [*F.S.*], slip op. at 2 n.2. The Board vacated, however, the administrative law judge's findings that claimant established the existence of both clinical and legal pneumoconiosis at Section 718.202(a)(4) and total disability due to pneumoconiosis at Section 718.204(c) and remanded the case for reconsideration of the medical opinions of Drs. Baker, Dahhan and Broudy at Sections 718.202(a)(4) and 718.204(c). [*F.S.*], slip op. at 7. On remand, the administrative law judge found that the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant proved that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.

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.[1] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On remand, rather than rendering a separate finding as to the existence of legal pneumoconiosis under Section 718.202(a)(4), the administrative law judge reconsidered the opinions of Drs. Dahhan, Broudy and Baker in light of the Board's remand

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

instructions.[2] 2008 Decision and Order at 6. With respect to Dr. Dahhan's opinion that claimant has chronic obstructive pulmonary disease (COPD) caused entirely by smoking, the administrative law judge determined that the fact that Dr. Dahhan examined claimant on two occasions – once in 1991 and once in 2003 – did not provide a basis for according his opinion additional weight. *Id*. at 3; Director's Exhibit 15. The administrative law judge also reaffirmed her prior finding that Dr. Dahhan's opinion was entitled to little weight because he did not explain his exclusion of coal dust exposure as a contributing cause of claimant's obstructive impairment and he relied upon negative x-ray readings that were contrary to the administrative law judge's determination that the existence of clinical pneumoconiosis was established under Section 718.202(a)(1).[3] 2008 Decision and Order at 5-6. The administrative law judge cited the same reasons for discrediting Dr. Broudy's opinion that claimant has moderately severe obstructive airways disease caused by smoking. *Id*.; Director's Exhibit 15.

Regarding Dr. Baker's opinion, the administrative law judge found that his reliance upon a positive reading of an x-ray that was later reread as negative by a physician with superior qualifications did not detract from the credibility of his opinion, that claimant had both clinical and legal pneumoconiosis and was totally disabled by both conditions. 2008 Decision and Order at 6; Director's Exhibit 13. The administrative law judge stated, "I continue to find that [Dr. Baker's] opinion is better reasoned and documented than the written opinions of Drs. Broudy and Dahhan, which are largely devoid of analysis." 2008 Decision and Order at 6. The administrative law judge concluded, therefore, that claimant established total disability causation under Section 718.204(c). *Id*.

Employer contends that, contrary to the administrative law judge's finding, Dr. Baker's opinion does not constitute a well-reasoned opinion sufficient to establish total disability causation pursuant to Section 718.204(c). Employer alleges that Dr. Baker relied on an inaccurate smoking history of twelve to fourteen years and an overestimated

[2] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[3] Pursuant to 20 C.F.R. §718.201(a)(1), the definition of clinical pneumoconiosis "includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

twenty-five year work history. Employer further contends that Dr. Baker failed to explain why he identified coal dust exposure as a contributing cause of claimant's totally disabling obstructive impairment. Employer maintains that Dr. Baker's deposition testimony was uncertain and constituted "little more than an assumption that exposure to coal mine dust must be a contributing cause to any respiratory disability." Employer's Brief at 3, 5. Employer also argues that the administrative law judge's conclusory determination to credit Dr. Baker's opinion as being "thorough" does not comply with the requirements of the Administrative Procedure Act.[4] *Id.* at 7, *quoting* 2008 Decision and Order at 4.

We reject employer's contention that Dr. Baker's opinion is legally insufficient to support claimant's burden of proof at Section 718.204(c), as employer's argument that Dr. Baker's opinion is neither reasoned nor documented goes to the authority of the administrative law judge to render credibility determinations. The United States Court of Appeals for the Sixth Circuit has held that the reviewing authority is required to defer to the administrative law judge's assessment of a physician's credibility. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In the present case, the administrative law judge noted correctly that Dr. Baker reported that claimant started smoking when he was twelve or fourteen years of age, not that he smoked for twelve or fourteen years, and that Dr. Baker also considered up to a fifty pack year history of smoking in concluding that coal dust exposure was a contributing cause of claimant's total disability.[5] 2008 Decision and Order on Remand at 4, 5; 2006 Decision and Order at 10; Claimant's Exhibit 2 at 5, 9,

[4] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented[.]" 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 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[5] Employer also contends that the administrative law judge erred in finding, in her 2006 Decision and Order, that claimant's smoking history totaled twenty-five pack years and that the administrative law judge should have discredited Dr. Baker's opinion because he did not acknowledge the full extent of claimant's use of cigarettes. Employer's Brief at 5; 2006 Decision and Order at 6. We decline to address these arguments, as employer has raised its allegation of error regarding the administrative law judge's smoking history finding for the first time in the present appeal. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984).

13; Director's Exhibit 13. Regarding the length of claimant's coal mine employment, employer has not established that the five year difference between the twenty years to which it stipulated and the twenty-five years recorded by Dr. Baker represented a discrepancy material to the credibility of Dr. Baker's opinion. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984).

Further, the administrative law judge rationally determined that Dr. Baker's opinion was supported by the chest x-ray interpreted as positive for pneumoconiosis, a pulmonary function study demonstrating an obstructive impairment, a blood gas study consistent with hypoxemia, and studies showing that coal dust exposure causes COPD and that one pack year of smoking is equivalent to one-half to one year of coal mining in terms of its impact on a miner's FEV1. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 151 (1989) (*en banc*); 2008 Decision and Order on Remand at 5. We affirm, therefore, the administrative law judge's decision to credit Dr. Baker's opinion as well-documented and well-reasoned pursuant to Section 718.204(c).

Employer also alleges that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Broudy under Section 718.204(c) on the ground that they did not diagnose pneumoconiosis. Employer's Brief at 12. We reject employer's argument. The administrative law judge acted within her discretion as fact-finder in according little weight to the opinions of Drs. Dahhan and Broudy on the issue of whether clinical pneumoconiosis was a contributing cause of claimant's totally disabling impairment, as these physicians determined, contrary to the administrative law judge's finding at Section 718.202(a)(1), that the x-ray evidence was negative for pneumoconiosis.[6] *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); 2008 Decision and Order on Remand at 4-5; Director's Exhibit 15. Furthermore, the administrative law judge rationally determined that the opinions of Drs. Dahhan and Broudy were entitled to little weight on the issue of total disability due to legal pneumoconiosis, as they did not set forth the rationale underlying their conclusions that claimant's obstructive impairment was unrelated to dust exposure in coal mine employment. *See Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-151; 2008 Decision and Order on Remand at 4-5. We affirm, therefore, the administrative law

[6] We decline to consider whether the administrative law judge's discrediting of the opinions of Drs. Dahhan and Broudy was appropriate under the decision of the United States Court of Appeals for the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), as none of claimant's coal mine employment occurred in states falling within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See* slip op. at 2 n.1; Director's Exhibit 1.

judge's finding that Dr. Baker's opinion outweighed the opinions of Drs. Dahhan and Broudy, and was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand Granting 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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BETTY JEAN HALL
Administrative Appeals Judge