BRB No. 08-0549 BLA

R.L.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 04/16/2009
	)	
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 – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (06-BLA-5746) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a miner's 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). The administrative law judge credited claimant with twenty-eight years of coal mine employment, and determined that

his subsequent claim, filed on July 21, 2005, was subject to the regulatory provisions at 20 C.F.R. §725.309(d).[1] The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and, accordingly, found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d).[2] Considering the entire record, the administrative law judge found that the weight of the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

On appeal, employer first argues that the instant claim is barred by principles of *res judicata* and finality. On the merits, employer challenges the administrative law judge's finding that 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). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response addressing only the procedural issue. Employer has replied to the briefs filed by claimant and the Director.[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. 33 U.S.C. §921(b)(3), as incorporated by 30

[1] The miner's first claim for benefits, filed on July 11, 1996, was denied by the district director on November 8, 1996, for failure to establish a totally disabling respiratory impairment caused by pneumoconiosis, and thereafter administratively closed. Decision and Order at 2-3, 9; Director's Exhibit 1 at 2. No further action was taken until the filing of the current claim on July 21, 2005.

[2] Where a miner files a claim for benefits more than one year after the 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); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior claim was based." 20 C.F.R. §725.309(d)(2).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the weight of the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).[4]

Initially, we address employer's assertion that because claimant's prior claim was denied for failure to establish the existence of pneumoconiosis, the doctrine of *res judicata* precludes claimant from entitlement to benefits in this subsequent claim. Specifically, employer argues that "at least some support is required to explain how [the miner] developed disabling pneumoconiosis when he did not have the disease [at the time of the prior denial in 1996] and did not have any further coal dust exposure [after 1992]." Employer's Brief at 20-21. Employer submits, therefore, that the disposition in the previous claim that the miner did not have pneumoconiosis was "claim preclusive," barring adjudication of the instant claim. Employer's Reply Brief to Director, at 7-8. Further, employer asserts that the administrative law judge improperly based his finding of the existence of pneumoconiosis on a presumption of latency or progression of the disease. We disagree. The doctrine of *res judicata* generally lacks application in this context, because the purpose of Section 725.309(d) is to provide relief from the principles of *res judicata* to a miner whose condition has worsened over time. *Spangler v. A & E Coal Co.*, BRB No. 93-2170 BLA (June 29, 1995)(unpub.). Moreover, the United States Court of Appeals for the Sixth Circuit has held that the doctrine of *res judicata* does not apply to claims filed pursuant to 20 C.F.R. §725.309. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994); *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *see* 20 C.F.R. §725.309(d), (2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). Additionally, the regulations recognize that pneumoconiosis is a progressive disease and do not require a showing that the miner suffers from a particular variety of latent and progressive pneumoconiosis. 20 C.F.R. §718.201(c); *see Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001)(medical literature establishes that pneumoconiosis may be latent and progressive); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 359, 16 BLR 2-50, 2-57 (7th Cir. 1992); *see also Zeigler Coal Co. v. Director, OWCP* [*Griskell*], 490 F.3d 609, 24 BLR 2-38 (7th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004).[5] We therefore agree with the Director that employer's assertion of error is without merit. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1 at 41.

[5] Moreover, the proposition that pneumoconiosis does not progress after cessation of a coal miner's employment is inimical to the tenets of the Act. *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S.

Turning to the merits, employer challenges the administrative law judge's determination to credit the medical opinions of Drs. Baker and Simpao over those of Drs. Repsher and Fino, in finding the existence of legal pneumoconiosis established at Section 718.202(a)(4).[6] Employer asserts that the medical opinions of Drs. Simpao and Baker are insufficient as a matter of law to establish the existence of pneumoconiosis under Section 718.202(a)(4). Specifically, employer maintains that the opinions of Drs. Baker and Simpao are not well-reasoned, arguing that the administrative law judge failed to consider the different findings on physical examination and testing reported by these physicians, or their inability to distinguish between the effects on claimant's pulmonary condition caused by smoking and heart disease, from the effects caused by coal dust exposure.[7] Finally, employer challenges the administrative law judge's reasons for according less weight to the medical opinions of Drs. Repsher and Fino, and contends that the administrative law judge's decision fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §551 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a) and 33 U.S.C. §919(d). Employer's Brief at 9-10, 12, 14, 17. Employer's arguments are without merit.

The administrative law judge reviewed the medical opinion evidence, in light of the physicians' objective supporting bases, and corresponding relevant testimony. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The administrative law judge found that Dr. Simpao's diagnosis of legal pneumoconiosis took into account the objective pulmonary function testing and physical findings from his examination of the miner, as well as his history of smoking and heart disease. Decision and Order at 5; Director's Exhibit 14 at 7; Claimant's Exhibit 3 at 5-6, 17, 29; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In particular, Dr. Simpao described a severe respiratory

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1047 (1988); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).

[6] "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). "Arising out of coal mine employment" refers to "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). Pursuant to 20 C.F.R. §718.204(c), "[a] miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in Sec. 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1).

[7] The administrative law judge found that claimant has a smoking history of thirty-seven pack years. Decision and Order at 7.

impairment and diagnosed pneumoconiosis attributable to coal dust exposure. Director's Exhibit 14 at 7, 9. On deposition, Dr. Simpao explained how his physical findings supported his medical conclusions, specifying that testing values demonstrated a moderate restrictive impairment and a severe obstructive impairment. Decision and Order at 6; Claimant's Exhibit 3 at 6-11, 13; *see also* Director's Exhibit 14 at 9. He concluded that coal dust exposure is "the significant contributing factor in [the miner's] pulmonary impairment" and that claimant's history of smoking and heart disease are "aggravating factors." Director's Exhibit 14 at 9; *see also* Claimant's Exhibit 3 at 9, 29, 32, 34. Dr. Baker also diagnosed legal pneumoconiosis, opining that claimant's coal mine dust exposure contributed to his COPD, and that both cigarette smoking and coal mine dust exposure contributed fully to his severe respiratory impairment. Decision and Order at 6, 12; Director's Exhibit 17 at 6.

The determination of whether a medical opinion is documented and reasoned rests within the discretion of the administrative law judge, *see Fields*, 10 BLR at 1-21, as does the assessment of the weight and credibility to be accorded to the conflicting medical evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In evaluating the conflicting medical opinions of record at Section 718.202(a)(4), we conclude that the administrative law judge adequately summarized the physicians' explanations for their conclusions and their underlying documentation, and we reject employer's assertion that more particularized findings and comparisons of physical findings were required in his assessment of the medical evidence. *See* Decision and Order at 5-7, 11-13. Further, contrary to employer's arguments, physicians need not quantify with specificity the relative contributions of smoking and coal dust exposure to claimant's respiratory condition. 20 C.F.R. §718.201(a)(2). Rather, the administrative law judge could rationally rely on their judgment that the effects of smoking versus coal dust exposure cannot necessarily be medically differentiated. Decision and Order at 5-6; Director's Exhibit 14 at 9; Claimant's Exhibit 3 at 17, 32, 34; *see Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Rowe*, 710 F.2d 251, 5 BLR 2-99; *cf. Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004). By comparison, the administrative law judge validly determined that the contrary medical opinions of Drs. Repsher and Fino were not well-documented or reasoned. He found that Dr. Repsher did not address whether claimant's twenty-eight years of coal mine employment was an aggravating or contributing cause to the pulmonary impairment, and failed to explain his conclusion that cigarette smoking was the sole and exclusive cause of disability. Decision and Order at 12; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Gross*, 23 BLR at 1-19-20. The administrative law judge rationally found that Dr. Fino, in turn, relied on studies that the administrative law judge characterized as flawed, outdated and inconsistent, to support his opinion that claimant's pulmonary impairment did not arise out of coal mine employment. Decision and Order at

7, 12; Employer's Exhibit 2 at 7-10; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons*, 23 BLR at 1-34-35; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see generally Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984). The administrative law judge's observations on the probative value of the studies cited as support for the medical opinion are well within his discretion as fact-finder to make credibility determinations. Having identified deficiencies in the medical opinions of Drs. Repsher and Fino, the administrative law judge permissibly accorded little weight to their opinions that claimant did not have legal pneumoconiosis. Decision and Order at 11-12; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Barrett*, 487 F.3d 350, 23 BLR 2-472; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

We conclude, therefore, that the administrative law judge permissibly exercised his discretion in finding that the medical opinions of Drs. Baker and Simpao are better supported by the objective evidence, *see Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986), and are entitled to "probative weight." Decision and Order at 5-6, 12. Because the credited medical opinions are consistent with the definition of legal pneumoconiosis adopted by the Department of Labor (DOL), and applicable caselaw, we reject employer's assertion that the administrative law judge applied an improper legal standard. Decision and Order at 11-13; *see also* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79936-45 (Dec. 20, 2000); *Barrett*, 478 F.3d 350, 23 BLR 2-472; *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge's finding, that the weight of the newly-submitted medical opinions under Section 718.202(a)(4), as well as all of the evidence of pneumoconiosis under Section 718.202(a), was sufficient to establish the existence of pneumoconiosis, is supported by substantial evidence, and is affirmed.

Next, employer contends that the administrative law judge erred in finding disability causation established at Section 718.204(c). Essentially, employer reiterates its previous arguments in asserting that the medical opinion of Dr. Simpao, "that coal dust contributed" to claimant's disability, fails to establish that pneumoconiosis is more than a *de minimus* or infinitesimal factor in claimant's total disability. Employer's Brief at 17-18. Further, employer submits that the administrative law judge "mischaracterized the doctor's opinion as stating that [the miner's] symptoms could not be explained by other factors when Dr. Simpao stated that they could have been caused by his smoking and heart disease." Employer's Brief at 18. Employer cites Dr. Simpao's testimony that some of claimant's symptoms are seen in individuals who develop conditions from smoking, or individuals with cardiac or back problems. Claimant's Exhibit 3 at 20-21, 24, 27. However, contrary to employer's contention, substantial evidence supports the administrative law judge's determination that Dr. Simpao "dismissed alternative causes for the physical findings implicating coal mine employment as a significant factor in the [c]laimant's disability, stating that he found no evidence of fluid around the lungs and no

evidence of a blood disease." Decision and Order at 16. While Dr. Simpao acknowledged that claimant's smoking and heart condition were aggravating factors, the administrative law judge permissibly relied on Dr. Simpao's opinion that pneumoconiosis was a "significant factor in [claimant's] respiratory impairment." Decision and Order at 16-17; Claimant's Exhibit 3 at 33-34; Director's Exhibit 14 at 9. By comparison, the administrative law judge properly discounted the opinions of Drs. Repsher and Fino, that the miner's disability was due entirely to smoking, based on their determination that the miner did not suffer from pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 16-17; Employer's Exhibits 1 at 3-4, 2 at 10-11; *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 (2002)(*en banc*). We conclude, therefore, that the administrative law judge acted within his discretion in finding that the opinion of Dr. Simpao was entitled to greater weight, and was sufficient to establish disability causation at Section 718.204(c). Decision and Order at 16-17; *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610-611, 22 BLR 2-288, 2-303 (6th Cir. 2001); *see also Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). Additionally, based on the foregoing, we conclude that the administrative law judge's decision adequately comports with the requirements of the APA, and that employer's assignments of error essentially request a re-weighing of the evidence, an exercise beyond our scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's credibility determinations at Section 718.204(c), we affirm his findings thereunder, and we affirm the award of benefits. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Cross Mountain Coal Inc. v. Ward*, 83 F.3d 211, 20 BLR 2-360 (6th Cir. 1996).

Accordingly, the Decision and Order – Award of Benefits 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