

BRB No. 09-0797 BLA

DAVID C. ELLIOTT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
RFI ENERGY, INCORPORATED)	
)	
and)	DATE ISSUED: 08/19/2010
)	
STATE WORKERS' INSURANCE FUND)	
)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Edward K. Dixon and Ryan M. Krescanko (Zimmer Kunz, PLLC), Pittsburgh, Pennsylvania, for employer/carrier.

Jeffrey S. Goldberg (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5582) of Administrative Law Judge Michael P. Lesniak awarding benefits on a 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 involves a claim filed on June 25, 2007. After crediting claimant with 26.75 years of coal mine employment,¹ the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis,² in the form of chronic obstructive pulmonary disease (COPD), due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer further contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. 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*).

² "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).

Impact of the Recent Amendments

By Order dated May 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Claimant, employer, and the Director have responded.

Claimant and the Director assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits.³ Employer agrees that Section 1556 is applicable to this claim, based on its filing date. However, employer contends that, even if claimant is entitled to the rebuttable presumption of total disability that was reinstated by Section 1556, the evidence is sufficient to establish rebuttal.

As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried his burden to establish each element of entitlement by a preponderance of the evidence, we hold that there is no need to consider whether he could establish entitlement with the aid of the rebuttable presumption reinstated by Section 1556.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a 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*).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the

³ Relevant to this living miner's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Supplemental Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). As the Director notes, claimant filed his claim after January 1, 2005.

medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Celko, Rasmussen, and Fino. Drs. Celko and Rasmussen diagnosed legal pneumoconiosis, opining that claimant suffers from COPD, due to both cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.201(a)(2). Director's Exhibit 12; Claimant's Exhibits 1, 5. Although Dr. Fino also diagnosed COPD, he opined that it was due to cigarette smoking. Employer's Exhibits 1, 4. Dr. Fino opined that claimant's coal mine dust exposure was not a significant contributing factor in causing his COPD. Employer's Exhibit 4 at 14.

In evaluating the evidence, the administrative law judge accorded little weight to Dr. Celko's opinion, because the doctor did not reference any medical research to support his opinion. The administrative law judge also found that Dr. Celko relied upon an inflated coal mine employment history. Decision and Order at 10.

The administrative law judge accorded little weight to Dr. Fino's opinion because, in Dr. Fino's written report, he did not adequately explain his conclusion that claimant's pulmonary function study results were consistent with smoking. Decision and Order at 10. The administrative law judge further found that, when deposed, Dr. Fino discussed "the average loss of lung function in smokers and miners," but did not specify how the statistics he analyzed "related to [c]laimant's case." *Id.* Additionally, the administrative law judge determined that Dr. Fino did not adequately explain his opinion that, while x-ray evidence does not rule out pneumoconiosis, he could rely on the lack of clinical pneumoconiosis on claimant's x-rays to conclude that claimant's emphysema was unrelated to coal mine dust exposure. *Id.*

The administrative law judge accorded the "most weight" to Dr. Rasmussen's opinion because he provided medical research to support his opinion that impairments attributable to coal mine dust exposure may occur absent radiographic proof of clinical pneumoconiosis. Decision and Order at 10. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion, that claimant's COPD is due in part to his coal mine dust exposure, over Dr. Fino's contrary opinion. Specifically, employer argues that the administrative law judge mischaracterized Dr. Fino's opinion. We disagree. In his consideration of Dr. Fino's opinion, the administrative law judge noted that Dr. Fino, after acknowledging that x-ray evidence alone is insufficient to rule out the existence of pneumoconiosis, nevertheless, based his opinion, that claimant's coal mine dust exposure did not contribute to his COPD, in large part on the lack of radiographic evidence of

pneumoconiosis.⁴ Employer's Exhibit 4 at 12. On the other hand, the administrative law judge noted that Dr. Rasmussen cited medical research to support his view that coal mine dust exposure can cause COPD, even in the absence of radiographic evidence of pneumoconiosis.⁵ Dr. Rasmussen explained that clinical and epidemiological studies show a loss of lung function as a result of coal mine dust exposure, even in the absence of

⁴ In assessing whether claimant's coal mine dust exposure contributed to his emphysema, Dr. Fino found that the "amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema." Employer's Exhibit 1. Dr. Fino explained that:

Dr. Leigh found that a non-smoking coal miner with an average lung content (correlating with minimal or sparse pneumoconiosis) has 7-10% more emphysema than a non-smoking man not exposed to coal dust. Extrapolating this to pulmonary function results, a 10% increase above normal in the amount for emphysema correlated to a 7% reduction in the FEV1%.

This reduction is not clinically significant in the average miner. However, it could be clinically significant if there was moderate or profuse pneumoconiosis present because the amount of pneumoconiosis correlates quite well with the amount of emphysema present. Therefore, it is very helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal mine dust inhalation.

Employer's Exhibit 1.

⁵ Dr. Rasmussen explained that:

[M]iners whose radiographs failed to reveal pneumoconiosis also have coal mine dust induced abnormalities in function. Part of that is perhaps the imperfection of the radiograph which may, in fact, fail to reveal even moderate or even sometimes severe forms of small macules or small micronodules in the lung tissue which represent a significant load of dust and that's well-known. And this occurs especially in the presence of emphysema. As emphysema increases, the opacities tend to diminish.

So, it's a well-known fact that coal miners die excessively of chronic obstructive lung disease even in the absence of radiographic changes.

Claimant's Exhibit 5 at 21-22.

radiological abnormalities. Claimant's Exhibit 5 at 26-28. The administrative law judge permissibly credited Dr. Rasmussen's opinion, that claimant's COPD is due in part to his coal mine dust exposure, over Dr. Fino's contrary opinion, because he found that Dr. Rasmussen's opinion was better reasoned and better supported by the medical research.⁶ *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁷

In weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Decision and Order at 10. Because this finding is supported by substantial evidence, it is affirmed.

Total Disability

Employer contends that, because the administrative law judge accorded less weight to the opinions of Drs. Celko and Fino regarding the cause of claimant's COPD, there is no support for the administrative law judge's finding that the "record indicates that all physicians [are] in consensus that [c]laimant is totally disabled." Employer's Brief at 11, quoting Decision and Order at 11. Employer's contention has no merit. Drs. Celko, Rasmussen, and Fino each opined that claimant is totally disabled from a

⁶ The Department of Labor relied on the medical literature recognizing that coal mine dust can contribute significantly to a miner's obstructive lung disease independent of clinical pneumoconiosis when the Department revised the regulatory definition of pneumoconiosis. 65 Fed. Reg. 79,939 (Dec. 20, 2000) (indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]"); *see Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

⁷ Because the administrative law judge provided a proper basis for according less weight to Dr. Fino's opinion, *i.e.*, that he did not adequately explain why claimant's coal mine dust exposure did not contribute to his chronic obstructive pulmonary disease, we need not address employer's remaining arguments regarding the weight accorded to Dr. Fino's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

respiratory standpoint.⁸ Director's Exhibit 12. Because it is based upon substantial evidence, the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

Weighing all of the relevant evidence together, the administrative law judge found that the evidence established that claimant suffers from a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 11. Because it is supported by substantial evidence, the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2) is affirmed. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*).

Total Disability Due to Pneumoconiosis

In finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c),⁹ the administrative law judge credited Dr. Rasmussen's opinion, that claimant's legal pneumoconiosis "is a significant co-contributor to his disabling lung disease," Claimant's Exhibit 1 at 4, and discredited

⁸ Dr. Celko opined that claimant is totally disabled from his emphysema. Director's Exhibit 12. Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform heavy and very heavy manual labor. Claimant's Exhibit 1. (Dr. Rasmussen noted that claimant's work as a dozer operator required heavy manual labor. Claimant's Exhibit 5 at 13-14.) Dr. Fino opined that claimant suffers from a disabling respiratory impairment. Employer's Exhibits 1.

⁹ Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

the opinions of Drs. Celko and Fino, for the same reasons that he set forth in his consideration of whether the medical opinion evidence established legal pneumoconiosis. Employer raises the same challenges to the administrative law judge's disability causation finding that it raised with respect to his finding of legal pneumoconiosis. Because we reject those arguments, we affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge