

BRB No. 09-0417 BLA

JAMES WALTER BROWN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	
)	DATE ISSUED: 12/31/2009
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Henry C. Bowen (Steptoe & Johnson PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2007-BLA-05612) of Administrative Law Judge Adele Higgins Odegard with respect to a 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 found this claim, filed on January 26, 2006, to be a subsequent claim pursuant to 20 C.F.R.

§725.309(d).¹ Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited claimant with fourteen years of coal mine employment. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). However, she found that the newly submitted evidence established total respiratory disability and, thus, found that claimant established a change in one of the applicable conditions of entitlement pursuant to Section 725.309(d). The administrative law judge then found, however, that claimant failed to establish that his total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).² Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4), arguing that the administrative law judge erred in her weighing of the medical opinions of Drs. Forehand, Zaldivar and Kinder. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response in claimant's appeal, unless specifically requested to do so by the Board.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,

¹ Claimant filed his initial claim with the Department of Labor on May 9, 1995, which was denied by the district director on October 24, 1995, based on the finding that claimant failed to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1.

² At Section 718.204(c), the administrative law judge concluded that she had to find that claimant was unable to establish that his total respiratory disability was due to pneumoconiosis because she had found that claimant did not establish the existence of pneumoconiosis. Decision and Order at 20.

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but that it is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.⁴ 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).

In order to establish entitlement to benefits in a living miner’s claim filed pursuant to 20 C.F.R. Part 718, 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; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Forehand, Zaldivar and Kinder. Decision and Order at 12-18. Dr. Forehand, Board-certified in allergies and immunology, diagnosed chronic obstructive pulmonary disease (COPD) due to claimant’s cigarette smoking and coal dust exposure, as well as coronary artery disease. Director’s Exhibit 11. In addition, Dr. Forehand opined that claimant has a totally disabling respiratory impairment due to his “complex lung disease.” *Id.* Drs. Zaldivar and Kinder, both of whom are Board-certified in internal medicine, opined that claimant did not suffer from clinical or legal pneumoconiosis. Director’s Exhibit 12; Employer’s Exhibits 1, 4, 5. Specifically, Dr. Zaldivar diagnosed smoker’s emphysema and coronary artery disease, and opined that claimant is incapable of performing his usual coal mining work as a “result of smoker’s emphysema as well as coronary artery disease, neither of which [is] related to his occupation.” Director’s Exhibit 12; Employer’s Exhibit 4. Dr. Kinder reviewed the evidence of record and opined that claimant’s x-rays show evidence of emphysema and COPD, due to claimant’s long history of smoking. Employer’s Exhibits 1, 5. Dr. Kinder also stated that claimant is totally disabled from his work, but that it is due to his smoking history and not related to claimant’s coal mine employment. *Id.*

In weighing the conflicting evidence, the administrative law judge found the opinions of Drs. Zaldivar and Kinder, attributing claimant’s pulmonary impairment to his smoking history, are well-reasoned and accorded them “some weight.” Decision and Order at 18. In contrast, the administrative law judge found the opinion of Dr. Forehand, the only opinion supportive of claimant’s burden, insufficient to establish the existence of pneumoconiosis because Dr. Forehand provided no explanation for his conclusions, nor

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner’s coal mining employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 4.

explain how the underlying documentation supports his conclusions. *Id.* at 16-17. Consequently, she found that claimant failed to establish that his pulmonary impairment is significantly related to, or substantially aggravated by, claimant's coal dust exposure. *Id.* at 17-18.

In challenging the administrative law judge's findings, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).⁵ Claimant contends that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Kinder, that claimant's pulmonary impairment was due to his smoking history and not related to his coal dust exposure, arguing that she erred in finding that the opinions of Drs. Zaldivar and Kinder are not contrary to the Act. Claimant's Brief at 14-15. Claimant therefore contends that these opinions are entitled to no weight. *Id.* Claimant further contends that "[o]nce one excludes the opinions of Drs. Kinder and Zaldivar, we are left with the opinion of Dr. Forehand[.]" Claimant's Brief at 15, and, that the administrative law judge erred in finding Dr. Forehand's opinion poorly reasoned and entitled to little weight. Specifically, claimant contends that Dr. Forehand's opinion is more consistent with the preamble to the regulations, which states that coal dust exposure and cigarette smoking can cause an equivalent degree of obstructive pulmonary impairment. Claimant's Brief at 16. In addition, claimant contends that the administrative law judge erred in not rendering a specific finding regarding claimant's cigarette smoking history in light of her crediting of the medical opinions that stated that claimant's pulmonary impairment was due to his cigarette smoking. *Id.*

We disagree. The administrative law judge rationally found that claimant failed to establish the existence legal pneumoconiosis pursuant to Section 718.202(a)(4). Contrary to claimant's contention, the administrative law judge reasonably exercised her discretion in finding that Dr. Forehand's opinion, the only opinion supportive of claimant's position, was not reasoned or documented because the physician did not adequately explain the rationale for his conclusions. Specifically, the administrative law judge found that, while Dr. Forehand considered all of the possible causative factors, he did not explain or attribute how those factors caused claimant's condition. *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 16; Director's Exhibit 11. In addition, the administrative law judge reasonably found that Dr. Forehand did not explain how his underlying documentation

⁵ "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). For the purposes of the regulations, a disease "arising out of coal mine employment" means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b).

supported his conclusion that the objective test results are indicative of an impairment related to coal mine dust exposure. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 16-17. Consequently, we reject claimant's contention that Dr. Forehand's opinion is entitled to greater weight as his conclusions are more consistent with the preamble to the regulations, as the administrative law judge rationally found that Dr. Forehand failed to adequately explain how these conclusions are supported by the underlying documentation and, therefore, permissibly accorded this opinion no weight. *Id.*

Moreover, we reject claimant's contention that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Kinder. The administrative law judge, within a reasonable exercise of her discretion as trier-of-fact, found that the medical opinions of Drs. Zaldivar and Kinder, when taken as a whole, are not hostile to the Act. Specifically, the administrative law judge reasonably found that when the statements highlighted by claimant as being hostile to the Act, are taken in the context of the doctors' opinions as a whole, they are not contrary to the requirements of the Act and the doctor's ultimate conclusions are not based solely on these individual statements. Decision and Order at 13-14 n.15. In addition, the administrative law judge rationally found that these opinions did not rule out the possibility of alternatives to their conclusions. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72 (6th Cir. 1987); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988); Decision and Order at 13-14 n.15. Moreover, because the opinions of Drs. Zaldivar and Kinder are not supportive of claimant's burden, error, if any, in the administrative law judge's findings regarding these opinions is harmless, as the administrative law judge rationally found that Dr. Forehand's opinion, the only opinion supportive of claimant's burden, was entitled to no weight. *See* discussion, *supra*.

As claimant does not otherwise allege any specific errors in the administrative law judge's weighing of the medical opinion evidence in this case, we affirm her Section 718.202(a)(4) finding and the denial of benefits, as they are supported by substantial evidence. *Akers*, 131 F.3d at 441, 21 BLR at 2-275; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge