BRB No. 12-0170 BLA

LAWRENCE L. GROVES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH ON THE GREEN, INCORPORATED	)	DATE ISSUED: 12/21/2012
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Ann Marie Scarpino (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2007-BLA-05375) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim, filed on May 1, 2006, pursuant to the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2011) (the Act).[1] This case is before the Board for the second time. In its prior Decision and Order, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding of twenty-seven years of coal mine employment and his determination that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Groves v. Arch on the Green, Inc.*, BRB No. 10-0106 BLA (Oct. 28, 2010) (unpub.). The Board vacated the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and the administrative law judge's findings that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the Board vacated the award of benefits and remanded the case to the administrative law judge for reconsideration. The Board also instructed the administrative law judge to determine whether claimant is entitled to the rebuttable presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2]

On remand, the administrative law judge initially found that claimant could not invoke the amended Section 411(c)(4) presumption, because he failed to establish that his surface coal mine employment occurred in conditions substantially similar to underground mining. The administrative law judge then reconsidered the recent medical opinions and found that Dr. Rasmussen's opinion was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge, therefore, determined that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d) and found that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge did not follow the Board's remand instructions in finding that claimant established the existence of legal pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.202(a)(4) and 725.309(d). In particular, employer challenges the administrative law judge's reliance on the preamble to the amended regulations in

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[1] Claimant's previous claim, filed on September 14, 1998, was finally denied on January 25, 2000, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1 at 2, 257. Claimant filed his current claim on May 1, 2006. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), 30 U.S.C. §921(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 or pulmonary impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

weighing the medical opinions of record. Employer also alleges error in the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has submitted a limited response, opposing the arguments raised by employer with regard to the administrative law judge's consideration of the preamble to the regulations. Employer has replied, reiterating its allegations of error.

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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a miner's claim, 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. When a miner files a claim for benefits more than one year after the final 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.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1 at 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he has pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

Initially, we hold that there is no merit in employer's assertion that the administrative law judge erred in assessing the probative value of the opinions of Drs. Rasmussen, Broudy and Dahhan, "based on whether their conclusions were consistent with the preamble and 'regulatory intent.'" Employer's Brief at 9-15, *quoting* Decision and Order at 16. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge may evaluate expert opinions in conjunction with the discussion of sound medical science that the Department

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

of Labor (DOL) set forth in the preamble to the amended regulations. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2- (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2- (6th Cir. 2012). The court further held, contrary to employer's contention, that the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Adams*, 694 F.3d at 802, 25 BLR at 2- .

Pursuant to 20 C.F.R. §718.202(a)(4), in accordance with the Board's instructions, the administrative law judge reconsidered the medical opinions of Drs. Rasmussen, Simpao, Broudy and Dahhan, all of whom diagnosed chronic obstructive pulmonary disease (COPD). Dr. Rasmussen stated that claimant's COPD is due to both smoking and coal dust exposure, in view of claimant's history of fifty "or more" pack-years of smoking and sixteen years of coal mine employment. Claimant's Exhibit 8 at 3. Dr. Rasmussen further indicated that it is difficult to distinguish between coal dust exposure and smoking as causes of impairment when both factors are present. *Id*. at 4. Dr. Rasmussen also explained that claimant's COPD could be the result of either coal dust exposure or smoking alone, but that this is not likely. *Id*. Dr. Rasmussen stated that "it seems quite intuitive that most of [claimant's] impairment is secondary to cigarette smoking and that coal mine dust contributes to a minor degree." *Id*. Dr. Rasmussen concluded that claimant "has at least legal if not clinical pneumoconiosis and coal mine dust contributes minimally to [claimant's] disabling chronic lung disease." *Id*. Dr. Simpao attributed claimant's obstructive impairment to both smoking and coal mine dust exposure. Director's Exhibit 11 at 4-5. Drs. Broudy and Dahhan opined that claimant has a chronic lung impairment that is due solely to smoking. Employer's Exhibits 1 at 3-4; 14 at 2.

The administrative law judge found that Dr. Rasmussen's opinion was the best documented and reasoned, and relied on it to find "that [c]laimant's COPD is mostly due to cigarette smoking and secondarily contributed to by coal dust inhalation." Decision and Order on Remand at 7. The administrative law judge also found that Dr. Simpao's opinion was "well-documented and supportive of Dr. Rasmussen's opinion." *Id*. at 16. The administrative law judge accorded less weight to the opinions of Drs. Broudy and Dahhan, finding that they did not adequately address whether claimant's twenty years of coal mine dust exposure aggravated his COPD. *Id*. at 10, 12-13.

Employer contends that the administrative law judge did not comply with the Board's remand instructions in several respects. Employer first argues that the administrative law judge did not address the specific language of Dr. Rasmussen's opinion and explain how it established that claimant suffers from legal pneumoconiosis. Employer also maintains that the administrative law judge did not adequately consider the validity of the reasoning of Dr. Simpao's opinion on remand. Employer further asserts that the administrative law judge did not subject Dr. Rasmussen's opinion to the

same level of scrutiny as Dr. Broudy's opinion. In addition, employer argues that the administrative law judge did not properly assess the credibility of Dr. Dahhan's opinion. Employer's contentions lack merit.

Pursuant to 20 C.F.R. §718.201(b), the definition of legal pneumoconiosis includes any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The Sixth Circuit has held that 20 C.F.R. §718.201 is satisfied if claimant's "coal mine employment contributed 'at least in part' to his pneumoconiosis." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000), *quoting Southard v. Director, OWCP,* 732 F.2d 66, 71 (6th Cir.1984). The Sixth Circuit has also held that determining the credibility and probative value of a doctor's opinion falls within the administrative law judge's discretion in his role as fact-finder and that the reviewing authority must defer to the administrative law judge's assessment, unless it is plainly irrational. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

In this case, the administrative law judge acknowledged the Board's remand instruction, stating that "[t]he Board ruled I must take into account the specific language used by Dr. Rasmussen, and explain whether it establishes the existence of legal pneumoconiosis." Decision and Order on Remand at 6. The administrative law judge also acknowledged that 20 C.F.R. §718.201(b) requires that claimant's impairment be "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id*. at 5, *quoting* 20 C.F.R. §718.201(b). The administrative law judge then reviewed Dr. Rasmussen's statements and acted within his discretion as fact-finder in determining that they support a finding that coal dust exposure contributed to claimant's disabling respiratory impairment and was more than a de minimus factor. *Id*. at 8; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. The administrative law judge rationally concluded, therefore, that Dr. Rasmussen's opinion contains a reasoned and documented diagnosis of legal pneumoconiosis as defined in 20 C.F.R. §718.201. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. Thus, employer's argument that Dr. Rasmussen's opinion is insufficient to establish the existence of legal pneumoconiosis is rejected.

Nor is there merit to employer's contention that the administrative law judge erred in finding the opinions of Drs. Rasmussen and Simpao to be sufficiently reasoned and documented to satisfy claimant's burden of proof. Contrary to employer's argument, the administrative law judge permissibly concluded that Dr. Rasmussen's opinion was well-

documented and well-reasoned, because Dr. Rasmussen performed a records review, took into account the results of a physical examination, objective testing and a pathology report, as well as claimant's smoking and coal mine dust exposure histories. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Further, the administrative law judge rationally determined that Dr. Rasmussen supported his conclusion, that both exposures had contributed to the development of claimant's obstructive impairment, with references to multiple medical studies, consistent with the DOL's recognition that coal dust and cigarette smoking cause obstructive impairments through similar mechanisms. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Mountain Clay, Inc. v. Collins*, 256 Fed. App'x 757 (6th Cir. Nov. 29, 2007) (unpub.); *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 79,943 (Dec. 20, 2000). The administrative law judge also acted within his discretion in finding Dr. Simpao's opinion, that both coal mine dust exposure and smoking contributed to claimant's obstructive impairment, to be well-documented and supportive of Dr. Rasmussen's opinion diagnosing legal pneumoconiosis because it was based on claimant's smoking and coal dust exposure histories, objective studies and claimant's symptoms. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). We, therefore, affirm the administrative law judge's finding that Dr. Rasmussen's opinion, supported by Dr. Simpao's report, established legal pneumoconiosis pursuant to 20 C.F.R. §718.2002(a)(4).

Further, contrary to employer's assertion, the administrative law judge provided valid reasons for discounting the opinions in which Drs. Broudy and Dahhan attributed claimant's COPD to smoking. The administrative law judge rationally determined that Drs. Broudy and Dahhan did not provide a "reasoned basis" for their opinions, as their assertion that they are able to distinguish between the effects of smoking and coal dust exposure is inconsistent with the DOL's view that these agents can cause obstructive impairments through similar mechanisms and that their effects can be additive. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-122; *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 79,943 (Dec. 20, 2000).

As the administrative law judge acted within his discretion in finding that the evidence was sufficient to establish the presence of a chronic impairment arising out of coal mine employment, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In light of our affirmance of the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-3.

Employer further challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Drs. Rasmussen and Simpao opined that claimant's total disability is due, in part, to coal dust exposure, while Drs. Broudy and Dahhan attributed claimant's total disability solely to his smoking history. As indicated in our affirmance of the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), the administrative law judge rationally discounted the opinions of Drs. Broudy and Dahhan because they did not adequately address "claimant's extensive history of coal dust exposure." Decision and Order on Remand at 17; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Moreover, as the administrative law judge acted within his discretion in relying on Dr. Rasmussen's opinion, as supported by Dr. Simpao's opinion, to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally determined that Dr. Rasmussen's opinion is sufficient to establish that claimant is totally disabled due to legal pneumoconiosis at 20 C.F.R. §718.204(c). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) (pneumoconiosis must be a contributing cause of some discernible consequence to claimant's totally disabling respiratory impairment). Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand Award of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge