

BRB No. 05-0739 BLA

MIKE G. THOMAS)
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 Claimant-Respondent)
)
 v.)
)
 EMPIRE ENERGY CORPORATION)
)
 and)
)
 LIBERTY MUTUAL INSURANCE) DATE ISSUED: 06/15/2006
 COMPANY)
)
 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 – Award of Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Scott M. Busser (Zarlengo, Mott, Zarlengo and Winbourn, P.C.), Denver, Colorado, for employer/carrier.

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

PER CURIAM:

Employer-carrier (employer) appeals the Decision and Order – Award of Benefits (02-BLA-0068) of Administrative Law Judge Richard K. Malamphy on a miner’s duplicate 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).¹ Initially, the administrative law judge credited claimant² with thirty-three years of coal mine employment. Decision and Order at 3. The administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).³ *Id.* at 6-7. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found, based on the newly submitted evidence, that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *Id.* at 7-11. Accordingly, the administrative law judge awarded benefits, commencing August 1, 1998. *Id.* at 11.

On appeal, employer asserts that the administrative law judge erred in his consideration of the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.202(a). Employer's Brief at 6-8. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.⁴

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant is Mike G. Thomas, the miner, who filed his present claim for benefits on July 20, 2000. Director's Exhibit 1. The miner's first claim for benefits, filed on July 13, 1979, was finally denied on March 6, 1985 by Administrative Law Judge George P. Morin. Director's Exhibit 31. Judge Morin denied benefits because employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2), (b)(4) (2000). *Id.*

³Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.309 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

⁴We affirm the administrative law judge's finding of thirty-three years of coal mine employment and his finding of a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) because they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted opinions of Drs. James, Told, Bennett, Hollar, and Repsher. Decision and Order at 8-9. Drs. James, Bennett, and Holler diagnosed claimant with chronic obstructive pulmonary disease due to his coal dust exposure and smoking history, which is sufficient to constitute a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2).⁵ Director's Exhibits 7-9, 26; Claimant's Exhibit 5. Dr. Told found the existence of pneumoconiosis by x-ray. Claimant's Exhibit 2. Dr. Repsher found no radiographic evidence of coal workers' pneumoconiosis or evidence of any other pulmonary condition caused or aggravated by claimant's coal dust exposure in his coal mine employment. Employer's Exhibit 1. In finding that claimant established the existence of pneumoconiosis, the administrative law judge found the opinions of Drs. James and Bennett to be "well explained and well supported" and entitled to "substantial weight." Decision and Order at 8-9. Conversely, the administrative law judge found that the opinion of Dr. Told is "poorly explained and is conclusory" and, therefore, entitled to "minimal weight." *Id.* at 8. In considering Dr. Hollar's opinions, the administrative law judge found that this physician's opinion is "entitled to some weight" because "his opinions are supported by the objective medical evidence of record." *Id.* at 9. But the administrative law judge found that because Dr. Hollar's May 25, 2001 "letter contains conclusory opinions without adequate explanation," this physician's opinion is not entitled to as much weight as the opinions of Drs. James and Bennett. *Id.* Finally, the administrative law judge noted that Dr. Repsher "did not interpret any x-rays of record and did not conduct any recent examinations of the Claimant" and, therefore, the administrative law judge found his opinion to be "outweighed by the objective medical evidence of record and the well reasoned opinions of Drs. Bennett and James." *Id.*

§§718.202(a)(2)-(a)(3), and his findings at 20 C.F.R. §§718.203(b) and 718.204(b), (c). *Id.*

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).

Employer asserts that the administrative law judge failed to explain why he found the opinions of Drs. Bennett and James to be well explained and well supported.⁶ In considering Dr. James' opinion, the administrative law judge noted that this physician is a Board-certified Internist and Pulmonologist and that he examined claimant and reviewed his medical records. Decision and Order at 4. Specifically, the administrative law judge noted that Dr. James recorded claimant's symptoms and his medical, family, occupational, and smoking histories,⁷ cited articles in support of his opinion, and noted "that there has been a significant decline in the Claimant's respiratory status between 1979 and 2000." *Id.* Similarly, in considering Dr. Bennett's opinion, the administrative law judge noted that this physician recorded claimant's symptoms and medical and social histories and that she conducted a physical examination and pulmonary function and blood gas testing on claimant, prior to rendering her opinion. *Id.* at 5. The administrative law judge also noted that Dr. Bennett "testified extensively" at the hearing, explaining the bases for her opinions and responding to Dr. Repsher's criticisms. *Id.* at 6. Therefore, contrary to employer's assertion, the administrative law judge permissibly found the opinions of Drs. Bennett and James to be well explained and well supported.

⁶Employer asserts that the administrative law judge "erred by taking one remark by Dr. Repsher out of context and not viewing it in light of the objective medical evidence upon which Dr. Repsher based his opinions." Employer's Brief at 8. Employer does not state which remark from Dr. Repsher's opinion the administrative law judge took "out of context." However, employer appears to be referring to the administrative law judge's declaration that "Dr. Repsher's statements that COPD can be caused by coal dust exposure in only rare cases concern me." Decision and Order 9. Although the administrative law judge did make such a statement, he did not adversely weigh Dr. Repsher's opinion based on this statement. Rather, the administrative law judge stated that Dr. Repsher's statement that COPD can be caused by coal dust exposure in only rare cases calls "into question whether Dr. Repsher reviewed the medical evidence with an open mind. For purposes of this Decision and Order, though, I have assumed that Dr. Repsher did in fact review the evidence with an open mind and would have diagnosed pneumoconiosis if he found sufficient objective medical evidence to support such a diagnosis." *Id.*

⁷Employer asserts that Dr. James "did not address the fact that Claimant smoked between 1979 and 1990 after he retired." Employer's Brief at 8. In fact, Dr. James recorded a smoking history of a "total possible exposure of 104 pack years" and that claimant quit at age 73, which would have been in 1990, and he concluded that claimant's chronic obstructive pulmonary disease was due to his significant exposures to cigarette smoke and coal mine dust. Claimant's Exhibit 5.

Moreover, employer contends that the opinions of Drs. Bennett and James are flawed because they did not account for the improved FEV1 and FVC values obtained on Dr. James' 2004 pulmonary function study as compared to Dr. Told's 2003 study. Employer suggests that these physicians should have discussed claimant's improvement on these studies from 2003 to 2004 because Dr. Repsher testified that the significant improvement between claimant's 2003 and 2004 pulmonary function studies rules out that a major part of the claimant's abnormality back in 2003 was due to coal dust exposure or coal workers' pneumoconiosis. 2004 Hearing Transcript at 116-17. Although Dr. Repsher testified that claimant's improved FEV1 and FVC values in 2004 rule out coal dust exposure or coal workers' pneumoconiosis as a cause of claimant's lung abnormality, he also testified earlier at the hearing, that claimant's most recent pulmonary function studies, which would include the 2003 and 2004 studies, were "uninterpretable" because of claimant's congestive heart failure. *Id.* at 102-103. Additionally, in a August 28, 2003 letter, Dr. Repsher stated that Dr. Told's 2003 pulmonary function study is "uninterpretable, due to extremely poor effort and cooperation" by claimant. Employer's Exhibit 2. Furthermore, as claimant points out, while Dr. Repsher testified that the level of improvement between the 2003 and 2004 studies is "significant," he still found the results obtained to be "quite abnormal." *Id.* at 117. Accordingly, we reject employer's assertion.

Finally, employer contends that Dr. Bennett's opinion is not "reasoned" because "she does not understand some of the basic terminology, did not display any expertise in the relevant areas of medical science, [and] did not understand the testing regulations." Employer's Brief at 7. Employer's assertions are without merit. During Dr. Bennett's hearing testimony, she accurately answered several questions from employer's counsel regarding terms associated with pulmonary function testing.⁸ 2004 Hearing Transcript at 83-85. Regarding her experience in the area of pulmonology, Dr. Bennett stated that in her six years of practice, she has treated or evaluated over a hundred coal miners for respiratory disease, that in her residency program, she had extensive training with pulmonologists and critical care specialists in treating pulmonary disease, and that she has attended a black lung seminar. 2004 Hearing Transcript at 50, 63-64. Additionally, Dr. Bennett testified that she was aware of the appropriate federal regulations regarding how to conduct pulmonary function and blood gas studies and that she has received training on how to administer these studies in compliance with federal regulations. *Id.* at 82-83.

Based on the foregoing, we hold that the administrative law judge, within his discretion as trier-of-fact, found that the opinions of Drs. Bennett and James outweigh the

⁸While Dr. Bennett could not identify the acronym for left ventricular end diastolic pressure, she explained what the phrase meant. 2004 Hearing Transcript at 84, 163-64.

opinion of Dr. Repsher. See *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis based on the newly submitted medical opinion evidence. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Section 718.202(a) provides four alternative methods by which a claimant may establish the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *but see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Because we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), it is unnecessary for us to address employer's allegations of error with regard to the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1).⁹

⁹Employer additionally asserts that the administrative law judge's finding that the opinions of Drs. Bennett and James are well supported "is particularly troubling in light of his improper weighing of the x-ray evidence." Employer's Brief at 7-8. Pursuant to Section 718.202(a)(4), the administrative law judge credited the opinions of Drs. Bennett and James, who base their finding of chronic obstructive pulmonary disease due to claimant's coal dust exposure and smoking history largely on claimant's symptoms and his pulmonary function study results. 2004 Hearing Transcript at 58-62, 69-70; Director's Exhibits 7, 9, 26; Claimant's Exhibit 5. Therefore, any error the administrative law judge may have made with regard to weighing the x-ray evidence would not affect his finding of legal pneumoconiosis, based on these two physicians' opinions. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge