

BRB No. 08-0642 BLA

G.H.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ENERGY WEST MINING COMPANY)	DATE ISSUED: 06/29/2009
)	
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 – Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman, Denver, Colorado, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2006-BLA-5665) of Administrative Law Judge Richard K. Malamphy 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 at least twenty-four years of coal mine employment, found employer to be the properly designated responsible operator herein, and adjudicated this claim, filed on October 13, 2004, pursuant to 20 C.F.R. Part 718. Noting that employer had conceded that claimant suffered a totally disabling pulmonary impairment, the administrative law judge found the evidence sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

§718.202(a)(4), and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the evidence relevant to the issue of legal pneumoconiosis pursuant to Section 718.202(a)(4). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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.¹ 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).

Employer maintains that the administrative law judge failed to apply the proper standard in finding legal pneumoconiosis established at Section 718.202(a)(4). As this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, employer correctly notes that the burden of proof is on claimant to establish that his chronic obstructive pulmonary disease (COPD) and/or emphysema arose out of coal mine employment, without benefit of any presumption, consistent with *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006). Employer argues that the opinions of Drs. Radley, Gagon, and James, that both coal dust exposure and smoking caused claimant's COPD, do not constitute well-reasoned diagnoses of legal pneumoconiosis. Employer also asserts that the administrative law judge failed to properly evaluate the opinion of claimant's treating physician, Dr. Radley, pursuant to the criteria at 20 C.F.R. §718.104(d), and shifted the burden of proof to employer by requiring Drs. Rosenberg and Farney to explain why claimant's twenty-five years of coal mine employment played no role in claimant's lung disease. Employer's Brief at 15-35.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the evidence sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge accurately summarized the CT scan evidence, treatment records, and medical opinion evidence of record, and determined that while all of the physicians diagnosed severe chronic obstructive pulmonary disease, Drs. Radley, Gagon, and James attributed

¹ The law of the United States Court of Appeals for the Tenth Circuit is applicable, as the miner was employed in the coal mining industry in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Hearing Transcript at 10.

the disease to both smoking and coal dust exposure, whereas Drs. Rosenberg and Farney opined that it resulted solely from smoking. Decision and Order at 5-11; Claimant's Exhibits 1, 7; Director's Exhibits 15, 40, 41, 43; Employer's Exhibits 1, 5, 6, 8, 9. The administrative law judge acknowledged that Drs. Rosenberg, Farney, and James were Board-certified in internal medicine and pulmonary diseases, but accorded greater probative weight to the opinion of Dr. Radley based on her status as the miner's treating physician, because she had been treating the miner on a regular basis since 2003 for conditions including COPD, and the administrative law judge found that her opinion was well-reasoned and demonstrated a thorough understanding of the miner's history and ongoing condition. Decision and Order at 12. As the administrative law judge found that Dr. Radley's opinion was credible in light of its reasoning and documentation, other relevant evidence, and the record as a whole, and it was bolstered by the opinion of Dr. James, a pulmonary specialist, and the opinion of Dr. Gagon, we find no error in the administrative law judge's reliance on the opinion of Dr. Radley. See 20 C.F.R. §718.104(d); *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, ___ BLR ___ (10th Cir. 2009); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 12. Further, contrary to employer's assertion, Drs. Radley, James, and Gagon did not assume a presumption of causality based on claimant's history of coal dust exposure alone, but relied on reported literature as well as objective and historical data relating to claimant, and an analysis of his symptoms. Employer's Exhibits 1, 5; Claimant's Exhibits 1, 7; Director's Exhibits 15, 41; Decision and Order at 12; see *Oliver*, 555 F.3d at 1218, ___ BLR at 2-___. While the administrative law judge referenced case law from the United States Court of Appeals for the Sixth Circuit to support his finding that the opinions of Drs. Radley, James and Gagon were sufficient to establish legal pneumoconiosis, despite the physicians' inability to apportion the effects of smoking versus coal dust exposure, his analysis and application of the law was consistent with the Tenth Circuit's standard in *Andersen*, requiring claimant to establish that his COPD was significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 11-13.

We also reject employer's argument that Dr. Gagon's opinion was entitled to less weight because the physician's diagnosis of pneumoconiosis was based on a positive x-ray interpretation, contrary to the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Employer's Brief at 19. As Dr. Gagon additionally diagnosed a severe obstructive respiratory defect due to smoking and coal mine employment based on claimant's pulmonary function and blood gas study results, the published literature, and his prior experience with respiratory patients, and stated that his opinion would be the same even if claimant had an x-ray that was negative for pneumoconiosis, the administrative law judge permissibly credited his opinion. Director's Exhibits 15, 41; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields*, 10 BLR at 1-22; *Hoffman v. B & G Construction Co.*, 8 BLR 1-65, 1-166 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984).

Lastly, we find no evidence that the administrative law judge shifted the burden of proof in this case. Rather, he acted within his discretion in giving greater weight to the opinion of Dr. Radley as the miner's treating physician. Decision and Order at 12-13; *see Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding of legal pneumoconiosis at Section 718.202(a)(4), and disability causation pursuant to Section 718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge