BRB No. 09-0533 BLA

HAROLD D. COOPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
IDA MAE COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/30/2010
	)	
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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 Awarding Benefits (2007-BLA-5379) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim filed

pursuant to 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).[1] In a Decision and Order dated March 31, 2009, the administrative law judge credited claimant with thirteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that he is totally disabled due to 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 weighing the conflicting medical opinions as to whether claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response on the merits of claimant's entitlement, unless specifically requested to do so by the Board.

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[1] Claimant initially filed a claim on May 18, 1989, which was denied by Administrative Law Judge Eric Feirtag on January 23, 1992, on the grounds that claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on October 26, 1994. Director's Exhibit 2. In a Decision and Order issued on December 6, 1996, Administrative Law Judge Edward J. Murty, Jr., found that claimant failed to establish total disability due to pneumoconiosis and denied benefits. *Id*. Judge Murty's decision was affirmed by the Board on appeal. *Id*. Claimant filed a request for modification on December 2, 1998, which was denied by Administrative Law Judge Linda S. Chapman (the administrative law judge) on September 19, 2001. *Id*. Claimant appealed and the administrative law judge's decision was affirmed by the Board. Claimant also filed two additional requests for modification on August 26, 2002 and September 7, 2004, which were denied by the district director. *Id*. Claimant took no further action until filing his subsequent claim on March 3, 2006. Director's Exhibit 4.

[2] We affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, total disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as those findings have not been challenged by employer in this appeal and are not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

By Order dated March 30, 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.[3] *Cooper v. Ida Mae Coal Co.*, BRB No. 09-0533 BLA (Mar. 30, 2010) (unpub. Order). Employer filed a supplemental brief, asserting that the amendments do not affect this claim because claimant established less than fifteen years of coal mine employment. However, employer asserts that if the Board remands this case for consideration under the amendments, then due process requires that the record be reopened to allow the parties the opportunity to respond to the changes in the law. The Director has filed a letter brief, asserting that while Section 1556 applies to this case, based on the filing date of the subsequent claim, "the Board need take no action if it affirms the award." Director's Letter Brief at 2. The Director also states, "because [the administrative law judge] found that [claimant] had established thirteen years of coal mine employment, and no party has contested that finding, the claimant cannot benefit from [S]ection 1556 and the Board need not order the [administrative law judge] to consider the issue if it vacates the award and remands the case."[4] *Id*. Claimant did not respond to the Board's Order.

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

[3] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, were enacted. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 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. Under Section 411(c)(4), if a miner establishes that he or she worked at least fifteen years in an underground coal mine or in a surface mine in conditions substantially similar to those in an underground mine, and has or had a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[4] Although claimant did not cross-appeal the administrative law judge's finding of thirteen years of coal mine employment, he was not required to do so, as that finding was not previously adverse to him. 20 C.F.R. 802.201. Thus, we decline to affirm, as unchallenged, the administrative law judge's determination as to the length of coal mine employment, as suggested by employer and the Director, Office of Workers' Compensation Programs. We further note that claimant alleged sixteen years of coal mine employment, and Judge Feirtag previously found that claimant established at least fifteen years of coal mine employment. *See* Hearing Transcript at 14; Director's Exhibit 2. Because the administrative law judge did not explain the basis for her determination that claimant worked thirteen years in coal mine employment, she would be required to do so if the case were remanded for any reason.

and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim, pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to 20 C.F.R. §718.204(c), a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis 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)(i), (ii); *see Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Employer argues on appeal that the administrative law judge erred in finding that claimant established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer specifically contends that the administrative law judge erred in failing to properly explain why she accorded controlling weight to the opinions of Drs. Forehand and Roatsey, that claimant is totally disabled due, in part, to coal dust exposure, over the contrary opinions of Drs. Castle and Hippensteel, that claimant's total respiratory disability is due entirely to smoking and is unrelated to coal dust exposure. Based on our review of the administrative law judge's Decision and Order, the evidence of record, and the briefs of the parties, we conclude that substantial evidence supports an award of benefits in this case.

We reject employer's assertion that the administrative law judge erred in her consideration of Dr. Castle's opinion addressing the issue of disability causation. Dr. Castle examined claimant on December 12, 2006, and reported that claimant worked in coal mines for seventeen and one-half years and smoked one-half pack of cigarettes a day

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 2.

for thirty-eight years. Employer's Exhibit 1. Dr. Castle diagnosed coal workers' pneumoconiosis, based on an x-ray. *Id*. He indicated that a pulmonary function test showed moderate airway obstruction and hyperinflation of the lungs, with no significant change after the use of a bronchodilator. *Id*. He also indicated that claimant's arterial blood gas study showed values both at rest, and with exercise, that were qualifying for total disability under the regulations. Although Dr. Castle diagnosed a disabling respiratory impairment due to chronic bronchitis caused by smoking, he specifically noted that, "it is not possible for me to exclude coal workers' pneumoconiosis as being a very minimal contributing factor to [claimant's] hypoxemia." *Id*.

In a deposition conducted on June 13, 2007, Dr. Castle testified that he had reviewed the blood gas study results obtained by Drs. Hippensteel and Forehand. Employer's Exhibit 5. He noted that during Dr. Hippensteel's test, claimant's pO2 values improved after exercise, which led him to believe that claimant's hypoxemia was due to smoking. *Id*. Dr. Castle testified as follows:

> Dr. Hippensteel found that he did have hypoxemia at rest, very similar to what I found. He found the pO2 to be 57.4 with a pCO2 of 30.7. Then after exercise the pO2 improved to 62.3 millimeters of mercury; the CO2 was 31.3. So although he still had qualifying blood gases, the pO2 improved; and that's not typical of coal workers' pneumoconiosis and that leads me to conclude that [claimant] *most likely has hypoxemia* due to his ongoing tobacco smoking rather than coal workers' pneumoconiosis.

Id. at 20-21 (emphasis added). Unlike Dr. Hippensteel's study, Dr. Castle noted that during Dr. Forehand's study, claimant's pO2 value declined with exercise, showing that claimant's hypoxemia worsened with exercise. *Id.* According to Dr. Castle, this type of "variability in the pO2 rather than a fixed degree of hypoxemia" was "most likely due" to smoking and not coal dust exposure. *Id*. at 22.

In weighing the medical opinions at 20 C.F.R. §718.204(c), the administrative law judge gave less weight to Dr. Castle's opinion and explained:

> [T]he arterial blood gas results obtained by Dr. Hippensteel were qualifying under the regulations, both before and after exercise. Regardless of whether they improved on exercise on Dr. Hippensteel's tests, they remained sufficiently low to meet the regulatory criteria. Dr. Castle did not discuss the significance of these findings.

Decision and Order at 27. Employer asserts, contrary to the administrative law judge's finding, that Dr. Castle provided an explanation for his opinion. Employer's assertion of error, however, amounts to little more than a request that the Board reweigh the evidence,

which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Because the administrative law judge acted within her discretion in finding that Dr. Castle had not persuasively explained why claimant's fluctuations in pO2 values were not due to coal dust exposure, particularly in light of the qualifying nature of those studies, we affirm her decision to accord Dr. Castle's opinion less weight. *See Milburn Colliery Co. v. Director, OWCP* [*Hicks*], 138 F.3d 524, 534, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

We also reject employer's assertion that the administrative law judge abused her discretion in according Dr. Hippensteel's opinion less weight as to the etiology of claimant's respiratory disability. Dr. Hippensteel examined claimant on February 22, 2007, and recorded a work history of seventeen and one-half years in coal mine employment and an ongoing smoking history of thirty-eight years. Employer's Exhibit 2. Based on his examination, Dr. Hippensteel diagnosed chronic bronchitis and healed granulomatous inflammation. *Id*. Dr. Hippensteel attributed claimant's "active" chronic bronchitis to smoking and not coal dust exposure, citing that claimant had an obstructive respiratory impairment, with no evidence of restriction, that significantly improved with the use of a bronchodilator. *Id*. Dr. Hippensteel also noted that while claimant's arterial blood gas study was qualifying for total disability under the regulatory criteria, because the values "improve with exercise rather than worsen," they were not attributable to coal dust exposure and were instead due to active bronchitis caused by smoking. *Id*. Dr. Hippensteel specifically explained that claimant's bronchitis was not due to coal dust exposure because "industrial bronchitis" is expected to "subside[s] within . . . months after leaving work . . . and [claimant] left work in the mines almost [twenty] years ago." *Id*. He indicated that claimant is "currently impaired" and unable to work in the mines, but also stated that, "from a permanent standpoint[,] I cannot declare him disabled since if he stopped smoking[,] he actually could improve his ventilatory function and gas exchange function to a level that would not qualify him" for total disability. *Id*.

Contrary to employer's assertion, the administrative law judge permissibly gave Dr. Hippensteel's opinion, that claimant suffers from disabling chronic bronchitis, due entirely to smoking, less weight in light of Dr. Hippensteel's assertion that chronic bronchitis caused by coal dust exposure is not progressive and "is something that should subside within a period of several months after leaving work in the mines." *See* Decision and Order at 28, quoting Employer's Exhibit 2. The administrative law judge properly considered the rationale underlying Dr. Hippensteel's opinion and found that he excluded coal dust exposure as a causative factor for claimant's disabling chronic bronchitis based on his "assumption" that chronic bronchitis due to coal dust exposure will subside months after leaving the mines. Decision and Order at 28. As noted by the administrative law judge, however, Dr. Hippensteel's opinion is "contrary to the assumptions underlying the Act that pneumoconiosis is a progressive condition that can

manifest itself years after a miner leaves the mines." Decision and Order at 28; *see* 20 C.F.R. §718.201; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Furthermore, the administrative law judge reasonably found that "Dr. Hippensteel's speculation that [claimant's] respiratory condition could improve if he stopped smoking is not only unsupported, it does not answer the question of whether, even if he stopped smoking, [claimant] would still have a disabling respiratory impairment" due, in part, to coal dust exposure.[6] Decision and Order at 28; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). We therefore affirm the administrative law judge's decision to accord Dr. Hippensteel's opinion less weight at 20 C.F.R. §718.204(c).[7] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Lastly, we reject employer's contention that the administrative law judge erred in finding the opinions of Drs. Forehand and Roatsey to be sufficient to establish that claimant is totally disabled due to pneumoconiosis. Dr. Forehand examined claimant on March 27, 2006, at the request of the Department of Labor. In summarizing Dr. Forehand's opinion, the administrative law judge noted that Dr. Forehand based his opinion on a positive chest x-ray for coal workers' pneumoconiosis, a pulmonary function study showing an obstructive respiratory defect, an arterial blood gas study demonstrating hypoxemia, and an EKG which was normal. Decision and Order at 8; Director's Exhibit 16. The administrative law judge further noted:

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[6] The administrative law judge also indicated that she gave less weight to Dr. Hippensteel's opinion because he did not diagnose pneumoconiosis. However, employer correctly notes that Dr. Hippensteel testified that it was possible that claimant "has a component of simple pneumoconiosis added to his granulomatous disease." Employer's Exhibit 6; Brief in Support of Petition for Review at 16-17. We consider any error committed by the administrative law judge in rejecting Dr. Hippensteel's opinion, on the ground that he did not diagnose pneumoconiosis, to be harmless, in light of the alternative reasons provided by the administrative law judge for according less weight to Dr. Hippensteel's opinion at 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[7] Contrary to employer's contention, insofar as the administrative law judge properly explained why she found the opinions of Drs. Castle and Hippensteel to be insufficiently reasoned as to the etiology of claimant's respiratory impairment, she was not required to credit their disability causation findings, based solely on their qualifications. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

> Dr. Forehand found that [claimant] had a significant respiratory impairment of an oxygen-transfer nature, and stated that there was insufficient residual ventilatory capacity remaining for [claimant] to return to his last coal mining job. He concluded that [claimant] was unable to work and was totally and permanently disabled. He stated that [claimant's] cigarette smoking had reduced his ventilatory function [FEV1] to 76% of that predicted, but it was still above the disability standard of 60%. He noted that scarring in [claimant's] lungs from coal mine dust exposure had reduced his oxygen [pO2] to 60 and elevated [his]"A-a" gradient to 45, which met the disability standard. He stated that the effects of coal workers' pneumoconiosis contributed to [claimant's] disability to a greater extent than the effects of smoking.

Decision and Order at 8.

Dr. Roatsey prepared a report dated November 6, 2006, and diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Claimant's Exhibit 7. As noted by the administrative law judge:

> [Dr. Roatsey's] report was based on [claimant's] history of symptoms, occupational history, laboratory data including a chest x-ray, pulmonary function tests . . . an EKG, [claimant's] past medical history, social history, family history, a review of symptoms, and a physical examination. Dr. Roatsey reported that [claimant] had 17.5 years of underground mining, and that he smoked a quarter of [a] pack a day at that time. [Dr. Roatsey] found that [claimant] had significant bronchitis, wheezing, and cough that was productive with gray sputum, and shortness of breath. [The] chest x-ray showed pneumoconiosis category q/p with a 2/2 profusion, with emphysema and small pneumatic opacities and calcified granuloma. He stated that pulmonary function tests. . . showed moderate obstruction, with the best [FEV1] being 52. His EKG showed normal sinus rhythm with no acute STT changes.
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> Based on his examination and tests , Dr. Roatsey diagnosed coal workers' pneumoconiosis and [chronic obstructive pulmonary disease] . . . Dr. Roatsey felt that [claimant] had coal workers' pneumoconiosis, and stated that his respiratory capacity would be disabling . . . . He [also] stated that [claimant's] respiratory conditions were directly caused by coal workers' pneumoconiosis and secondarily, by his smoking.

Decision and Order at 9.

Contrary to employer's assertion, the administrative law judge permissibly credited the opinions Drs. Forehand and Roatsey because she found their "reports well-reasoned and supported by the objective medical evidence." Decision and Order at 27. The administrative law judge also explained, in accordance with the Administrative Procedure Act,[8] the bases for the weight she accorded the conflicting evidence:

> As noted above, the medical opinions in the previous claims are outdated, and do not address [claimant's] current condition. Thus, I have relied most heavily on the medical opinions in the current claim. I give determinative weight to the opinions of Dr. Forehand and Dr. Roatsey, who concluded, based on clinical and objective testing, that [claimant's] totally disabling obstructive impairment and hypoxemia were due to his pneumoconiosis, and to his exposure to coal mine dust. I credit them over the opinions of Dr. Castle and Dr. Hippensteel, whose reports I have not found to be persuasive . . . .

Id. at 28. Thus, because the administrative law judge acted within her discretion in rendering her credibility findings in this case, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[9] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Underwood*, 105 F.3d at 951; 21 BLR at 2-32.

[8] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), requires that "every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record." *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[9] In light of the foregoing, we hold that application of the recent amendments to the Act, which became effective on March 23, 2010, would not alter the outcome of this case**.** *See* 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*)).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge