

BRB No. 02-0485 BLA

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| EDWARD E. MORELAND |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | DATE ISSUED: |
| |) | |
| ALLEGHENY MINING |) | |
| CORPORATION/NEW ALLEGHENY |) | |
| INCORPORATED |) | |
| |) | |
| 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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (LAW CARE), Greensburg, Pennsylvania, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-537) of Administrative Law Judge Michael P. Lesniak awarding benefits on 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).¹ This case is before the Board for a second time.² Based on the

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, 725 and 726 (2001). All citations

date of filing, the administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R Part 718, and credited claimant with thirty years of coal mine employment. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), which established a material change in conditions pursuant to 20 C.F.R. §725.309. The

to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant filed his initial claim for benefits on January 28, 1974. Director's Exhibit 50. The district director denied this claim on April 12, 1976, and again on April 27, 1981, after review of the claim under the 1977 Amendments to the Act. Director's Exhibit 50. Claimant filed a duplicate claim on November 6, 1996, which was denied by the district director on April 1, 1997, due to claimant's failure to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 51. Claimant filed the present duplicate claim on June 23, 1998, which was denied by the administrative law judge in a Decision and Order issued on October 13, 2000. Director's Exhibit 1. On appeal, the Board affirmed the administrative law judge's findings regarding the number of years of coal mine employment and the analysis of the medical reports of Drs. Mathur, DeRienzo and Aneja, but remanded for the administrative law judge to reconsider whether the medical reports of Drs. Wald and Fino established causation and, therefore, a material change in conditions. *Moreland v. Allegheny Mining Corp.*, BRB No. 01-0249 BLA (Oct. 23, 2001)(unpub.).

administrative law judge also found the record evidence sufficient to establish the presence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b), and that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge that the evidence was sufficient to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Claimant responds, urging affirmance of the Decision and Order on Remand as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 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, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

³We affirm the findings of the administrative law judge regarding the designation of employer as the responsible operator and at 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204(b), as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With respect to the administrative law judge's weighing of the medical evidence relevant to Section 718.204(c), employer contends that the administrative law judge mischaracterized the opinion in which Dr. Wald stated that pneumoconiosis is a substantial contributing cause of claimant's total disability. Employer's contention is without merit. The record indicates that Dr. Wald diagnosed obstructive airways disease resulting from a combination of chronic bronchitis and asthma. Dr. Wald further indicated that cigarette smoking was "instrumental in the development of his chronic bronchitis," and that the miner's "workplace was also a substantial contributing factor in the development of his chronic bronchitis and the aggravation of his asthma." Claimant's Exhibit 2. The administrative law judge considered Dr. Wald's written report and his deposition testimony and found that this opinion supported claimant's burden of proof since "Dr. Wald found that coal dust exposure significantly contributed to the chronic bronchitis, which was initiated by cigarette smoking, and substantially aggravated the asthma, which was due to a genetic predisposition." Decision and Order on Remand at 14; Claimant's Exhibits 2, 6. Since Dr. Wald clearly indicated that claimant's totally disabling respiratory impairment, although not initially caused by coal dust exposure, was significantly aggravated by such exposure, it was within the administrative law judge's discretion to credit this opinion as satisfying claimant's burden to establish that pneumoconiosis is a substantially contributing cause of his disability. See *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).⁴

We also reject employer's argument that it was reversible error for the administrative law judge to credit the medical report of Dr. Cho under Section 718.204(c), due to this physician's determination that claimant's respiratory impairment was not totally disabling. The administrative law judge credited the opinion of Dr. Cho because this physician "found coal dust exposure to be an equal cause with cigarette smoking of the COPD, although he did not find the COPD to be disabling." Decision and Order on Remand at 14; Director's Exhibits 10, 12, 51. Since Dr. Cho diagnosed the presence of coal workers' pneumoconiosis, which resulted in some respiratory disability, although he differed with Dr. Wald on the degree of disability, we hold that the administrative law judge did not err by relying on this opinion, in part, to support Dr. Wald's opinion, which is sufficient to establish claimant's burden of proof at causation. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Employer also asserts that the administrative law judge erred by failing to specifically discuss the opinion of Dr. Fino, who attributed all of claimant's respiratory disability to

⁴Since the miner's last coal mine employment took place in the State of West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 51; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

smoking at Section 718.204(c). We find no merit in employer's contention. The Decision and Order on Remand indicates that the administrative law judge considered this opinion pursuant to Section 718.202(a)(4) and rationally determined that it was unreasoned since "Dr. Fino's reasoning shows that he ruled out pneumoconiosis based on the absence of factors indicating fibrosis, or clinical pneumoconiosis, which is only half the definition found at 20 C.F.R. §718.201," and that "Dr. Fino's analysis of the medical literature limiting the effects of coal dust exposure to medical pneumoconiosis and temporary industrial bronchitis has been rejected by the United States Department of Labor." Decision and Order on Remand at 13; Director's Exhibit 50. As the administrative law judge rationally determined that Dr. Fino's opinion was unreasoned due to this physician's failure to consider the legal definition of pneumoconiosis, it was within the administrative law judge's discretion to accord this opinion little weight. See generally *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

Further, the administrative law judge's evaluation of Dr. Fino's opinion on the existence of pneumoconiosis is applicable to Section 718.204(c), as it concerns whether claimant's respiratory condition is caused by legal pneumoconiosis. Since the administrative law judge rationally found Dr. Fino's opinion not well reasoned in his conclusions based on legal pneumoconiosis and was outweighed by the opinions of Drs. Wald and Cho, the administrative law judge did not err in failing to discuss Dr. Fino's opinion under Section 718.204(c). *Roberts v. West Virginia C. W. P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996). We also find no merit in employer's contention that the administrative law judge was required to credit Dr. Fino's opinion based on his status as a Board-certified pulmonologist. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). Since the administrative law judge has provided a rational basis for his finding that claimant demonstrated that pneumoconiosis significantly contributed to his total respiratory disability, we affirm the finding that causation has been established, and that claimant established a material change in conditions. 20 C.F.R. §§718.204(c); 725.309; *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). We further affirm the finding that claimant is entitled to benefits.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge