

BRB No. 09-0612 BLA

EARNEST L. MOORE)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 05/26/2010
)	
CONSOLIDATION COAL COMPANY)	
)	
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-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (05-BLA-6204) of Administrative Law Judge Michael P. Lesniak rendered on a subsequent claim filed pursuant to the provisions of 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 This case is before the Board for the second time.

In his initial decision, the administrative law judge credited claimant with twenty-six years of coal mine employment, as stipulated.² The administrative law judge found that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and both clinical and legal pneumoconiosis³ based on the medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge found that claimant established total respiratory disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). Further, because new evidence established all elements of entitlement, the administrative law judge found a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, he awarded benefits.

Upon review of employer's appeal, the Board vacated the administrative law judge's finding of legal pneumoconiosis because he did not adequately explain his reasons for crediting the opinions of Drs. Celko, Cohen, and Rasmussen, diagnosing pneumoconiosis, over the contrary opinions of Drs. Fino and Renn.⁴ *E.M. [Moore] v.*

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as claimant's current claim was filed before January 1, 2005. Consequently, employer's motion for an extension of time to file a supplemental brief concerning the impact of the amendments, is moot.

² The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

³ Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

⁴ The Board affirmed the administrative law judge's findings that claimant established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), total

Consolidation Coal Co., BRB No. 07-0563 BLA (Apr. 30, 2008)(unpub.). The Board remanded the case for the administrative law judge to reconsider the opinions, taking into account claimant's hospitalization and treatment records, and all of the pulmonary function studies of record. The Board further instructed the administrative law judge to address Dr. Cohen's reference to a pulmonary function study that was not in evidence. Additionally, the Board instructed the administrative law judge to weigh together the x-ray and medical opinion evidence before determining whether pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a). Because the Board vacated the administrative law judge's finding of pneumoconiosis, the Board also vacated the finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instructed the administrative law judge to reconsider the cause of claimant's total disability, if reached.

On remand, the administrative law judge reconsidered the medical opinion evidence and found that claimant established the existence of legal pneumoconiosis, in the form of obstructive lung disease due to both smoking and coal mine dust exposure, pursuant to Section 718.202(a)(4). The administrative law judge further found that all of the relevant evidence weighed together established the existence of pneumoconiosis under Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Additionally, the administrative law judge found that claimant established that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that claimant established legal pneumoconiosis pursuant to Section 718.202(a)(4), and that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *E.M. [Moore] v. Consolidation Coal Co.*, BRB No. 07-0563 BLA (Apr. 30, 2008)(unpub.), slip op. at 3-5 and n.3.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to Section 718.202(a)(4), the administrative law judge reconsidered the opinions of Drs. Celko, Cohen, Rasmussen, Fino, and Renn,⁵ claimant's hospitalization and treatment records, and pulmonary function studies administered between 1976 and 2006. Drs. Cohen and Rasmussen diagnosed claimant with severe obstructive lung disease due to both smoking and coal mine dust exposure. Claimant's Exhibits 1, 4; Employer's Exhibit 12. Dr. Celko diagnosed chronic obstructive pulmonary disease (COPD) due to smoking and "occupational dust exposure." Director's Exhibit 16 at 4; Employer's Exhibit 7. Drs. Fino and Renn diagnosed claimant with chronic bronchitis and emphysema that is due solely to smoking. Employer's Exhibits 2, 8, 11, 15. As further summarized by the administrative law judge, claimant's pulmonary function studies reflected worsening obstruction, while his hospitalization and treatment records indicated that he was treated for COPD. Director's Exhibits 1, 3, 18; Claimant's Exhibits 1, 4; Employer's Exhibits 1, 2, 6.

Considering the medical opinions in light of claimant's treatment records, the administrative law judge found that, since the treating physicians who diagnosed claimant with COPD did not provide an etiology for the disease, the treatment records neither established nor precluded a finding of pneumoconiosis. Further, the administrative law judge determined that the smoking histories in the treatment records were not a reason to discredit the opinions of Drs. Celko, Cohen, or Rasmussen, since all the physicians agreed that claimant smoked for twenty-eight to thirty-two pack years. Thus, the administrative law judge "continue[d] to find" the opinions of Drs. Celko, Cohen, and Rasmussen to be well-reasoned. Decision and Order on Remand at 8.

The administrative law judge addressed, as instructed, that Drs. Celko, Cohen, and Rasmussen reviewed less pulmonary function study evidence than did Drs. Fino and Renn. He concluded that this difference did not affect the weight to be accorded the

⁵ In weighing the medical opinions, the administrative law judge incorporated his previous finding that Drs. Cohen, Fino, Rasmussen, and Renn are similarly qualified in pulmonary medicine, while Dr. Celko's qualifications are "less impressive" than those of the other physicians. Decision and Order on Remand at 8 n.8. As employer does not challenge the administrative law judge's finding regarding the physicians' relative qualifications, the finding is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

opinions, because the more recent pulmonary function studies were “the most probative” of claimant’s current condition, and claimant’s physicians’ “conclusions regarding the nature and severity of [claimant’s] pulmonary impairment [were] consistent with [that] evidence.” Decision and Order on Remand at 9. Further, the administrative law judge considered whether Dr. Fino’s and Dr. Renn’s review of all the pulmonary function studies gave them additional “insight as to the etiology of” claimant’s COPD. *Id.* Finding that the two doctors’ opinions conflicted as to the pattern of impairment in the studies over time, the administrative law judge concluded that “the additional evidence reviewed by Drs. Renn and Fino [did] not strengthen” their opinions, or weaken those of Drs. Celko, Cohen, and Rasmussen.⁶ Decision and Order on Remand at 9-10.

Additionally, the administrative law judge found that Dr. Cohen’s review of a pulmonary function study that was not in the record did not affect the doctor’s opinion, because Dr. Cohen’s conclusion, that claimant has a severe obstructive impairment, was consistent with the pulmonary function studies in evidence. Decision and Order on Remand at 9 n.9.

The administrative law judge found that the opinions of Drs. Fino and Renn were not well-reasoned. He found that the doctors’ partial reliance on x-ray evidence, to conclude that coal dust did not contribute to claimant’s obstructive impairment, was unconvincing, in view of both the administrative law judge’s finding that the x-rays established pneumoconiosis, and the Department of Labor’s finding that coal mine dust can cause significant impairment, even in the absence of clinical pneumoconiosis. Further, the administrative law judge discounted Dr. Renn’s opinion, that significant reversibility in claimant’s impairment pointed to smoking as the cause, because Dr. Renn stood alone in his view that claimant’s impairment is significantly reversible. Additionally, the administrative law judge found that Dr. Renn did not adequately explain why claimant’s test results were more consistent with smoking-related emphysema than with coal dust-related emphysema. Further, in view of the finding that claimant had twenty-six years of coal mine employment, the administrative law judge discounted Dr. Fino’s opinion that claimant did not have a “prolonged period of time within the coal mines,” and thus, would not have had more than the average amount of coal dust in his lungs. Decision and Order on Remand at 7. Based on the foregoing findings, the administrative law judge determined that the weight of the medical opinion evidence established legal pneumoconiosis.

⁶ Employer does not challenge the administrative law judge’s findings regarding the credibility of the physicians’ opinions in light of the hospitalization and treatment records and the pulmonary function study evidence of record. Those findings are therefore affirmed. *Skrack*, 6 BLR at 1-711.

Employer argues that the administrative law judge erred in relying on the opinions of Drs. Celko, Cohen, and Rasmussen because they are “not persuasive,” and do not adequately link the medical literature concerning coal mine dust and obstruction to claimant’s specific case. Employer’s Brief at 13. Employer argues further that these opinions are flawed because they are “not as supported by the medical evidence as those of Drs. Renn and Fino.” *Id.* at 14. Employer essentially asks the Board to reweigh the evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. Upon review, we conclude that substantial evidence supports the administrative law judge’s discretionary determination that the opinions of Drs. Celko, Cohen, and Rasmussen are well-documented and reasoned. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Employer argues further that the administrative law judge failed to address whether Dr. Cohen’s review of a pulmonary function study outside the record affected the doctor’s opinion. Employer’s Brief at 14. This argument lacks merit. The administrative law judge specifically, and reasonably, determined that Dr. Cohen’s review of an inadmissible pulmonary function study detecting the same type of impairment as the admissible studies did not affect the doctor’s opinion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff’d on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); Decision and Order at 9 n.9.

Employer contends that the administrative law judge erred in discounting the opinions of Drs. Renn and Fino because they relied on x-ray evidence in excluding coal mine dust as a cause of claimant’s obstruction. We disagree. The administrative law judge permissibly discounted the opinions of Drs. Renn and Fino because they relied, in part, on their view that claimant does not have pneumoconiosis by x-ray, contrary to the administrative law judge’s finding, to support their opinion that claimant’s obstruction is unrelated to coal mine dust exposure. *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175; Employer’s Exhibits 11 at 25, 40; 15 at 27-28. Employer argues that the administrative law judge erred because Dr. Fino assumed that claimant’s x-ray was positive for pneumoconiosis. Contrary to employer’s argument, the administrative law judge recognized this aspect of Dr. Fino’s opinion. The administrative law judge, however, found Dr. Fino’s reasoning “unconvincing,” because it was also based on Dr. Fino’s view that claimant did not have a sufficiently prolonged period in the mines to experience above-average dust retention, when the administrative law judge found that claimant had twenty-six years of coal mine employment. Decision and Order on Remand at 7. Employer does not challenge that finding. It is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer also argues that the administrative law judge erred in referring to the preamble to the revised regulations when he assessed the reasoning of the opinions of Drs. Fino and Renn. Employer's Brief at 11-12. Contrary to employer's assertions, the administrative law judge did not treat the preamble as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis; he permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). The administrative law judge permissibly discounted Dr. Fino's opinion, that claimant's x-rays did not reflect sufficient coal dust to cause excess obstructive impairment, in view of the medical literature credited by DOL indicating that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not (clinical) pneumoconiosis is present." Decision and Order on Remand at 7, *quoting* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. Further, the administrative law judge permissibly found that Dr. Renn did not "convincingly explain" his opinion that the pattern of claimant's impairment indicates that his emphysema is due only to smoking, in light of DOL's finding that medical literature indicates that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order on Remand at 6, *quoting* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

Additionally, contrary to employer's argument, the administrative law judge permissibly discounted Dr. Renn's opinion because the doctor's finding of significant bronchoreversibility was inconsistent with the findings by the remaining doctors, who found no reversibility (Drs. Cohen and Celko), mild reversibility (Dr. Rasmussen), or "borderline" reversibility (Dr. Fino). *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986); Director's Exhibit 16 at 3; Claimant's Exhibit 1 at 5; Employer's Exhibits 2 at 6; 11 at 18-19; 15 at 21. Substantial evidence supports the administrative law judge's credibility determination with respect to Dr. Renn.⁷

⁷ Employer states that the administrative law judge "misunderstood" that Dr. Renn was addressing the change in results between claimant's 2005 and 2006 pulmonary function studies. Employer's Brief at 9. Employer, however, does not address that its own expert, Dr. Fino, reviewed multiple pulmonary function studies and concluded that claimant's 2005 pulmonary function study was "borderline" for reversibility, and that the "overwhelming majority" of claimant's obstructive lung impairment is "irreversible." Employer's Exhibit 11 at 18-19.

Based on the foregoing, we affirm the administrative law judge's finding that claimant established legal pneumoconiosis pursuant to Section 718.202(a)(4). We also affirm the administrative law judge's finding that all the evidence weighed together established both clinical and legal pneumoconiosis pursuant to Section 718.202(a). *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175.

The administrative law judge found disability causation established pursuant to Section 718.204(c), for the same reasons he found that the medical opinion evidence established that claimant's disabling obstructive lung disease is legal pneumoconiosis. Specifically, he accorded greater weight to the opinions of Drs. Cohen and Rasmussen, as supported by that of Dr. Celko, to find that "the better reasoned medical opinion evidence establishes that [c]laimant's occupational dust exposure (*i.e.*, pneumoconiosis) is a substantially contributing cause of his total disability." Decision and Order on Remand at 10. Employer raises the same challenges to the administrative law judge's finding that it raised with respect to his finding of legal pneumoconiosis pursuant to Section 718.202(a)(4). Because we have rejected those arguments, we affirm the administrative law judge's finding that claimant's pneumoconiosis is a substantially contributing cause of his total disability pursuant to Section 718.204(c). *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order on Remand-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