

BRB No. 12-0100 BLA

JOHN FORD)
)
 Claimant-Respondent)
)
 v.)
)
 CONSOLIDATION COAL COMPANY) DATE ISSUED: 11/28/2012
)
 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 Thomas M. Burke,
Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania,
for claimant.

William S. Mattingly (Jackson Kelly PPLC), 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 Awarding Benefits (2009-BLA-5674)
of Administrative Law Judge Thomas M. Burke on a subsequent claim¹ filed pursuant to
the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp.
2011)(the Act). The administrative law judge credited claimant with at least thirty-six

¹ Claimant's initial claim, filed on January 28, 1983, was denied by the district
director on June 8, 1983 because claimant failed to establish any element of entitlement.
Director's Exhibit 1.

years of coal mine employment, as stipulated by the parties, and adjudicated this claim, filed on September 15, 2008, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that the newly submitted evidence was sufficient to establish total respiratory disability, thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further determined that the weight of the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).² Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence on the issues of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief.³

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.⁴ 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 initially contends that, in evaluating the medical opinion evidence relevant to the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge erroneously discredited the opinion of Dr. Spagnolo, that claimant's respiratory

² The administrative law judge found that claimant was not entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, as claimant failed to establish that he worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4).

³ We affirm, as unchallenged on appeal, the administrative law judge's acceptance of the parties' stipulation to at least thirty-six years of coal mine employment, and his finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

impairment is unrelated to his coal dust exposure. Employer asserts that, contrary to the administrative law judge's findings, Dr. Spagnolo's opinion is not inconsistent with the preamble to the amended regulations and is not contradictory in its conclusions with respect to the role smoking played in claimant's respiratory impairment. Employer's Brief at 15-18.

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 conflicting medical opinions of Drs. Spagnolo,⁵ Schaaf,⁶ Lenkey,⁷ Saludes,⁸ and Altmeyer,⁹ noting their underlying documentation, the

⁵ Dr. Spagnolo prepared consulting opinions dated November 22, 2009 and October 1, 2010, and provided a deposition on November 9, 2010. He opined that claimant does not have the capacity to perform his past coal mine employment, and diagnosed chronic bronchial asthma exacerbated by left heart disease, emphysema, and the prescription medication, Atenolol. He stated that smoking played a role in triggering and further worsening claimant's airflow obstruction. Employer's Exhibits 7, 18 at 28. Dr. Spagnolo stated that it is very difficult to conclude that claimant's worsening in pulmonary function is related to coal dust, as claimant's last coal dust exposure was in 1983 and the x-ray and CT scan interpretations are negative for pneumoconiosis. Employer's Exhibits 16, 18 at 36-37.

⁶ Dr. Schaaf examined claimant on September 30, 2010, and diagnosed severe chronic obstructive airways disease as a consequence of chronic industrial bronchitis due to exposures in claimant's coal mine employment. He opined that claimant is incapable of performing his coal mining duties. Claimant's Exhibit 2.

⁷ Dr. Lenkey performed the Department of Labor examination on November 6, 2008, and opined that claimant has severe emphysema as manifested on pulmonary function testing. He believed that claimant's severe obstruction is attributable to long-standing dust and coal dust exposure. He noted a mild response to bronchodilator therapy, but found nothing to suggest chronic asthma. He stated that claimant is totally disabled. Director's Exhibit 13; Employer's Exhibit 9.

⁸ Dr. Saludes examined claimant on September 17, 2010, and diagnosed a severe chronic air flow obstruction with secondary restriction, resulting in total pulmonary disability. While claimant's x-ray was negative for pneumoconiosis, Dr. Saludes diagnosed chronic obstructive pulmonary disease (COPD) "likely" related to coal dust

employment and smoking histories relied upon, and the physicians' explanations for their respective conclusions. Decision and Order at 7-13. The administrative law judge determined that "Dr. Spagnolo is the only one of the five physicians to find that claimant's coal dust exposure did not, in any way, contribute to his total pulmonary disability," while Drs. Schaaf, Lenkey, Saludes, and Altmeyer all attributed claimant's pulmonary impairment, at least in part, to his coal dust exposure. Decision and Order at 19, 20. The administrative law judge permissibly discredited Dr. Spagnolo's opinion, that claimant's disabling respiratory impairment is unrelated to coal dust exposure, because it was premised primarily upon the doctor's belief that, once coal mining ceased, it was very unlikely that coal dust exposure could cause a worsening of pulmonary function in the absence of positive, worsening x-rays or CT scans. *See A & E Coal Co. v. Adams*, 694 F.3d 798, BLR (6th Cir. 2012); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); 20 C.F.R. §718.202(a)(4); Decision and Order at 19, citing Employer's Exhibit 18 at 36-37; Employer's Exhibits 7, 16, 18. The administrative law judge rationally found Dr. Spagnolo's opinion to be inconsistent with the regulations, which recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." Decision and Order at 19, *citing* 20 C.F.R. §718.201(c). The administrative law judge additionally noted that the preamble to the amended regulations recognizes that:

. . . a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of pneumoconiosis includes impairments that arise from coal mine employment, regardless of whether a miner shows x-ray evidence of pneumoconiosis, this evidence of

exposure, as claimant has been a lifelong nonsmoker and it is known that inhalation of coal dust is a cause of COPD. Claimant's Exhibit 3.

⁹ Dr. Altmeyer examined claimant on August 19, 2009, and diagnosed a totally disabling severe airways obstruction due to naturally occurring asthma and prior coal dust exposure. He determined that because there is significant bronchoreversibility and because claimant's lung function tests were only mildly reduced around the time he stopped coal mining, the bulk of the airways obstruction is due to naturally occurring asthma. He noted that claimant is being treated with corticosteroids, which is appropriate treatment for asthma but would not be helpful for airways obstruction related to coal dust. He opined that "there is a component of airways obstruction due to coal dust exposure." Employer's Exhibit 5.

deterioration of lung function among miners, including miners who did not smoke, is significant.

Decision and Order at 19-20, *citing* 65 Fed. Reg. at 79971 (Dec. 20, 2000); *see* 20 C.F.R. §718.201(a)(2). As the extent to which a medical opinion accords with the preamble to the amended regulations is a valid criterion for the trier-of-fact to consider in weighing the opinion, the administrative law judge properly discounted Dr. Spagnolo's opinion.¹⁰ *See Obush*, 24 BLR at 1-125-26. The administrative law judge addressed and rejected employer's challenges to the adequacy of the reasoning and documentation of the remaining medical opinions, and acted within his discretion in finding that the weight of the evidence was sufficient to establish the existence of legal pneumoconiosis. Decision and Order at 20-21; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding of legal pneumoconiosis at Section 718.202(a)(4).

Employer next contends that the administrative law judge erred in relying on the opinions of Drs. Altmeyer, Schaaf, Lenkey and Saludes to support his finding of disability causation at Section 718.204(c), arguing that these opinions are insufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's disability. Employer's Brief at 18-23. While employer correctly argues that Dr. Altmeyer did not quantify the contribution of pneumoconiosis to claimant's disability, and the administrative law judge acknowledged that Dr. Saludes's opinion could be construed as speculative, the administrative law judge properly credited the opinions of Drs. Schaaf and Lenkey, that claimant's disability was caused by coal dust exposure, as sufficient to establish disability causation at Section 718.204(c). Decision and Order at 21-22; *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, we affirm the administrative law judge's finding that claimant established disability causation at Section 718.204(c) by a preponderance of the evidence, and affirm the award of benefits.

¹⁰ Because the administrative law judge provided a valid reason for discounting Dr. Spagnolo's opinion, we need not address employer's argument that the opinion was not internally inconsistent with respect to the role smoking played in claimant's respiratory impairment. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-383 n.4 (1983).

Accordingly, the administrative law judge's Decision and Order 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