BRB No. 08-0215 BLA

C. S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY (F/K/A AMAX COAL COMPANY)	)	DATE ISSUED: 10/24/2008
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 (02-BLA-5234) of Administrative Law Judge Donald W. Mosser (the administrative law judge) 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found, as the parties stipulated, that the miner had at least thirty years of qualifying coal mine employment and that he had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence established that claimant had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding clinical pneumoconiosis established by the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and erred in finding legal pneumoconiosis established by medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in not weighing all of the relevant evidence together before finding pneumoconiosis established pursuant to Section 718.202(a). Additionally, employer contends that the administrative law judge erred in finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) and erred in finding that claimant's total disability was due to pneumoconiosis (disability causation) pursuant to Section 718.204(c). Finally, employer contends that the administrative law judge's award of benefits must be vacated and the case remanded for further development of the evidence, as the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Employer contends that because Dr. Henry's opinion is unreasoned on the issue of the cause of claimant's chronic obstructive pulmonary disease (COPD), claimant was not provided with a complete, credible pulmonary evaluation.[1] Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits. In a limited response brief, the Director contends that employer has no standing to assert claimant's right to a complete, credible pulmonary evaluation and that, even if employer did have standing to make such an assertion, the issue is moot since Dr. Henry provided a reasoned opinion as to the cause of claimant's COPD.

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

[1] Dr. Henry provided claimant with a pulmonary evaluation on behalf of the Director, Office of Workers' Compensation Programs.

rational, and are consistent with the applicable law,[2] they are binding upon this Board and may not be disturbed. 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 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*).

COMPLETE, CREDIBLE PULMONARY EVALUATION

Employer argues that because Dr. Henry failed to provide a meaningful explanation for his finding that claimant's COPD was due to both smoking and coal mine employment, the Director failed to provide claimant with a complete, credible pulmonary evaluation. Consequently, employer contends that the administrative law judge's decision awarding benefits must be vacated and the case remanded to the district director for a complete, credible pulmonary evaluation. Further, employer contends that even if Dr. Henry provided a complete, credible pulmonary evaluation sufficient to satisfy the Director's statutory obligation, the administrative law judge failed to consider whether the opinion on that issue was reasoned.

In considering the opinion of Dr. Henry, the administrative law judge concluded that Dr. Henry found that claimant had severe COPD due to both smoking and coal mine employment. Director's Exhibit 12. The administrative law judge concluded that Dr. Henry's opinion on the issue was reasoned because it was based on claimant's lengthy smoking and coal mine employment histories, claimant's symptoms, the results of claimant's pulmonary function and blood gas studies, and physical examination findings.

We agree with the Director that claimant was provided with a complete, credible pulmonary evaluation by Dr. Henry regarding the cause of his COPD, and that the administrative law judge properly found that Dr. Henry's opinion on the issue was reasoned, as it was based on underlying documentation. Further, contrary to employer's contention, the administrative law judge properly found that Dr. Henry's opinion that coal mine employment was a cause of claimant's COPD was reasoned, even though the doctor did not opine as to the exact proportional effect that claimant's coal mine

[2] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as claimant was last employed in coal mining in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

employment, as opposed to smoking, had on claimant's COPD. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Accordingly, employer's argument that claimant did not receive a complete, credible pulmonary evaluation is rejected.[3] *See Cline v. Director, OWCP*, 917 F.2d 9, 11 (8th Cir. 1990); *Ware v. Director, OWCP*, 814 F.2d 514 (8th Cir. 1987); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

20 C.F.R. §718.202(a)(4)

Employer next argues that the administrative law judge erred in crediting the opinions of Drs. Cohen and Henry, that claimant's COPD was due to both smoking and coal dust exposure, to find legal pneumoconiosis established at Section 718.202(a)(4), over the opinions of Drs. Renn and Repsher, that the sole cause of claimant's COPD was smoking. Specifically, employer contends that the administrative law judge erred in crediting Dr. Cohen's opinion because Dr. Cohen failed to explain why he believed that coal mine employment was a cause of claimant's COPD, in light of claimant's more substantial smoking history. Employer contends that the administrative law judge erred in crediting the opinion of Dr. Henry on the issue because it was not adequately explained.

Instead, employer contends that the administrative law judge should have credited the opinions of Drs. Repsher and Renn, that claimant's COPD was due solely to smoking. Employer contends that the administrative law judge erred in finding Dr. Repsher's opinion inadequately reasoned because he failed to explain why claimant's thirty year coal mine employment history did not contribute to claimant's COPD. Employer contends that Dr. Repsher provided a reasoned opinion as to why smoking alone caused claimant's COPD. Regarding Dr. Renn's opinion, employer contends that the administrative law judge erred in rejecting it because the doctor relied on "significant broncho-reversibility" and the fact that claimant did not develop COPD until after he left coal mine employment to find that claimant's COPD did not arise out of coal mine employment. Employer contends that Dr. Renn fully explained why these factors supported his opinion. Finally, employer asserts that the administrative law judge's reasoning shifts the burden of proof to employer to rule out a causal connection between claimant's respiratory impairment and his coal mine employment, instead of placing the

[3] Inasmuch as we affirm the administrative law judge's finding that Dr. Henry provided a reasoned opinion addressing the cause of claimant's COPD, we decline to address the Director's argument that employer does not have standing to raise the issue of whether claimant received a complete, credible pulmonary evaluation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

burden of proof on claimant to establish that his respiratory impairment arose out of coal mine employment. Employer also contends that the administrative law judge erred in presuming that all obstructive lung diseases are caused by coal mine employment, instead of determining whether claimant established that his obstructive lung disease was caused by coal mine employment, rather than smoking. Employer's Brief at 6-11.

In finding legal pneumoconiosis established at Section 718.202(a)(4), the administrative law judge found the opinion of Dr. Cohen, that claimant's COPD was due to both smoking and coal mine employment, to be the best reasoned. He, therefore, accorded it controlling weight. The administrative law judge found that Dr. Cohen's opinion was supported by his findings on examination of claimant, claimant's history of smoking and coal mine employment, claimant's symptoms of COPD, which he experienced over several years, and the results of objective testing. The administrative law judge noted that Dr. Henry also provided a reasoned opinion that claimant suffered from COPD due to both smoking and coal mine employment.

Regarding the opinions of Drs. Repsher and Renn, that claimant's COPD was due to smoking alone, the administrative law judge found that Dr. Repsher's opinion was less persuasive because he failed to explain the basis for his determination that claimant's thirty years of coal mine employment did not contribute to claimant's severe COPD. The administrative law judge noted that the doctor's statement, that it was uncommon to find that coal dust exposure was the cause of clinically significant COPD, was insufficient to eliminate the possibility that claimant's COPD was due to coal mine employment. The administrative law judge also noted that Dr. Repsher's labeling of claimant's COPD as a "pure obstructive disease" was insufficient to establish that it was unrelated to coal mine employment, as the administrative law judge noted that legal pneumoconiosis can be both a restrictive and an obstructive disease.

Turning to Dr. Renn's opinion, the administrative law judge found that it was not in keeping with the regulations, which define pneumoconiosis as a latent and progressive disease. The administrative law judge noted that Dr. Renn testified that claimant's COPD could not have been aggravated by coal mine employment because the disease did not develop until after claimant left the mines. The administrative law judge also found that Dr. Renn's opinion, that claimant could not have pneumoconiosis because he showed "significant broncho-reversibility," was not in keeping with case law that has held that broncho-reversibility does not rule out legal pneumoconiosis. Based on his review of the medical opinion evidence, therefore, the administrative law judge concluded that legal pneumoconiosis was established at Section 718.202(a)(4).

Contrary to employer's assertion, the administrative law judge did not improperly shift the burden of proof in this case. Rather, he weighed the medical opinion evidence, finding that the opinions of Drs. Cohen and Henry were more persuasive than the

opinions of Drs. Repsher and Renn, because they were better documented and reasoned. Contrary to employer's argument, the administrative law judge rationally concluded that Dr. Repsher's opinion, that claimant had a "purely obstructive disease" was insufficient to eliminate claimant's thirty years of coal mine employment as a cause of COPD, inasmuch as pneumoconiosis encompasses both restrictive and obstructive impairments. *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Similarly, the administrative law judge properly found the opinion of Dr. Renn, regarding the cause of COPD, to be less persuasive because Dr. Renn focused on the "broncho-reversibility" of claimant's COPD, *Barrett*, 478 F.3d at 356, 23 BLR at 2-483, and on the absence of COPD until three or four years after claimant had left the mines. *See* 20 C.F.R. §718.201(c).

Instead, the administrative law judge properly accorded determinative weight to Dr. Cohen's opinion because it was the best reasoned opinion of record. The administrative law judge noted that it was consistent with the objective medical evidence and that Dr. Cohen fully explained how both claimant's coal mine employment history and smoking contributed to his COPD. Regarding the opinion of Dr. Henry, the administrative law judge also properly found that Dr. Henry's opinion also established legal pneumoconiosis as Dr. Henry found that claimant's COPD was due to both coal mine employment and smoking and his opinion was well-reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-55 (1989) (*en banc*). The administrative law judge's finding that legal pneumoconiosis was established at Section 718.202(a)(4) is therefore affirmed.

20 C.F.R. §718.202(a)

Employer also argues that the administrative law judge erred in failing to weigh all of the relevant evidence together before finding pneumoconiosis established at Section 718.202(a). Contrary to employer's contention, however, Section 718.202(a) provides alternative methods for establishing pneumoconiosis. Thus, claimant may establish pneumoconiosis under any of the methods provided at 20 C.F.R. §718.202(a)(1)-(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Accordingly, we reject employer's argument that all of the relevant evidence must be weighed together to determine if pneumoconiosis has been established.[4] Consequently, because the administrative law

[4] We recognize that the United States Courts of Appeals for the Third and the Fourth Circuits have held that all relevant evidence at 20 C.F.R. §718.202(a)(1)-(4) must be weighed together in determining whether pneumoconiosis is established at Section 718.202(a). *Penn Allegheny Coal Co.*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). However,

judge properly found that pneumoconiosis was established by the medical opinion evidence pursuant to Section 718.202(a)(4), we need not consider employer's argument that the administrative law judge erred in finding pneumoconiosis established by the x-ray evidence at Section 718.202(a)(1). *See Dixon*, 8 BLR at 1-345.

20 C.F.R. §718.203(b)

Employer next contends that the administrative law judge erred in finding that claimant was entitled to the presumption that his legal pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b), based on his thirty years of coal mine employment. Employer contends that claimant is not entitled to that presumption on the basis of a finding of legal pneumoconiosis.

Because the administrative law judge properly found legal pneumoconiosis established based on his weighing of the medical opinion evidence, any error he may have made in applying the presumption of causality at Section 718.203(b) is harmless, as a finding of causality is subsumed in the finding of legal pneumoconiosis. *Kiser v. L & J Equipment Co.*, 23 BLR 1-246 (2006); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147 (1999).

20 C.F.R. §718.204(c)

Finally, employer argues that the administrative law judge erred in finding that the medical opinion evidence established disability causation at Section 718.204(c). Specifically, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Repsher and Renn because they did not find, contrary to his own finding, that claimant had either clinical or legal pneumoconiosis. Specifically, employer contends that their opinions that claimant did not have clinical pneumoconiosis should have been credited because they were supported by negative x-ray and CT scan evidence.

In finding that the medical opinion evidence established disability causation, the administrative law judge accorded less weight to the opinions of Drs. Repsher and Renn because they did not find, contrary to his own finding, the existence of clinical or legal pneumoconiosis. Instead, the administrative law judge credited the opinion of Dr. Cohen, who explained how both coal mine employment and smoking were significantly contributing causes of claimant's total disability. The administrative law judge concluded that, in light of the evidence of record regarding claimant's lengthy history of

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inasmuch as the Seventh Circuit has not adopted this standard, we will not apply it in this case.

both smoking and coal mine employment and his other documentation, Dr. Cohen's opinion was entitled to controlling weight on the issue.

At the outset, we note that employer contends only that the administrative law judge should have credited the opinions of Drs. Repsher and Renn, because their findings that claimant did not have clinical pneumoconiosis were supported by negative x-ray and CT scan evidence. Employer does not challenge the administrative law judge's finding that the opinions of Drs. Repsher and Renn were less persuasive on disability causation because they did not find, contrary to the administrative law judge's finding, that claimant had legal pneumoconiosis. This finding is affirmed as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, the administrative law judge could properly reject the opinions of Drs. Repsher and Renn because they did not find, contrary to the administrative law judge's determination, the existence of legal pneumoconiosis. *See Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Consequently, we affirm the administrative law judge's finding that disability causation was established pursuant to Section 718.204(c).

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