

BRB No. 10-0102 BLA

ROBERT D. GRAY)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 10/28/2010
)	
PEABODY 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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Maia S. Fisher (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 Award of Benefits (2007-BLA-05772) of Administrative Law Judge Daniel F. Solomon (the administrative law judge), with respect to a subsequent claim filed on June 7, 2006, 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 After crediting claimant with at least twenty-six years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. After noting that the parties also stipulated that claimant is totally disabled under the Act, the administrative law judge determined that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and disability causation at 20 C.F.R. §718.204(c). Therefore, the administrative law judge found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) and awarded benefits.

Employer appeals, arguing that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. In its reply brief, employer reiterates the arguments in its initial brief. The Director, Office of Workers'

¹ Claimant filed his initial claim for benefits on April 25, 1989, which was denied by the district director on October 12, 1989, because claimant did not establish the existence of coal workers' pneumoconiosis or that he was totally disabled due to the disease. Director's Exhibit 1. Claimant filed a timely request for reconsideration on October 25, 1989, which the district director denied on November 27, 1989. *Id.* No further action was taken until claimant filed his second claim for benefits on November 12, 1997. *Id.* The district director issued a finding of entitlement on July 9, 1998. *Id.* Employer requested a hearing and on September 20, 1999, Administrative Law Judge Rudolf Jansen issued a Decision and Order denying benefits on the ground that claimant did not establish the existence of pneumoconiosis. *Id.* Claimant appealed to the Board, which affirmed Judge Jansen's decision on November 6, 2000, and subsequently denied claimant's motion for reconsideration. *Gray v. Peabody Coal Co.*, BRB No. 00-0109 BLA (Nov. 6, 2000)(unpub.); Director's Exhibit 1. Claimant then appealed to the United States Court of Appeals for the Sixth Circuit, which remanded the case to Judge Jansen for further consideration. *Gray v. Peabody Coal Co.*, No. 01-03083 (6th Cir. Apr. 19, 2002); Director's Exhibit 1. Judge Jansen again denied benefits, as claimant failed to establish the existence of pneumoconiosis, and the Board affirmed this decision. *Gray v. Peabody Coal Co.*, BRB No. 04-0383 BLA (Oct. 27, 2004)(unpub.); Director's Exhibit 1. Claimant appealed to the Sixth Circuit, which dismissed the appeal as untimely and denied claimant's petition for rehearing. *Gray v. Peabody Coal Co.*, No. 05-3508 (6th Cir. Aug. 2, 2005), *petition for reh'g denied*, No. 05-3508 (6th Cir. Sept. 8, 2005). Subsequently, claimant filed a petition for modification, which the district director found to be untimely in correspondence dated May 31, 2006. Director's Exhibit 1. No further action was taken until claimant filed his current claim.

Compensation Programs (the Director), has declined to file a response brief in this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.³ 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. The Administrative Law Judge's Findings

In considering whether legal pneumoconiosis⁴ and total disability due to pneumoconiosis were established at 20 C.F.R. §§718.202(a)(4), 718.204(c), the administrative law judge weighed the opinions of Drs. Rasmussen, Baker, Rosenberg, and Repsher. The administrative law judge noted that Drs. Baker, Rosenberg, and Repsher are Board-certified pulmonologists. Decision and Order at 22; Claimant's Exhibit 2; Employer's Exhibits 19-20. The administrative law judge indicated that, although Dr. Rasmussen does not share this qualification, the Department of Labor

² We affirm, as unchallenged on appeal, the administrative law judge's acceptance of the parties' stipulation to at least twenty-six years of coal mine employment and his determination that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

(DOL) and several courts, including the United States Court of Appeals for the Sixth Circuit, have recognized that Dr. Rasmussen is “an acknowledged expert in the field of pulmonary impairments of coal miners.” Decision and Order at 22, *citing Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); 1972 U.S. Code Cong. Adm. News 2305, 2314; Claimant’s Exhibit 6. In addition, the administrative law judge stated that Dr. Rasmussen has published several articles on pneumoconiosis and recently addressed chronic obstructive pulmonary disease (COPD), which the administrative law judge identified as a key diagnosis in the current case. Decision and Order at 22. In contrast, the administrative law judge found that Drs. Baker, Rosenberg, and Repsher have not recently published the results of any research related to COPD or pneumoconiosis. *Id.* Therefore, while the administrative law judge determined that all of the physicians are well-qualified, he found Dr. Rasmussen to be slightly more qualified, based on his research and more recent and relevant publications. *Id.*

At 20 C.F.R. §718.202(a)(4), the administrative law judge found that Dr. Rasmussen’s opinion, that claimant’s COPD and emphysema were due to coal dust exposure and cigarette smoking, was well-documented and well-reasoned, because it was based on an examination of claimant and a review of a substantial portion of claimant’s medical records. Decision and Order at 23; Director’s Exhibit 12; Claimant’s Exhibits 6, 11-13.⁵ In addition, the administrative law judge determined that Dr. Rasmussen’s opinion was the “most adequate” in addressing claimant’s history and condition and noted that Dr. Rasmussen acknowledged that there are several causes of COPD. Decision and Order at 23. The administrative law judge indicated that Dr. Rasmussen’s opinion reinforced his findings regarding Dr. Rasmussen’s qualifications so he attached significant weight to the opinion. *Id.*

The administrative law judge determined that Dr. Baker’s opinion, that claimant’s COPD was due to coal dust exposure and cigarette smoking, was not “complete,” because Dr. Baker did not offer a complete explanation of his diagnosis and did not review claimant’s extensive medical records. Decision and Order at 23. Nevertheless, the administrative law judge accorded Dr. Baker’s opinion some weight for being well-documented and because it was supported by Dr. Rasmussen’s well-reasoned opinion and was consistent with the DOL’s comments to the regulations. Decision and Order at 23; Claimant’s Exhibit 2.

⁵ The administrative law judge indicated that, while he admitted Claimant’s Exhibits 12 and 13, which are reports by Dr. Rasmussen, dated March 4, 2009 and March 17, 2009, responding to reports by Drs. Repsher and Rosenberg, he did not accord them much weight because he found them to be untimely and cumulative. Decision and Order at 3.

In contrast, the administrative law judge found the opinions of Drs. Repsher and Rosenberg, that claimant's COPD was due solely to his cigarette smoking, to be less reasoned, because he determined that they relied on studies published prior to January 21, 2001, the date on which the new regulations, including the revised definition of pneumoconiosis, became effective. Decision and Order at 23-24; Employer's Exhibits 9-11, 27-29. The administrative law judge also indicated that the Attfield and Hodous study, and the majority of the other reports cited by Drs. Repsher and Rosenberg, addressed clinical, rather than legal, pneumoconiosis. Decision and Order at 24.

Further, the administrative law judge found Dr. Repsher's opinion to be less probative, as he determined that it was based on general statistical probabilities and outdated studies, instead of claimant's history and condition. Decision and Order at 24. In addition, the administrative law judge noted that Dr. Repsher did not sufficiently address claimant's coal dust exposure history prior to excluding it as a cause of his respiratory impairment. *Id.* The administrative law judge stated that Dr. Repsher's exclusion of coal dust as a contributing factor, based on claimant's disproportionate decrease in FEV1 and FEV1/FVC, is not well-reasoned because he did not explain how this finding excludes all factors other than smoking. *Id.*

Regarding Dr. Rosenberg's opinion, the administrative law judge found that he similarly did not address claimant's significant coal dust exposure and whether it could be an aggravating factor in claimant's impairment. Decision and Order at 24. The administrative law judge determined that Dr. Rosenberg's opinion was not well-reasoned, as he relied on claimant's positive post-bronchodilator response to support his conclusion that claimant's obstructive impairment is not coal dust related. *Id.* at 25. However, the administrative law judge indicated that, in light of the values showing only partial reversibility of claimant's obstruction, Dr. Rosenberg did not explain how the reversibility completely eliminated the possibility that claimant's impairment was at least aggravated by coal dust exposure. *Id.* As a result, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis arising from his coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b), based on Dr. Rasmussen's opinion. *Id.*

At 20 C.F.R. §718.204(c), the administrative law judge credited Dr. Rasmussen's opinion, that claimant's legal pneumoconiosis was more than a *de minimus* causal factor in his totally disabling impairment. Decision and Order at 26; Director's Exhibit 12; Claimant's Exhibits 6 and 11. In contrast, the administrative law judge gave less weight to the opinions of Drs. Repsher and Rosenberg, because he found that they did not address whether claimant's coal mine employment could be more than a *de minimus* factor in his disability and dismissed claimant's coal dust exposure as a factor in his disability because they did not find that claimant suffered from legal pneumoconiosis.

Decision and Order at 26. Therefore, the administrative law judge found that claimant established total disability causation at 20 C.F.R. §718.204(c). *Id.*

II. Arguments on Appeal

Employer asserts that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer argues specifically that the administrative law judge did not explain why Dr. Rasmussen's publications entitle his opinion to more weight or why they were more compelling than the publications of Drs. Repsher and Rosenberg. In addition, employer contends that the administrative law judge did not explain why the credibility of Dr. Rasmussen's diagnosis of legal pneumoconiosis was not diminished by his reliance on a finding of clinical pneumoconiosis or his mistaken belief that claimant did not have heart disease. Employer states that the administrative law judge's additional reasons for crediting Dr. Rasmussen's opinion are not rational, because Drs. Repsher and Rosenberg also reviewed the entire record and recognized that COPD can be due to many causes. Further, employer argues that the administrative law judge substituted his own opinion for that of the experts when he determined that Dr. Rasmussen's conclusion regarding the cause of claimant's impairment was more reasonable. Employer contends that the administrative law judge's reliance on the additive effects of smoking and coal dust exposure in causing COPD is legally and factually flawed. Employer also asserts that, without Dr. Rasmussen's opinion, there is no evidence to support entitlement since the administrative law judge did not suggest that Dr. Baker's opinion, alone, is sufficient to establish entitlement.

Employer's allegations of error are without merit. The administrative law judge, as fact-finder, is granted substantial discretion in the consideration of the medical evidence and in resolving conflicts between the medical opinions of record. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youhioghny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Contrary to employer's contention, the administrative law judge explained why Dr. Rasmussen's publications entitled his opinion to more weight and why they were more relevant and timely than the publications of Drs. Repsher and Rosenberg. The administrative law judge noted that Dr. Rasmussen has written several articles on pneumoconiosis and recently addressed COPD, which the administrative law judge stated was a "key diagnosis in this case." Decision and Order at 22. In contrast, the administrative law judge indicated that Dr. Rosenberg has not published any studies addressing pneumoconiosis and that his most recent article on COPD was published in 1983. *Id.* The administrative law judge further noted that, while Dr. Repsher testified before the Kentucky legislature regarding pneumoconiosis, he has not written on, or researched the disease since 1979. *Id.* Employer does not contest these findings but instead, summarizes the past publications of Drs. Repsher and Rosenberg on

pulmonary diseases. Therefore, we hold that the administrative law judge acted rationally in concluding that Dr. Rasmussen was better qualified to offer an opinion on legal pneumoconiosis, based on his research and more recent published work on COPD and pneumoconiosis. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Wetzel*, 8 BLR at 1-141; *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); Decision and Order on Remand at 22.

In addition, contrary to employer's contention, the administrative law judge addressed Dr. Rasmussen's diagnosis of clinical pneumoconiosis, which was based on a positive x-ray reading, and stated that his opinion regarding legal pneumoconiosis should not be given less weight simply because the administrative law judge determined that the x-ray evidence was insufficient to establish the existence of clinical pneumoconiosis. Decision and Order at 22. The administrative law judge noted that Dr. Rasmussen's diagnosis of legal pneumoconiosis was based on his finding of COPD/emphysema due to claimant's productive cough and pulmonary function study results indicating a severe reversible airway obstruction. Decision and Order at 19, 22-23; Director's Exhibit 12; Claimant's Exhibit 6. Therefore, despite employer's assertion, there was no need for Dr. Rasmussen to reconsider his diagnosis of legal pneumoconiosis in light of the negative x-rays, as the administrative law judge permissibly determined that Dr. Rasmussen's finding of legal pneumoconiosis was well-documented, well-reasoned, and supported by the evidence of record. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Employer also argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion on the basis that Dr. Rasmussen examined claimant, reviewed records and recognized that there are many causes for COPD. Employer contends that Dr. Repsher also examined claimant and both Drs. Repsher and Rosenberg reviewed the entire record. In addition, employer states that Drs. Repsher and Rosenberg did not dispute that COPD can be due to many causes. However, these additional arguments are tantamount to a request for the Board to reweigh the evidence, a function outside the Board's purview. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In addition, the administrative law judge did not substitute his own opinion for that of the experts in giving greater weight to Dr. Rasmussen's diagnosis of legal pneumoconiosis, nor did he simply presume the existence of legal pneumoconiosis. Rather, the administrative law judge relied on Dr. Rasmussen's opinion, because he permissibly found that Dr. Rasmussen's rationale concerning the etiology of claimant's impairment was consistent with comments by the DOL in the preamble to the revised regulations. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 117 (2009). Therefore, we affirm the administrative law judge's crediting of Dr. Rasmussen's opinion at 20 C.F.R. §§718.202(a)(4), 718.204(c).

In addition, employer argues that the administrative law judge impermissibly discredited the opinions of Drs. Repsher and Rosenberg by finding that the literature that they relied on was out-dated and not based on principles consistent with the definition of legal pneumoconiosis. Employer contends that the administrative law judge shifted the burden of proof to employer by requiring Drs. Repsher and Rosenberg to explain why claimant's coal dust exposure could not be an aggravating factor in his impairment. Employer asserts that the administrative law judge also erred in discrediting their opinions, based on their discussion of the statistical probabilities of coal dust versus cigarette smoking, as sources of claimant's obstructive lung disease. Further, employer states that the administrative law judge did not explain his preference for Dr. Rasmussen's opinion over the opinions of Drs. Repsher and Rosenberg concerning claimant's disproportionate decrease in FEV1 and FEV1/FVC, especially when Dr. Rasmussen agreed that the disproportionate ratio was indicative of smoking induced COPD.

Contrary to employer's contention, the administrative law judge did not shift the burden of proof by discrediting the opinions of Drs. Repsher and Rosenberg because they did not explain why coal dust exposure could not be a contributing cause of claimant's impairment. Although claimant bears the burden of proving, by a preponderance of the evidence, that he has pneumoconiosis, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), when there is conflicting evidence, the administrative law judge must determine the weight to which each item of evidence is entitled. *See Anderson*, 12 BLR at 1-113. As the administrative law judge noted, while both Drs. Repsher and Rosenberg excluded coal dust exposure as a possible cause of claimant's impairment, neither addressed whether coal dust exposure could be a contributing cause.⁶ Decision and Order at 24; Employer's Exhibits 11, 27, 28, 29. Because the administrative law judge gave a valid reason for finding the opinions of Drs. Repsher and Rosenberg unpersuasive, we need not address employer's additional arguments, and we affirm the administrative law judge's discounting of the opinions of Drs. Repsher and Rosenberg at 20 C.F.R. §§718.202(a)(4), 718.204(c). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

⁶ Dr. Repsher stated that he agreed with Dr. Rasmussen that claimant has an approximately 55% reduction in his diffusing capacity, but that studies demonstrate that coal dust exposure does not generally affect the diffusing capacity, whereas cigarette smoking routinely affects this measurement in sensitive smokers. Employer's Exhibit 28. Dr. Rosenberg noted that the FEV1% is generally preserved in relationship to coal dust exposure, but is diminished with an impairment due to cigarette smoking. Employer's Exhibits 11, 27, 29. Therefore, Dr. Rosenberg found that claimant's obstruction was not due to legal pneumoconiosis. *Id.*

Because we have affirmed the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion was sufficient to establish the existence of legal pneumoconiosis and total disability due to pneumoconiosis at 20 C.F.R. §§718.202(a)(4), 718.204(c). We also affirm, therefore, his finding of a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and the award of benefits.⁷

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁷ Because we have affirmed the award of benefits, 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 Publ. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).