BRB No. 12-0006 BLA

JAMES STEPHEN CUMMINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 10/31/2012
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (09-BLA-05531) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).

This case involves a miner's claim filed on March 12, 2008.[1] The administrative law judge noted that employer conceded that claimant had over twenty-two years of coal mine employment, but found that the evidence failed to establish that claimant had fifteen years of underground, or substantially similar, coal mine employment. The administrative law judge, therefore, found that claimant was not entitled to consideration pursuant to Section 411(c)(4).[2] 30 U.S.C. §921(c)(4). Turning to the regulations contained in 20 C.F.R. Part 718, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[3] total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that the total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R §718.204(c).[4] Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge's use of the preamble to the regulations to evaluate the medical opinion evidence violates both employer's right to due process and the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). Employer also contends that, pursuant 20 C.F.R §718.202(a)(4), the administrative law judge erred in selectively evaluating the medical opinion evidence, in

[1] Claimant's previous claim for benefits, filed on December 7, 2006, was withdrawn. Decision and Order at 1-2; Aug. 13, 2010 Hearing Transcript at 7; 20 C.F.R §725.306.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revived Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner was employed for at least fifteen years in qualifying coal mine employment, *i.e.*, in underground, or substantially similar, coal mine employment, and a totally disabling respiratory impairment is established, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)).

[3] The administrative law judge found that the existence of clinical pneumoconiosis was not established pursuant to 20 C.F.R §718.202(a)(1) and (2), and that claimant did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 7-8.

[4] The administrative law judge, citing *Kiser v. L & J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006) and *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147 (1999), found that, as "the existence of legal pneumoconiosis" is established, it is unnecessary to apply the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R §718.203(b). Decision and Order at 18.

mischaracterizing the opinions of Drs. Farney and Renn, and in improperly crediting the opinions of Drs. James and Rose to find the existence of legal pneumoconiosis established. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, urging the Board to reject employer's arguments with regard to the administrative law judge's use of the preamble in evaluating the medical opinion evidence. Employer filed a reply brief, reiterating its contentions.[5]

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.[6] 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

The administrative law judge found that Drs. James, Rose, Farney and Renn agreed that claimant suffers from a chronic obstructive pulmonary disease (COPD).[7] The

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[5] The administrative law judge's findings that less than fifteen years of qualifying coal mine employment were established, that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b), that disability causation was established pursuant to 20 C.F.R. §718.204(c), and that claimant was not entitled to consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5, 6.

[6] The administrative law judge accepted the parties' stipulation that claimant's coal mine employment was in Illinois. Director's Exhibit 1 at 112, 121, 131; Hearing Transcript at 7, 15, 26, 63; Decision and Order at 2, 3, 17 n.12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[7] Dr. James opined that coal mine employment is "a significant contributing factor" in the development of claimant's chronic obstructive pulmonary disease (COPD) and hypoxemia. Decision and Order at 9-10, 17; Claimant's Exhibit 3 at 1, 2-3.

Dr. Rose concluded that claimant's emphysema is "substantially related" to his coal mine employment, and that both coal mine employment and previous smoking are

administrative law judge also found, however, that the doctors disagreed as to the cause of the disease. Decision and Order at 8, 17.

In summarizing the conflicting medical opinions, the administrative law judge considered their underlying documentation, including claimant's employment and smoking histories, and the explanations physicians provided for their respective conclusions. *Id*. at 9-12, 13-15. Regarding the opinion of Dr. James, the administrative law judge found that Dr. James relied on claimant's pulmonary function and blood gas testing, medical literature, claimant's twenty-two years of coal mine employment and his significant smoking history. The administrative law judge determined that, based on these factors, Dr. James found that claimant's COPD arose, in part, out of his coal mine employment. *Id*. at 17, 18; Claimant's Exhibit 3 at 2-3. The administrative law judge also noted that Dr. James explained why it was "unlikely" that claimant's COPD was due solely to smoking, or to asthma, based on claimant's testing and exposures. Claimant's Exhibit 3 at 2-3. Further, the administrative law judge determined that Dr. James's finding, attributing claimant's COPD to both his coal mine employment and his smoking history, was consistent with the medical literature cited in the preamble to the revised regulations, acknowledging the additive risks of coal mine employment and smoking. Decision and Order at 13, 15, 17.

The administrative law judge further noted that the opinion of Dr. James was supported by that of Dr. Rose, who also considered the medical literature showing the additive effects of "cumulative coal mine dust exposure and pack years of smoking," and who concluded that claimant's "worsening chronic obstructive lung disease is

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"important causes" of his emphysema. Dr. Rose opined that claimant suffers from legal pneumoconiosis. Decision and Order at 10-11; Claimant's Exhibit 4 at 8-9.

Dr. Farney attributed claimant's COPD and emphysema solely to smoking, and specified that the conditions were unrelated to, and not caused or aggravated by, coal mine dust. Dr. Farney opined that claimant's "exposure to coal dust was insufficient to account for the degree of COPD," and that in his above-ground coal mine employment "the risk for developing COPD is generally considered much less…." Decision and Order at 11, 14-15, 16; Director's' Exhibit 29 at 18-25; Employer's Exhibits 8 at 1, 3, 10 at 14, 19.

Dr. Renn agreed with Dr. James that cigarette smoking was not the sole contributing factor to claimant's COPD, but identified also "the effect of his longstanding asthma," and a "pattern" of ventilatory dysfunction showing a tobacco-smoke induced airflow obstruction that is "significantly partially bronchoreversible." Employer's Exhibit 9 at 5-6. He concluded that claimant's impairment results from "asthma, remodeling of asthma and tobacco-smoke induced airflow obstruction," not caused or related to exposure to coal mine dust. *Id.*; Decision and Order at 11, 12.

multifactorial, due to his previous cigarette smoking and occupational coal mine dust exposure." Claimant's Exhibit 4; Decision and Order at 10-11. While acknowledging that Dr. James's pulmonary function testing did not include a bronchodilator study, the administrative law judge noted that Dr. Rose's opinion referenced a bronchodilator study and that Dr. Rose found that claimant's positive partial bronchodilator response "does not exclude the important contributions that exposure to both coal mine dust and smoking have had in the development and progression of [claimant's] emphysema and consequent worsening hypoxemia." Decision and Order at 16-18; Claimant's Exhibit 4 at 8. Consequently, the administrative law judge credited Dr. James's explanation as to why he disagreed with the conclusions reached by Drs. Farney and Renn, that claimant's partial positive bronchodilator response excluded any contribution from coal mine dust exposure. Decision and Order at 16-17; *see Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002).

The administrative law judge also found that the more recent arterial blood gas testing performed by Drs. James and Rose, demonstrating "severe exercise-related gas exchange abnormalities with hypoxemia," supported their opinions attributing claimant's COPD to coal mine employment. Specifically, the administrative law judge found that the more recent blood gas study results, reflecting severe hypoxemia, are consistent with the progressive and latent nature of pneumoconiosis, in contrast to the opinion of Dr. Farney, who "did not find [hypoxemia]" and Dr. Renn, who "did not discuss [hypoxemia] at all." Decision and Order at 15; *see* 20 C.F.R. §718.201(c); *Amax Coal Co. v. Franklin*, 957 F.2d 335, 16 BLR 2-50 (7th Cir. 1992); *Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984).

Further, contrary to employer's argument, the administrative law judge properly consulted the preamble to the regulations 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 J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-225-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011;*Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004), *citing Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); 65 Fed. Reg. 79,939-79,942 (Dec. 20, 2000). As fact-finder, the administrative law judge properly exercised his discretion to construe and assess the significance of the physicians' views, in light of the preamble, upon their medical diagnoses. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009). Further, contrary to employer's argument, the administrative law judge did not, in referring to the preamble, presume that "all obstructive or restrictive lung disease is legal pneumoconiosis and [that] no doctor can differentiate between disease or impairment caused by cigarette smoking and mining." Employer's Brief at 17-18. Rather, the administrative law judge rationally found that the

views of Drs. James and Rose on the cause of claimant's COPD were most consistent with the view in the regulations regarding the additive effects of coal mine dust exposure and smoking that are contained in the medical literature and scientific studies relied upon by the DOL. *Shores*, 358 F.3d at 490, 23 BLR at 2-26.

Lastly, contrary to employer's argument, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond.[8] *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Thus, we reject employer's assertions that the administrative law judge's review of the medical opinions in light of the preamble, and the medical studies referred to therein, constitute use of non-record evidence, an untimely evidentiary ruling, a denial of employer's right to due process, or a violation of the APA. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79,940-45 (Dec. 20, 2000); *Summers*, 272 F.3d at 483, 22 BLR at 2-281. Accordingly, we affirm the administrative law judge's finding that Dr. James's opinion on the cause of claimant's COPD, as buttressed by the opinion of Dr. Rose, was reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

In contrast, the administrative law judge rationally assigned less weight to the opinions of Drs. Farney and Renn because he found that they were not in accord with the scientific views, regarding the definition of pneumoconiosis, discussed in the preamble. *Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Summers*, 272 F.3d at 483 n.7; 22 BLR at 2-281 n.7. The administrative law judge found that Drs. Farney and Renn cited medical literature "to show that coal mine dust related emphysema is gauged by the severity of the dust burden and the fibrosis in the lungs." Decision and Order at 16, 17; Employer's Exhibits 8, 10 at 14, 15, 17, 23-26, 11 at 7-8, 17-18, 38-40; Director's Exhibit 29 at 22-24. The administrative law judge concluded that Dr. Farney requires evidence of fibrosis or a "fibrotic component" in order to diagnose legal pneumoconiosis. Decision and Order at 15, 17. For his part, the administrative law judge noted that Dr. Renn relied on Dr. Ahmed's x-ray interpretation to conclude that that claimant does not have centrilobular emphysema, but has bullous emphysema, which "doesn't occur in response to exposure to coal mine dust when you have legal pneumoconiosis." Employer's Exhibit 11 at 7-8, 13, 17-18, 38-40. The administrative law judge, therefore, permissibly discredited the opinions of Drs. Farney and Renn because they relied on the absence of fibrotic lung disease, as a medical opinion that focuses on the absence of clinical pneumoconiosis may be assigned less weight pursuant to Section 718.202(a)(4). *Summers*, 272 F.3d at 483, 22 BLR at 2-281; Decision and Order at 15-17. As a result, the administrative law judge acted within his discretion in questioning whether Drs.

[8] As a result, we reject employer's challenge to the administrative law judge's denial of employer's "Motion *In Limine*," requesting advance notice of intent to utilize the preamble. *See* Employer's Brief at 14-15; Decision and Order at 2 n.3 and n.4.

Farney and Renn accounted for the effect of claimant's coal dust exposure on his respiratory or pulmonary condition, and whether claimant's COPD was aggravated by his coal dust exposure.[9] 20 C.F.R. §718.201(a)(2); Decision and Order at 13-15. The administrative law judge also rationally discredited the opinions of Drs. Farney and Renn because the doctors cited scientific articles that do not address legal pneumoconiosis. *See Clark*, 12 BLR at 1-155. The administrative law judge, therefore, permissibly found their opinions insufficient to rule out coal dust exposure as a source of claimant's obstructive impairment. 20 C.F.R. §718.201(a); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990). Thus, we reject employer's assertion that the administrative law judge failed to "conduct a neutral and thorough evaluation" of the evidence, and characterized the opinions of Drs. Farney and Renn "as somehow relying solely on reversibility."[10] Employer's Brief at 24-25. Rather, the administrative law judge considered the views and documentation underlying their opinions, determined that their views were inconsistent with the regulations, and, therefore, properly found that their opinions merited "less weight." Decision and Order at 17-18; *see Greene*, 575 F.3d at 628-29, 24 BLR at 2-215-16; *Poole*, 897 F.2d at 893-94, 13 BLR at 2-354.

As the administrative law judge's evaluation of the medical opinion evidence was rational, his finding that the existence of legal pneumoconiosis was established at Section 718.202(a)(4) based on the opinion of Dr. James, as buttressed by the opinion of Dr. Rose, is affirmed. *See Clark*, 12 BLR at 1-155.

[9] *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-411, 2-426-27 (7th Cir. 2002)([T]here is overwhelming scientific and medical evidence that exposure to coal dust can cause, aggravate, or contribute to obstructive lung diseases. 65 Fed. Reg. at 79,944.).

[10] The administrative law judge properly found that Dr. Renn's reliance on pulmonary function testing that "did not produce complete reversibility" further undermined his opinion. Decision and Order at 12; Director's Exhibit 11 at 8-9; Employer's Exhibit 11 at 19-20, 23-24, 28, *see Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002)(physician must adequately explain why reversibility on pulmonary function studies necessarily eliminates a finding of legal pneumoconiosis).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge