BRB No. 11-0841 BLA

HERALD WILEY JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CRAGER FORK MINING COMPANY	)	DATE ISSUED: 09/26/2012
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

William A. Lyons and W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05274) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent[1] claim filed on February 27, 2009, 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).[2] The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 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). The administrative law judge determined that the only medical evidence associated with claimant's previous claim is a standard form medical report from the Kentucky Workers' Compensation Board, which includes a spirometry and chest x-ray. After reviewing this report, the administrative law judge accorded it little probative weight, in light of the more recent evidence, and concluded that it did not alter any of his findings. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the newly submitted evidence was sufficient to establish the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The

[1] The miner's initial claim was denied by the district director by reason of abandonment on February 27, 2006. Director's Exhibit 1-23.

[2] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). In this case, the administrative law judge found that claimant did not invoke the amended Section 411(c)(4) presumption, as he established only twelve years of qualifying coal mine employment. Decision and Order at 6, 13, 17.

Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We will first address the administrative law judge's consideration of the medical opinion evidence relevant to the existence of legal pneumoconiosis[5] under 20 C.F.R. §718.202(a)(4). Employer contends that the administrative law judge erred in crediting the diagnoses of legal pneumoconiosis rendered by Drs. Baker and Al-Khasawneh. Employer also maintains that the administrative law judge did not comply with the requirements of the Administrative Procedure Act,[6] because he failed to set forth a valid rationale for discrediting the opinions of Drs. Dahhan and Jarboe, engaged in a selective

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 6, 8, 17, 26. Based upon this finding, claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Decision and Order at 7; Director's Exhibit 6-6.

[5] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

analysis of the evidence, and shifted the burden of proof to employer. These contentions are without merit.

Employer alleges that Dr. Baker's diagnosis of legal pneumoconiosis is not reasoned or documented because it is based on inaccurate smoking and coal mine employment histories, and his positive reading of claimant's chest x-ray.[7] The administrative law judge found that Dr. Baker reported a smoking history of between one-half and one pack of cigarettes per day for twenty-six years. Decision and Order at 20; Director's Exhibits 13, 15. Regarding the accuracy of the smoking history that Dr. Baker reported, the administrative law judge compared it to the histories reported by Drs. Al-Khasawneh, Dahhan and Jarboe, and to claimant's hearing testimony.[8] Decision and

[7] Dr. Baker examined claimant at the request of the Department of Labor (DOL) on March 13, 2009. Director's Exhibit 13. Dr. Baker recorded a coal mine employment history of twenty-one years and noted that claimant was a current smoker with a history of smoking one-half to one pack of cigarettes per day for twenty-six years. *Id*. Based on the objective test results, claimant's symptoms and medical history, and a chest x-ray, Dr. Baker diagnosed coal workers' pneumoconiosis 1/1, chronic obstructive pulmonary disease with a totally disabling obstructive defect, moderate resting hypoxemia, and chronic bronchitis. *Id.* Dr. Baker indicated that the cause of the coal workers' pneumoconiosis was coal dust exposure, and that the remaining conditions were caused by a combination of coal dust exposure and cigarette smoking. *Id*. In response to a request from DOL, Dr. Baker prepared a supplemental report in which he assumed that claimant had eleven years of coal mine employment. Director's Exhibit 15. Dr. Baker reiterated his prior diagnoses and his conclusion that a significant portion of claimant's totally disabling obstructive impairment is due to coal dust exposure. *Id*.

[8] Claimant testified that he started smoking at age thirty or thirty-five, that he quit approximately a year before the November 17, 2010 hearing, and that he smoked one-half of a pack of cigarettes per day. Hearing Transcript at 33-34. On cross-examination, he agreed that a smoking history beginning in 1980, and ending in March 2010, could be correct and that he probably smoked one-half of a pack of cigarettes daily for thirty years. *Id.* at 35. In his April 15, 2010 report, Dr. Al-Khasawneh reported a smoking history of one-half of a pack of cigarettes per day from 1980 to 2010. Claimant's Exhibit 3. In Dr. Dahhan's August 9, 2009 report, he recorded a smoking history of "a pack per week … for the last twenty years" and obtained a carboxyhemoglobin level of 4.6%. Director's Exhibit 16. In Dr. Jarboe's September 10, 2009 report, he recorded a smoking history of one-half of a pack per day since age thirty-five and indicated that claimant smoked one cigarette a day for the last six to twelve months. Director's Exhibit 17. Dr. Jarboe questioned claimant's reported history and opined that claimant's carboxyhemoglobin of 4% was compatible with a smoking history of about one pack of cigarettes per day. *Id*.

Order at 6-7, 21. Based on this evidence, the administrative law judge concluded that claimant smoked "somewhere between half a package of cigarettes and a full package daily for thirty years." Decision and Order at 6, 21; Director's Exhibits 13, 16, 17; Claimant's Exhibit 3; Hearing Transcript at 33-35.

We affirm this finding, as it is rational and supported by substantial evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). The administrative law judge acknowledged that claimant may have smoked more than one-half pack of cigarettes daily and that the carboxyhemoglobin tests performed by Drs. Dahhan and Jarboe cast doubt on the extent of claimant's smoking and whether he had quit. Decision and Order at 6-7. However, the administrative law judge reasonably found that, because the carboxyhemoglobin test results are reflective of the level on the date of the test in 2009, claimant might have stopped smoking by the time he was examined by Dr. Al-Khasawneh in April of 2010. *Id.*; *see Clark*, 12 BLR at 1-155; *Justice v. Island Creek Coal Company*, 11 BLR 1-91, 1-94 (1988). The administrative law judge acted within his discretion as fact-finder, therefore, in determining that claimant smoked "somewhere between half a package of cigarettes and a full package daily for thirty years," consistent with the smoking history of one-half to one pack of cigarettes per day for twenty-six years reported by Dr. Baker. Decision and Order at 20-21; *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, we reject employer's contention that Dr. Baker's opinion is based on an inaccurate smoking history.

With respect to the coal mine employment history on which Dr. Baker relied, the administrative law judge noted that, although Dr. Baker originally obtained a twenty-one year history, he assumed an eleven year history in a supplemental report and reiterated his opinion that coal dust was a significant contributor to claimant's obstructive impairment. Decision and Order at 20; Director's Exhibits 13, 15. The administrative law judge also noted Dr. Baker's explanation that it was "generally felt that at least [ten] years of coal dust exposure is necessary for Coal Workers' Pneumoconiosis to contribute to any pulmonary disability." Director's Exhibit 15. The administrative law judge did not err, therefore, in finding that Dr. Baker relied on an accurate coal mine employment history. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002).

Lastly, contrary to employer's allegation, the administrative law judge correctly determined that, rather than relying on a positive x-ray reading, Dr. Baker based his diagnosis of legal pneumoconiosis on claimant's medical, employment and smoking histories and the results of his examination of claimant, including objective testing that showed a disabling obstructive impairment. Decision and Order at 10-11; Director's Exhibit 13. Moreover, the administrative law judge permissibly found that Dr. Baker was

not required to assign a numerical percentage to the degree of contribution from coal dust exposure because the degree of contribution was significant. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 487 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). The administrative law judge therefore acted within his discretion in finding that Dr. Baker's diagnosis of legal pneumoconiosis was well-documented and entitled to substantial weight. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.

Employer also asserts that the administrative law judge erred in crediting Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis, as he relied on an inaccurate smoking history of half a pack of cigarettes per day for thirty years.[9] Employer further contends that, because the spirometry obtained by Dr. Al-Khasawneh showed a 90% improvement after the administration of bronchodilators, claimant's obstructive defect was caused by smoking, rather than coal dust exposure. In addition, employer alleges that Dr. Al-Khasawneh did not take "a position on causation," other than asserting that both smoking and coal dust exposure contributed to claimant's pulmonary impairment. Employer's Brief at 22. Employer's arguments are without merit.

The administrative law judge rationally found that Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis was entitled to weight, as it was documented by, and consistent with, the results of his examination of claimant, claimant's coal mine employment and smoking histories, and the results of claimant's pulmonary function and blood gas studies. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. Regarding Dr. Al-Khasawneh's reliance on an inaccurate smoking history, the administrative law judge stated:

> [I]t appears likely that Dr. Al-Khasawneh may have obtained a smoking history that was less than what the [c]laimant actually smoked. While I factor this into the weight to be given his opinion, I do not find that it

[9] Dr. Al-Khasawneh examined claimant on April 15, 2010 and recorded a coal mine employment history of eleven years and a smoking history of half a pack of cigarettes per day for thirty years. Claimant's Exhibit 3. Dr. Al-Khasawneh determined that there was no evidence of clinical pneumoconiosis, based on a negative x-ray reading. *Id*. He further indicated, however, that a diagnosis of legal pneumoconiosis was supported by the severe obstructive pattern on claimant's pulmonary function studies and the severe hypoxemia at rest on claimant's blood gas studies. *Id*. Dr. Al-Khasawneh concluded, "both tobacco and smoking as well as coal dust exposure contributed significantly and aggravated the obstruction on the pulmonary function test. There is no way medically to differentiate how much smoking damage versus coal dust damage had contributed to the obstruction, all that I [can] say at this point is that they both contributed significantly." *Id*.

> completely invalidates his opinion that both the [c]laimant's tobacco abuse and coal dust exposure contributed to his obstructive impairment in a significant manner, and that it was impossible medically to differentiate the damage caused by one or the other. I find his opinion consistent with the Department of Labor view that coal dust exposure in non-smoking miners can cause both a moderate and severe reduction in FEV1 and that when the miner is a smoker, the risk of a reduced FEV1 is even greater.

Decision and Order at 21. The administrative law judge's conclusion was within his discretion as fact-finder. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Moreover, the administrative law judge permissibly credited Dr. Al-Khasawneh's opinion because, like Dr. Baker, he was "aware that the [c]laimant smoked at least a half a pack of cigarettes daily for a period that exceeded his proven coal mining history." Decision and Order at 25; *see Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985); *Clark*, 12 BLR at 1-152. We affirm, therefore, the administrative law judge's decision to credit Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis.

Finally, we hold that the administrative law judge rationally found that the opinions of Drs. Dahhan and Jarboe were entitled to diminished weight, as their conclusions were based upon premises inconsistent with the scientific views accepted by the Department of Labor (DOL) in the preamble to the amended regulations. *See A&E Coal Co. v. Adams*, F.3d , No. 11-3926, 2012 WL 3932113 (6th Cir. Sept. 11, 2012); *Crockett*, 487 F.3d at 355, 23 BLR at 2-481; *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). The administrative law judge correctly determined that Dr. Dahhan's opinion, ruling out coal dust as a significant contributing cause of claimant's obstructive impairment, was based on his view that coal dust generally causes a clinically insignificant annual loss of FEV1, while DOL has taken the view that, even among nonsmoking miners, coal dust inhalation causes a clinically significant loss of FEV1 at a rate roughly equal to that among smokers who are not miners. Decision and Order at 22, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); Director's Exhibit 17. In addition, the administrative law judge permissibly determined that the credibility of Dr. Dahhan's opinion was diminished by his statement that claimant's bronchodilator therapy is inconsistent with a fixed impairment associated with coal dust exposure, as "it appears to be a roundabout way of stating that that claimant's impairment is reversible – even though Dr. Dahhan found no reversibility on the pulmonary function studies he performed." Decision and Order at 22; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. The administrative law judge rationally found that Dr. Dahhan's opinion, that claimant's smoking history was sufficient to have caused his impairment, was unpersuasive, as the issue is not whether smoking could have caused the claimant's impairment alone, but whether coal dust exposure significantly contributed to, or aggravated, his impairment. *See Adams v. Director, OWCP*, 886 F.2d

818, 13 BLR 2-52 (6th Cir. 1989). We affirm, therefore, the administrative law judge finding that Dr. Dahhan's opinion was entitled to less weight than the opinions of Drs. Baker and Al-Khasawneh.

Similarly, the administrative law judge rationally determined that Dr. Jarboe's opinion was entitled to diminished weight because he relied, in part, on the partial reversibility of claimant's obstructive impairment, without explaining why coal dust exposure could not have contributed to, or aggravated, the fixed portion of the impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge also acted within his discretion in finding that Dr. Jarboe's citation to the Oxman study,[10] reflected Dr. Jarboe's view that coal dust exposure generally does not cause a clinically significant obstructive impairment, which is contrary to the position adopted by the DOL. 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see Barrett*, 487 F.3d at 355, 23 BLR at 2-481. Thus, we affirm the administrative law judge's conclusion that Dr. Jarboe's opinion was outweighed by the opinions of Drs. Baker and Al-Khasawneh.

Because we have affirmed the administrative law judge's decision to accord greatest weight to the diagnoses of legal pneumoconiosis rendered by Drs. Baker and Al-Khasawneh, we also affirm his finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). In light of our affirmance of the administrative law judge's credibility determinations on the issue of legal pneumoconiosis, and because the administrative law judge relied upon those determinations to conclude that claimant established that his total disability is due to pneumoconiosis, we also affirm his finding at 20 C.F.R. §718.204(c), and further affirm the award of benefits.[11] *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483, 23 BLR 2-44, 2-66 (6th Cir. 2003); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185 (6th Cir. 1997).

[10] Dr. Jarboe described the Oxman study as showing that only 6% of smoking miners could be expected "to develop a clinically significant (greater than 20%) loss of FEV1 with a cumulative respirable dust exposure equivalent to 35 years of work in a respirable dust level of 2 mg/m3." Director's Exhibit 16.

[11] Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis, we decline to address employer's allegations regarding the administrative law judge's determination that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), as error, if any, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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