BRB No. 10-0443 BLA

GILBERT McCARDLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	
	)	DATE ISSUED: 04/18/2011
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 P. Margelis (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (08-BLA-5569) of Administrative Law Judge Thomas M. Burke rendered on a subsequent claim[1] filed 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). The administrative law judge credited claimant with seventeen years of coal mine employment[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new medical opinion evidence established the existence of legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, under 20 C.F.R. §718.202(a), and that claimant thereby established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant established that he has a totally disabling pulmonary or respiratory impairment that is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Employer further asserts that the administrative law judge erred in admitting a medical report that was untimely submitted by claimant, without providing employer the opportunity to respond. Additionally, employer asserts that a recent amendment to the Act[4] may affect this case, and requests that if the Board

---

[1] Claimant filed three previous claims for benefits, each of which was finally denied. Director's Exhibits 1-3. His third claim for benefits, filed on June 12, 1997, was denied by the district director on August 15, 1997, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 3. The record does not reflect that claimant took any further action until filing this claim on February 16, 2007. Director's Exhibit 5.

[2] Because claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 9.

[3] "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).

[4] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on March 23, 2010, were enacted. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides that if a miner had at least fifteen years of qualifying coal mine employment, and had a totally disabling respiratory impairment, there is a rebuttable presumption that he or she was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by*

remands this case, the record should be reopened, on remand, to allow employer to develop evidence addressing the change in the law. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response addressing the impact of the recent amendments on this case. The Director agrees with employer that, because claimant filed this claim after January 1, 2005, and it was pending on or after March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim. The Director asserts that, if the Board does not affirm the award, the case should be remanded for the administrative law judge to address whether claimant is entitled to the Section 411(c)(4) presumption that was reinstated by Section 1556.

Based upon the parties' responses, and our review, we hold that Section 1556 does not affect the disposition of this case. For the reasons set forth below, we affirm the administrative law judge's award of benefits. Thus, there is no need to consider whether claimant could establish entitlement with the aid of the presumption that was reinstated by Section 1556.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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. If a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

Relevant to 20 C.F.R. §718.202(a)(4),[5] the record contains the new medical opinions of Drs. Saludes,[6] Schaaf,[7] Repsher,[8] Fino,[9] and Begley.[10] Considering this evidence, the administrative law judge found that Dr. Begley's opinion was not probative of the existence of legal pneumoconiosis, because Dr. Begley did not address the etiology of claimant's COPD.[11] Further, the administrative law judge found that the opinions of

[5] The administrative law judge found that the new x-ray evidence did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The record does not contain any biopsy or autopsy evidence, or any evidence of complicated pneumoconiosis, under 20 C.F.R. §718.202(a)(2), (3).

[6] Dr. Saludes diagnosed chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and smoking. Director's Exhibit 16; Employer's Exhibit 9 at 22.

[7] Dr. Shaaf diagnosed severe COPD due to chronic bronchitis. He opined that both coal mine dust exposure and smoking are substantial contributing factors. Claimant's Exhibit 3 at 32-33.

[8] Dr. Repsher opined that claimant does not suffer from a pulmonary impairment caused by coal mine dust exposure. Dr. Repsher opined that claimant's COPD is due to smoking alone, because claimant's "PFTs show severe COPD with a disproportionately greater loss of FEV1 compared with FVC, which is characteristic of cigarette smoking-induced COPD and not present in legal CWP." Employer's Exhibit 6 at 5.

[9] Dr. Fino noted that a 1994 study by Dr. Leigh found a 7% reduction in FEV1 in non-smoking coal miners with minimal or sparse pneumoconiosis. Employer's Exhibit 1 at 15. Dr. Fino additionally noted that "this reduction is not clinically significant in the average coal miner." *Id*. Applying Dr. Leigh's study to claimant's case, Dr. Fino explained that claimant's negative x-rays indicated that seven to ten percent of claimant's obstruction was due to coal mine dust exposure, which is not clinically significant and does not explain claimant's low FEV1. Employer's Exhibit 12 at 24, 25. Dr. Fino concluded that claimant's COPD is due solely to smoking, based on claimant's negative x-ray, his smoking and work histories, his reduced diffusing capacity, and the fact that he has bullous emphysema, a condition that Dr. Fino opined does not occur in the absence of complicated pneumoconiosis. Employer's Exhibit 1 at 15; Employer's Exhibit 12 at 24, 30.

[10] In a report that claimant submitted after the hearing, Dr. Begley diagnosed severe COPD due to chronic bronchitis, but did not address whether the COPD was related to coal mine dust exposure. Claimant's Exhibits 1, 2.

[11] Since the administrative law judge found that Dr. Begley's opinion was not probative at 20 C.F.R. §§718.202(a), 718.204(c), employer's argument that it was not

Drs. Saludes and Schaaf, attributing claimant's COPD, in part, to coal mine dust exposure, were well-reasoned. Specifically, he found that the physicians accounted for claimant's exposure histories, explained that they could not distinguish between the effects of claimant's smoking and coal mine dust exposures on his obstructive impairment, and attributed claimant's COPD to a combination of factors, consistent with the medical science accepted by the Department of Labor. Decision and Order at 13, 14.

By contrast, the administrative law judge found that the opinions of Drs. Repsher and Fino, attributing claimant's COPD only to smoking, were entitled to less weight than those of Drs. Saludes and Schaaf. The administrative law judge found that Dr. Repsher's rationale for eliminating coal mine dust as a cause of claimant's impairment was not persuasive, in light of the opinions of Drs. Fino, Saludes, and Schaaf. Specifically, the administrative law judge found that Dr. Repsher's opinion, that the reduction in the FEV1/FVC experienced by claimant is not seen with legal pneumoconiosis, was undermined by Dr. Fino's testimony that, in his experience, he has seen coal dust cause the level of reduction in the FEV1/FVC ratio that was seen in claimant. Additionally, the administrative law judge noted that both Drs. Saludes and Schaaf based their opinions, that claimant's COPD is related to coal mine dust exposure, on FEV1/FVC data similar to the data relied on by Dr. Repsher.[12] Decision and Order at 14; Director's Exhibits 16, 26; Employer's Exhibit 11 at 22.

Further, the administrative law judge found that Dr. Fino's opinion, attributing claimant's COPD entirely to smoking, was entitled to less weight, because Dr. Fino failed to adequately explain how he eliminated coal mine dust exposure as a contributing or aggravating cause of claimant's emphysema, and because he failed to address the etiology of claimant's chronic bronchitis. Decision and Order at 15. The administrative law judge further found that Dr. Fino relied unpersuasively on the absence of x-ray abnormalities, and on statistical averaging, to conclude that coal mine dust exposure did not cause a "clinically significant abnormality" in claimant. *Id*. at 15, 17; Employer's

---

provided an adequate opportunity to respond to Dr. Begley's post-hearing report is moot. In any event, the administrative law judge reasonably ruled that, since employer was going to depose Dr. Fino after Dr. Begley's report was to be submitted, employer would have the opportunity to respond to Dr. Begley's post-hearing report. Hearing Transcript at 11.

[12] The administrative law judge found that "[t]he DOL-sponsored pulmonary function study by Dr. Saludes produced the same FEV1/FVC ratio results as those obtained by Dr. Repsher, and Dr. Schaaf's study showed an FEV1/FVC ratio that was even more reduced." Decision and Order at 14.

Exhibit 1 at 15-16; Employer's Exhibit 12 at 30. Thus, based on the opinions of Drs. Saludes and Schaaf, the administrative law judge found that claimant established the existence of legal pneumoconiosis under Section 718.202(a)(4).

Employer initially asserts that the administrative law judge erred in finding the opinions of Drs. Saludes and Schaaf to be reasoned. We disagree. Drs. Saludes and Schaaf diagnosed severe obstructive disease based on claimant's pulmonary function studies. Director's Exhibit 18 at 2; Claimant's Exhibit 3 at 22; Employer's Exhibit 9 at 17-18. Further, as the administrative law judge observed, in attributing claimant's obstructive impairment, in part, to coal mine dust exposure, Drs. Saludes and Schaaf considered all of the risk factors for lung disease applicable to claimant, including significant coal mine employment and smoking histories, and they explained that they could not distinguish between the effects of each on claimant's obstruction. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 7, 13. Thus, contrary to employer's assertion, the administrative law judge permissibly found the opinions of Drs. Saludes and Schaaf to be reasoned.[13] *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

We additionally reject employer's assertion that the administrative law judge erred in discrediting Dr. Repsher's opinion. Contrary to employer's assertion, the administrative law judge permissibly found Dr. Repsher's statement, that "a disproportionately greater loss of FEV1 compared with FVC . . . [is] not present in legal pneumoconiosis," to be undermined by Dr. Fino's testimony that he has seen coal mine dust cause the level of reduction in FEV1/FVC seen in claimant's case. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark v.*

[13] We reject employer's assertion that the administrative law judge failed to account for Dr. Schaaf's reliance on a biopsy report that is not contained in the record. Employer's Brief at 21. The administrative law judge noted that Dr. Schaaf reviewed a biopsy report that is not contained in the record, and the administrative law judge specifically stated that he did not consider the portion of Dr. Schaaf's opinion that discussed the biopsy evidence. Decision and Order at 7 n.8. Moreover, Dr. Schaaf explicitly stated that his medical conclusions would remain the same even if he had not considered the biopsy. Claimant's Brief at 10; Claimant's Exhibit 3 at 34-35. Contrary to employer's assertion, therefore, the administrative law judge adequately addressed Dr. Schaaf's consideration of the inadmissible biopsy report. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989)(*en banc*); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Employer's Exhibit 11 at 22. Employer argues further that the administrative law judge erred in discounting Dr. Repsher's opinion that the pattern of claimant's pulmonary function impairment is inconsistent with legal pneumoconiosis, because Drs. Saludes and Schaaf diagnosed legal pneumoconiosis based on pulmonary function study data similar to that obtained by Dr. Repsher. Employer's Brief at 24. We disagree. Because Drs. Saludes and Schaaf reached a conclusion contrary to that of Dr. Repsher, based on similar FEV1/FVC ratios, the administrative law judge reasonably inferred that their opinions, coupled with that of Dr. Fino, conflicted with Dr. Repsher's explanation that the reduction in claimant's FEV1/FVC ratio would not be present with legal pneumoconiosis. *See Underwood*, 105 F.3d at 949, 21 BLR at 2-28. Substantial evidence supports the administrative law judge's permissible credibility determination to accord less weight to the opinion of Dr. Repsher. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

We also reject employer's assertion that the administrative law judge failed to state a valid reason for discounting Dr. Fino's opinion. Contrary to employer's assertion, substantial evidence supports the administrative law judge's findings that Dr. Fino relied on the absence of x-ray abnormalities, and used statistical averaging of the expected effect of coal mine dust exposure, to conclude that claimant does not have legal pneumoconiosis. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge permissibly found Dr. Fino's conclusion, that a 7% reduction in FEV1 is not clinically significant in the average coal miner, to be flawed in light of the Department of Labor's discussion in the preamble to the regulations, recognizing that statistical averaging may hide the significant effect that coal mine dust exposure can have on the pulmonary function of an individual miner.[14] *See Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 79,920, 79941 (Dec. 20, 2000). Because the administrative law judge provided valid reasons for crediting the opinions of Drs. Saludes and Schaaf over the opinions of Drs. Repsher and Fino, we affirm the administrative law judge's finding that the new medical opinion evidence established legal pneumoconiosis pursuant to Section 718.202(a)(4), and that claimant thereby

[14] Because the administrative law judge provided valid reasons for discounting Dr. Fino's opinion, we decline to address employer's assertion that the administrative law judge erred in finding that Dr. Fino failed to address the etiology of claimant's chronic bronchitis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

established a change in the applicable condition of entitlement pursuant to Section 725.309(d).[15]

The Merits of Entitlement

Employer does not challenge the administrative law judge's finding that claimant has a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). We therefore affirm the administrative law judge's finding. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

Relevant to Section 718.204(c), the administrative law judge considered the opinions of Drs. Saludes, Schaaf, Fino, and Repsher, and the previously submitted opinions of Drs. Altmeyer and Reddy. Drs. Saludes and Schaaf opined that claimant is totally disabled due to coal mine dust exposure and smoking, while Drs. Fino and Repsher attributed claimant's disabling COPD to smoking alone. Director's Exhibits 16; 26; Employer's Exhibits 1, 6. Dr. Altmeyer diagnosed a moderate to severe pulmonary impairment caused entirely by smoking, and Dr. Reddy opined that claimant is totally disabled due to clinical pneumoconiosis and smoking. Director's Exhibits 1, 2. The administrative law judge discredited the opinions of Drs. Fino, Repsher, Altmeyer, and Reddy, because the physicians did not diagnose legal pneumoconiosis. Decision and Order at 16-17. Further finding that the opinions of Drs. Saludes and Schaaf as to disability causation were well-reasoned and documented for the same reasons that their diagnoses of legal pneumoconiosis were found to be reasoned and documented, the administrative law judge determined that claimant established that he is totally disabled due to pneumoconiosis. *Id*.

Employer asserts that, because the administrative law judge's reasons for discounting the opinions of Drs. Repsher and Fino as to the existence of legal pneumoconiosis are invalid, the administrative law judge's discounting of their opinions as to disability causation is also invalid. We disagree. As discussed above, the administrative law judge provided valid reasons for discounting the opinions of Drs. Repsher and Fino under Section 718.202(a)(4). Consequently, we reject employer's

[15] We reject employer's assertion that the administrative law judge committed reversible error in failing to weigh the negative x-ray evidence in conjunction with the medical opinion evidence under 20 C.F.R. §718.202(a), as employer fails to explain how the x-ray evidence that was negative for clinical pneumoconiosis would undermine a finding that claimant's COPD constitutes legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-173 (4th Cir. 2000); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

assertion of error. Because employer raises no additional challenge to the administrative law judge's findings under Section 718.204(c), we affirm the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis. We therefore affirm the award of benefits.

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

_____
REGINA C. McGRANERY
Administrative Appeals Judge