BRB No. 11-0729 BLA

CLIFFORD O. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HONEY CAMP COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/11/2012
	)	
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 Living Miner's Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Barry H. Joyner (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/carrier (employer) appeals the Decision and Order Awarding Living Miner's Benefits (2008-BLA-5585) of Administrative Law Judge William S. Colwell 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). Claimant filed his current claim, his fourth, on March 29, 2004.[2] Director's Exhibit 5. The administrative law judge credited claimant with nineteen and three-quarters years of coal mine employment.[3] Decision and Order at 2. The administrative law judge found that the new evidence established the existence of legal pneumoconiosis,[4] in the form of obstructive lung disease and emphysema due to coal dust exposure and smoking, pursuant to 20 C.F.R. §718.202(a)(4), and thereby established a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Reviewing the merits of entitlement, the administrative law judge permissibly relied on the medical evidence developed since the 2002 denial of claimant's third claim, as more probative of claimant's current condition. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004)(en banc). The

[1] Claimant's first claim for benefits, filed on April 25, 1985, was finally denied on November 3, 1988. Director's Exhibit 1. Claimant's second claim, filed on March 24, 1997, was finally denied on October 16, 1998. Director's Exhibit 2. Claimant's third claim for benefits, filed on November 5, 1999, was denied by Administrative Law Judge Edward T. Miller on April 26, 2002, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 3. Claimant took no further action until he filed his current claim on March 29, 2004. Director's Exhibit 5.

[2] Because claimant filed his claim before January 1, 2005, a recent amendment to the Act does not affect this case. *See* Pub. L. No. 111-148, §1556(a),(c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)); Decision and Order at 3 n.1.

[3] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 6, 8. Accordingly, 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, 1-202 (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). 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).

administrative law judge found that claimant is totally disabled, and that his disability is due to 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 evaluation of the medical opinions in finding that claimant established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's findings regarding the cause of claimant's totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c). Employer asserts that the administrative law judge erred in weighing the medical opinions in light of the scientific views endorsed by the Department of Labor (DOL) in the preamble to the revised regulations. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that the administrative law judge properly considered the preamble in weighing the medical opinion evidence of record. Employer filed a reply brief, reiterating its contentions on appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled 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. Where a miner files a claim 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*, 23 BLR at 1-3. The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Consequently, to obtain review of the merits of his subsequent claim, claimant had to establish that he suffered from pneumoconiosis.

[5] The administrative law judge's finding of nineteen and three-quarters years of coal mine employment, and his finding that that claimant established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §§718.204(b)(2), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Rasmussen, Dahhan, Hippensteel, and Fino. Dr. Rasmussen opined that claimant suffers from legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema, due in significant part to coal mine dust exposure.[6] Claimant's Exhibit 1. Drs. Dahhan, Hippensteel, and Fino opined that claimant's coal mine dust exposure did not contribute to his obstructive impairment.[7]

The administrative law judge accorded no probative weight to the opinions of Drs. Dahhan, Hippensteel, and Fino because he found them to be inadequately reasoned and based on premises contrary to the findings of the DOL, as set forth in the preamble to revised regulations regarding obstructive lung disease and coal mine dust exposure. Decision and Order at 20-24. Conversely, the administrative law judge credited Dr. Rasmussen's opinion, diagnosing legal pneumoconiosis, because he found it to be sufficiently reasoned and documented, and consistent with the medical science relied upon by the DOL when it revised the regulatory definition of pneumoconiosis. Decision and Order at 23-24.

Initially, we reject employer's assertion that the administrative law judge erred in referring to the preamble to the amended regulations when weighing the medical opinions relevant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 9-10, 13. In evaluating the expert opinions of record in conjunction with the DOL's discussion of the medical science cited in the preamble to the amended regulations, the administrative law judge did not utilize the preamble as a legal rule, or to create an erroneous presumption of legal pneumoconiosis. Employer's Brief at 12-16. Contrary to employer's assertion, it was within the administrative law judge's discretion to consult the preamble, as an authoritative statement of medical principles accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment, in assessing the credibility of the medical experts' opinions in this case.

[6] Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD) and emphysema due to both coal mine dust exposure and smoking. Claimant's Exhibit 1.

[7] Dr. Dahhan opined that claimant has mild chronic obstructive lung disease, unrelated to coal mine dust exposure. Director's Exhibit 66. Dr. Hippensteel diagnosed a disabling obstructive impairment secondary to bullous emphysema, which is associated with cigarette smoking, not coal mine dust exposure. Employer's Exhibits 1, 3. Dr. Fino diagnosed a severe obstructive ventilatory impairment due to bullous emphysema, which is due to smoking, not coal mine dust exposure. Director's Exhibit 63; Employer's Exhibits 4, 5.

See Harman Mining Co. v. Director, OWCP [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-382-83 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

We also reject employer's assertion that the administrative law judge erred in determining that Dr. Rasmussen's opinion was sufficient to establish the existence of legal pneumoconiosis, pursuant to Section 718.202(a)(4). The administrative law judge found that Dr. Rasmussen, who is Board-certified in internal medicine, had twice examined claimant, and based his opinion on claimant's complaints and symptoms, his medical, employment and smoking histories, and the results of his objective studies. Decision and Order at 10-13, 24; Director's Exhibit 14; Claimant's Exhibit 1. The administrative law judge found that Dr. Rasmussen's opinion was bolstered by the fact that he is "highly-credentialed in the specialized area of occupational lung disease and has been active in this field of medicine since at least 1969." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); Decision and Order at 23-24. The administrative law judge also found that Dr. Rasmussen had "reasonably attributed" claimant's COPD and emphysema to both smoking and coal mine dust exposure, based on claimant's thirty-year smoking history of less than one pack per day, and his twenty years of coal mine employment in small mines, which are "notoriously more dusty than larger mines." Decision and Order at 13, 24; Claimant's Exhibit 1. As noted by the administrative law judge, Dr. Rasmussen also cited to medical literature in support of his opinion that both coal mine dust exposure and smoking cause "lung destruction, which is indistinguishable by radiographic, physiologic, or physical means." Decision and Order at 13; Claimant's Exhibit 1. The administrative law judge further found that his conclusion that the preponderance of the x-ray evidence is negative for the existence of clinical pneumoconiosis in no way detracted from Dr. Rasmussen's diagnosis of legal pneumoconiosis, as Dr. Rasmussen himself acknowledged that the x-ray he interpreted was negative for the disease. Decision and Order at 19, 24; Claimant's Exhibit 1.

Contrary to employer's arguments, having specifically considered these aspects of Dr. Rasmussen's opinion, the administrative law judge permissibly credited Dr. Rasmussen's opinion, that coal mine dust exposure and smoking cause indistinguishable lung destruction, because he found that it is consistent with the DOL's recognition that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms – namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with the decrease in positive enzymes in the lung." Decision and Order at 23, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Looney*, 678 F.3d at 313; *Obush*, 650 F.3d at 257, 24 BLR at 2-382-83; *Beeler*, 521

F.3d at 726, 24 BLR at 2-103; Decision and Order at 23-24. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination to credit Dr. Rasmussen's diagnosis of legal pneumoconiosis, as adequately explained and consistent with the views accepted by the DOL when it revised the definition of legal pneumoconiosis. *See Looney*, 678 F.3d at 313; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-262 (4th Cir. 2000); *Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-149.

We further reject employer's contention that the administrative law judge erred in discrediting the medical opinions of Drs. Dahhan, Hippensteel, and Fino. Employer's Brief at 19-25. The administrative law judge correctly noted that Dr. Dahhan supported his opinion, that claimant's airway obstruction was not caused by, related to, contributed to or aggravated by the inhalation of coal mine dust based, in part, on the fact that claimant "lost more than 2000 cc in the FEV1 according to the most recent Spirometry from Dr. Rasmussen's evaluation, an amount that cannot be accounted for by the possible obstructive impact of coal dust on the respiratory system that in this case, would be no more than 5-8 cc loss." Decision and Order at 20; Employer's Exhibit 4.

Contrary to employer's contention, the administrative law judge permissibly discounted Dr. Dahhan's opinion, in part, because the doctor, in excluding coal mine dust exposure as a cause of the miner's significant obstructive lung disease, improperly focused on generalities and statistics, rather than on the miner's specific condition. *See* 65 Fed. Reg. at 79,941 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 20; Employer's Brief at 19-21. The administrative law judge further discounted Dr. Dahhan's opinion, as his view that claimant's 2000 cc loss in FEV1 "cannot be accounted for by the possible obstructive impact of coal dust," is contrary to the DOL's recognition that coal mine dust-induced COPD can be clinically significant. *See* 65 Fed. Reg. at 79,938 (Dec. 20. 2000)*; Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 20-21; Employer's Brief at 20; Employer's Exhibit 4 at 3. An administrative law judge may discredit a medical opinion he finds to be divergent from the prevailing view of the medical community and scientific literature relied upon by the DOL in promulgating the revised regulations. *See Looney*, 678 F.3d at 313; *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). Thus, the administrative law judge permissibly concluded that Dr. Dahhan did not provide an adequate explanation for his conclusion that coal mine dust exposure played no role in the development of claimant's COPD. *See Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-149.

Employer also argues that the administrative law judge erred in his consideration of Dr. Hippensteel's opinion. Employer's Brief at 21-25. We disagree. The administrative law judge noted that Dr. Hippensteel relied, in part, on the partial

reversibility of claimant's impairment after bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment.[8] Decision and Order at 22. The administrative law judge found, as was within his discretion, that Dr. Hippensteel did not adequately explain why the irreversible portion of claimant's pulmonary impairment was not due, in part, to coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 22. As the administrative law judge's basis for discrediting Dr. Hippensteel's opinion is rational and supported by substantial evidence, it is affirmed.[9] *See Compton*, 211 F.3d at 207-08, 22 BLR at 2-168.

Employer next contends that the administrative law judge erred in discrediting Dr. Fino's opinion, that claimant's "severe obstruction is due to bullous emphysema, which is not a coal mine dust related pulmonary disease."[10] Employer's Brief at 24-25; Director's Exhibit 63 at 15; Employer's Exhibit 4 at 12. Employer's contention lacks merit. The administrative law judge correctly noted that, in attributing claimant's severe impairment entirely to non-coal mine dust related emphysema, Dr. Fino opined that "even if obstructive lung disease due to coal mine employment contributed to the obstruction, the loss in the FEV1 would be in the 200 cc range," based on "the medical estimate of loss in FEV1 in working miners was summarized in the 1995 NIOSH document," and would not be "clinically significant." Decision and Order at 20; Director's Exhibit 63 at 15. The administrative law judge permissibly discounted Dr. Fino's opinion because, in excluding

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[8] Dr. Hippensteel stated that "coal workers' pneumoconiosis . . . causes a fixed and irreversible impairment," and that the "partly reversible features of [claimant's] functional tests allow [his] condition to be separated from that caused by coal workers' pneumoconiosis and show that processes in this man's lung unrelated to his prior coal mine dust exposure have caused him to be impaired . . . ." Employer's Exhibit 1 at 26.

[9] The administrative law judge noted that all of the ventilatory studies submitted with this claim yielded post-bronchodilator values sufficiently severe to meet the disability standards set forth at Appendix B of Part 718. Decision and Order at 22.

[10] Dr. Fino further stated:

> Significant bullous emphysema is present, resulting in this man's impairment and disability. Although coal mine dust inhalation may cause emphysema, it does not cause bullous emphysema. Bullous emphysema is either hereditary or related to smoking. In this case, this man's bullous emphysema is related to smoking.

Director's Exhibit 63 at 14-15.

coal mine dust exposure as a potential cause of claimant's severe obstruction, Dr. Fino relied on the results of medical studies that are divergent from the prevailing view of the medical community and scientific literature expressed in the preamble, that coal mine dust-induced COPD can be clinically significant. *See* 65 Fed. Reg. at 79,938 (Dec. 20. 2000)*; Looney*, 678 F.3d at 313; *Summers*, 272 F.3d at 483 n.7; 22 BLR at 2-281 n.7; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 20-21; Employer's Brief at 24; Director's Exhibit 63 at 15; Employer's Exhibit 4 at 12. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that Dr. Fino's opinion was insufficiently reasoned.

Based on the above, we affirm the administrative law judge's weighing of the medical opinion evidence and his finding that claimant established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4).

Finally, considering the medical opinion evidence relevant to the cause of claimant's total respiratory disability, the administrative law judge rationally discounted the opinions of Drs. Dahhan, Hippensteel, and Fino, that pneumoconiosis did not contribute to claimant's disability, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 28; Director's Exhibits 63, 66; Employer's Exhibits 1, 3-5. Moreover, as the administrative law judge rationally relied on the opinion of Dr. Rasmussen to find that claimant established the existence of legal pneumoconiosis, in the form of disabling COPD and emphysema, due in significant part to coal mine dust exposure, he permissibly found that Dr. Rasmussen's opinion supported a finding that legal pneumoconiosis is a "substantially contributing cause" of claimant's total disability, pursuant to 20 C.F.R. §718.204(c).[11] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order at 28; Director's Exhibit 14; Claimant's Exhibit 1. Consequently, we affirm the administrative law judge's finding that claimant established, through the well-reasoned opinion of Dr. Rasmussen, that claimant's totally disabling respiratory impairment is due, in part, to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).

[11] Dr. Rasmussen opined that both smoking and coal dust exposure combined to cause claimant's disabling obstructive pulmonary impairment. Director's Exhibit 14; Claimant's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's 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