

BRB No. 09-0463 BLA

TOMMY HOWELL, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN COAL CORPORATION)	
)	DATE ISSUED: 03/23/2010
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 on Remand Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2006-BLA-06018) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for a second time. Claimant filed his subsequent claim on September 16, 2005.¹

¹ Claimant has filed two previous claims for benefits. Director's Exhibit 1. Claimant first filed a claim on September 13, 1988, which was denied by Administrative

In a Decision and Order issued on August 28, 2007, the administrative law judge credited claimant with at least twenty-six years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence of record was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Adjudicating the claim on its merits, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer appealed, and the Board rejected employer's assertion that the revised regulation at 20 C.F.R. §725.309 is invalid. *See T.H. [Howell] v. Eastern Coal Corporation*, BRB No. 07-0989 BLA, slip op. at 3-4 (Apr. 29, 2008) (unpub.). However, the Board agreed with employer that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement based on his finding that the newly submitted evidence established total disability, as total disability was not an element of entitlement that was reached in claimant's prior claim. *Id.* at 4. The Board also held that the administrative law judge erred in weighing the conflicting medical opinions as to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id.* at 4-5. The Board agreed with employer that the administrative law judge selectively analyzed the opinions of Drs. Rosenberg and Jarboe, as he improperly substituted his opinion for that of a medical expert, and failed to subject the opinions of claimant's physicians to the same scrutiny as those of employer's physicians.² Therefore,

Law Judge Ainsworth H. Brown on July 23, 1993, because claimant failed to establish the existence of pneumoconiosis. *Id.* The Board subsequently affirmed the denial of benefits on August 15, 1994. *Id.* Claimant filed a second claim on January 26, 2001, which was denied by Administrative Law Judge Rudolph L. Jansen because claimant failed to establish the existence of pneumoconiosis and, thus, a change in an applicable condition of entitlement. *Id.* The Board affirmed this denial of benefits on August 3, 2004. Claimant took no action with regard to the denial of his last claim until he filed the current claim on September 16, 2005. Director's Exhibit 3.

² Specifically, the Board held that the administrative law judge erred in giving less weight to the opinions of Drs. Rosenberg and Jarboe, on the ground that pulmonary function studies, relied on by both physicians, are not diagnostic of pneumoconiosis, while he assigned greater weight to Dr. Simpao's diagnosis of legal pneumoconiosis, based, *inter alia*, upon physical examination findings and the obstructive and restrictive impairment shown on a pulmonary function test. *See T.H. [Howell] v. Eastern Coal Corporation*, BRB No. 07-0989 BLA, slip op. at 5 (Apr. 29, 2008) (unpub.).

the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 725.309. *Id.* at 4, 6. Additionally, as the administrative law judge's finding as to the existence of legal pneumoconiosis influenced his credibility determinations under 20 C.F.R. §718.204(c), the Board also vacated his finding that claimant established total disability due to pneumoconiosis under that subsection. *Id.* at 6. Thus, the Board vacated the award of benefits and remanded the case for further consideration.³ *Id.* at 7.

In his Decision and Order on Remand issued on March 6, 2009, the administrative law judge noted the Board's remand instructions, and again found that the newly submitted evidence of record was sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge also reinstated his prior finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). Considering the merits of the claim, the administrative law judge further found that the weight of the evidence was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), asserting that the opinions of Drs. Simpao and King are not sufficiently reasoned to satisfy claimant's burden of proof. Employer also contends that the administrative law judge erred in finding that the opinions of Drs. Rosenberg and Jarboe do not address the issue of whether coal dust exposure aggravated claimant's chronic obstructive pulmonary disease (COPD). Employer further asserts that the administrative law judge erred in finding 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 Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer has filed a reply brief reiterating its arguments.

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

³ The Board advised that the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2), which was unchallenged on appeal, was subject to reinstatement on remand if the administrative law judge again found that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309. *Howell*, slip op. at 4 n.5.

and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that the administrative law judge erred on remand in finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer maintains that the administrative law judge erred in according controlling weight to Dr. Simpao’s opinion, that claimant has a respiratory condition due, in part, to coal dust exposure, over the contrary opinions of Drs. Rosenberg and Jarboe, that claimant’s respiratory condition is unrelated to coal dust exposure. We disagree.

There are five medical opinions of record. Dr. Hussain examined claimant on October 5, 2005, at the request of the Department of Labor. Director’s Exhibit 13. Dr. Hussain noted that a chest x-ray was normal, that a pulmonary function test revealed an obstructive ventilatory defect, and that an arterial blood gas study was normal. *Id.* He listed cardiopulmonary diagnoses of “pneumoconiosis – legal” due to coal dust exposure and chronic obstructive pulmonary disease (COPD), which he attributed to tobacco smoking. *Id.* Dr. Hussain opined that claimant suffered from a moderate respiratory impairment, which would prevent him from “the work of coal mining.” *Id.* He concluded that claimant’s respiratory impairment was substantially aggravated by coal dust exposure, with sixty percent attributable to legal pneumoconiosis and forty percent due to COPD. *Id.*

Dr. Rosenberg examined claimant on March 21, 2006. Employer’s Exhibit 3. In his report dated February 21, 2007, Dr. Rosenberg noted that claimant’s pulmonary function study revealed mild airflow obstruction, which improved after bronchodilators were administered. *Id.* He also referenced a December 8, 2006 pulmonary function study, obtained by Dr. Simpao nine months after his own examination, which revealed severe airflow obstruction. *Id.* Dr. Rosenberg opined that claimant does not have legal pneumoconiosis and explained:

It should be emphasized, that a variable type of obstructive lung disease which deteriorates rapidly over a period of months, clearly is not the kind of impairments [sic] related to past coal mine dust exposure. Rather, functional deterioration related to past coal dust exposure would occur slowly, over a period of years. Undoubtedly, [claimant’s] continued smoking history . . . has caused his increased obstructive disease with

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant’s coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director’s Exhibit 11.

bronchospasm and chronic bronchitis. [T]his is particularly so, in light of the bronchodilator response he has had at different times. Clearly, [claimant's] pattern of obstruction is not one related to past coal mine dust exposure.

Employer's Exhibit 3. In a deposition conducted on March 9, 2007, Dr. Rosenberg reiterated that, although coal mine dust exposure can cause obstruction, "when it does so[,] one would not expect marked variability . . . over a short time frame." Employer's Exhibit 4. Dr. Rosenberg noted that in 2005, claimant's FEV1 was sixty percent of predicted value, but was seventy-six percent of predicted value at the time he examined claimant in March of 2006, with improvement to eighty-one percent of predicted value after administering a bronchodilator, and then the FEV1 reduced to forty-four percent of predicted value when Dr. Simpao examined claimant in December of 2006. *Id.* According to Dr. Rosenberg, this type of marked variability "is clearly a reflection of asthmatic bronchitis related to smoking." *Id.* He concluded that claimant is totally disabled as a result of the obstructive impairment due to claimant's smoking history.

Dr. Simpao examined claimant on December 8, 2006, at the request of the Department of Labor. Claimant's Exhibit 1. He noted that claimant's chest x-ray showed a "[f]lattened diaphragm suggesting COPD," and that a pulmonary function study showed a "[m]oderate degree of restrictive and a severe degree of obstructive airway disease." *Id.* He also noted that claimant's arterial blood gas study showed "WNL – A gradient 12" and an EKG showed "[p]oor R wave progression in V1 through V3 suspicious for anteroseptal infarction." *Id.* Dr. Simpao opined that claimant "does have legal pneumoconiosis as well as COPD as based off of his [pulmonary function study], [chest x-ray], abnormal diaphragmatic excursions, EKG, symptomatology and physical findings." *Id.* Dr. Simpao also identified the following in support of his diagnosis:

[Claimant's] subjective information, which included frequent colds of about [six] per year for the last [five] years, a diagnosis of chronic bronchitis for the last [nine] years, arthritis in feet for [one] year, hypertension that has been medicated for [two] years, a productive cough of approximately [one] cup of sputum for [nine] years, dyspnea on exertion such as walking for [twenty] years, chest pain with heavy exertion for several years, orthopnea, ankle edema starting as little as one week prior to exam, and a social history that includes smoking of [one-half] to [one] pack of cigarettes a day since 1955. Upon physical examination, [claimant's] face was slightly plethoric and ruddy, slightly cyanotic lips, slightly cyanotic nails, equivocal bruit on the right side in arteries, and prominent but not engorged veins. His chest was found to have an increase in AP diameter upon chest inspection, and auscultation revealed few crepitations, distant breath sounds, and inspiratory and expiratory wheezes.

Id. Dr. Simpao opined that claimant's "pulmonary impairment from his coal workers' pneumoconiosis would be too extensive for him to perform his former coal mining duties as a general inside labor man." *Id.* He concluded that the primary cause of claimant's pulmonary impairment was his twenty-six years of coal dust exposure, although he noted that claimant's extensive smoking history was an aggravating factor of claimant's respiratory condition. *Id.*

The record indicates that Dr. King has been claimant's treating physician since November 2, 1993, and completed a medical questionnaire dated February 1, 2007. Claimant's Exhibit 2. He diagnosed that claimant had both clinical and legal pneumoconiosis. *Id.* His opinion that claimant has a chronic lung disease caused by coal mine employment was based on claimant's thirty-three years of exposure to coal dust. *Id.* He further opined that claimant has a moderate pulmonary impairment, with fifty percent due to coal workers' pneumoconiosis and fifty percent due to COPD. *Id.* He concluded that claimant does not have the respiratory capacity to perform coal mine work. *Id.*

Dr. Jarboe examined claimant on February 15, 2007, and concluded that claimant has emphysema manifested as a moderate airflow obstruction, seen on nearly every pulmonary function study in claimant's medical history. Employer's Exhibit 1(a). He also noted that claimant suffers from air trapping manifested as a mild restriction, seen as a reduction in the forced vital capacity (FVC) on pulmonary function study. *Id.* He opined that claimant did not suffer from legal pneumoconiosis. *Id.* In addressing the etiology of the emphysema, Dr. Jarboe noted that claimant's pulmonary function studies primarily show a preserved FVC and a disproportionately reduced forced expiratory volume (FEV1). *Id.* He noted that this pattern is indicative of airflow obstruction caused by cigarette smoking or asthma and not by the inhalation of coal dust, which results in a proportionate reduction in both FVC and FEV1. *Id.* In addition, he noted that claimant's airflow obstruction demonstrated a reversible component, and also demonstrated marked variability seen in the multiple pulmonary function studies done in other examinations. *Id.* Dr. Jarboe stated that coal workers' pneumoconiosis "does not cause an impairment characterized by such marked changes in function. It causes a fixed impairment which does not change significantly over time." *Id.*

Dr. Jarboe further opined that "while pulmonary emphysema can occur in coal miners, when it does, it is in proportion to the degree of dust deposition either on plain chest radiograph or in . . . CT scan" *Id.* Therefore, he opined that since neither claimant's x-ray nor CT scan showed such dust deposition, "the emphysema present in this case has been caused by a long and well-documented . . . smoking history." *Id.* In a deposition conducted on April 12, 2007, Dr. Jarboe stated that inhalation of coal dust and the presence of pneumoconiosis can cause mild elevations of residual volume ranging from 110-120 percent, but claimant's residual volume in the pulmonary function study

was 169 percent. *Id.* He noted that increases of this level are usually caused by cigarette smoking or asthma. *Id.* He concluded that claimant “retains the functional respiratory capacity to continue his last coal mining job.” *Id.*

In weighing the conflicting medical opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that neither Dr. Jarboe nor Dr. Rosenberg directly addressed the issue of whether coal dust exposure was an aggravating factor of claimant’s disabling respiratory condition. Decision and Order at 7. The administrative law judge determined that Dr. Simpao, while not a Board-certified pulmonary specialist, had the “most rational opinion in this record,” attributing claimant’s respiratory condition to a combination of coal dust exposure and smoking. *Id.* at 8. Thus, he credited Dr. Simpao’s opinion as being sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further determined that Dr. Simpao’s opinion was sufficient to establish that claimant was totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). He stated that he does not give Dr. King’s opinion controlling weight, but accepts that he treated claimant for COPD and pneumoconiosis. He also noted that the opinions of Drs. Hussain and King are consistent with each other, and consistent with the opinion of Dr. Simpao, in finding that claimant has COPD aggravated by pneumoconiosis.

Upon consideration of the administrative law judge’s Decision and Order on Remand, the arguments on appeal and the evidence of record, we affirm the administrative law judge’s findings at 20 C.F.R. §718.202(a)(4), as they are rational and supported by substantial evidence. Contrary to employer’s assertion, the administrative law judge gave permissible reasons for according the opinions of Drs. Jarboe and Rosenberg less weight on the issue of the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge found that Dr. Jarboe relied on the results of lung volumes and the absence of fibrotic changes in the lungs to support his conclusion that claimant’s diagnosed respiratory condition is not due to coal dust exposure. However, the administrative law judge noted that “lung volumes are not part of the testing enumerated by the statute and regulations.” Decision and Order at 7. Because the administrative law judge found that employer did not proffer “evidence relative to the reliability of the use of lung volumes” to exclude coal dust exposure as a causative factor for claimant’s respiratory condition, he reasonably determined that the opinion of Dr. Jarboe was not persuasive as to the etiology of claimant’s respiratory condition. Decision and Order at 7; *see* 20 C.F.R. §§718.103, 718.107; *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff’d* 24 BLR 1-1 (2007) (*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting), *aff’d* 24 BLR 1-13 (2007) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). Moreover, while a fibrotic reaction of lung tissue caused by coal dust exposure is required to establish the existence of clinical pneumoconiosis, the administrative law judge correctly noted that, contrary to

Dr. Jarboe's suggestion, x-ray evidence of fibrosis is not necessary for a finding of legal pneumoconiosis under the regulation at 20 C.F.R. §718.201.⁵ See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); 20 C.F.R. §718.201; Decision and Order at 7.

The administrative law judge also acted within his discretion in finding that Dr. Rosenberg rendered a less reasoned opinion because he did not "directly address the concept of aggravation of COPD by mining." Decision and Order at 7; see *Cornett*, 227 F.3d at 569, 22 BLR at 2-107. The administrative law judge correctly noted that the definition of legal pneumoconiosis may include a respiratory impairment "substantially aggravated" by coal dust exposure. Decision and Order at 4. The administrative law judge noted that although Dr. Rosenberg "testified that 'marked' variability in testing indicates that the disability was from smoking," the regulations still anticipate that smokers who mine may "have an additive risk for developing significant obstruction." *Id.*; see *Cornett*, 227 F.3d at 576, 22 BLR at 2-120.

The administrative law judge has broad discretion in assessing the credibility of the medical experts and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Thus, we affirm the administrative law judge's credibility determinations with regard to Drs. Jarboe and Rosenberg, as he was not persuaded by their opinions completely excluding coal dust exposure as an aggravating factor for claimant's COPD, and consequently accorded their opinions less weight at 20 C.F.R. §718.202(a)(4). See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Tennessee Consol. Coal*

⁵ Pursuant to 20 C.F.R. §718.201, the definition of pneumoconiosis includes both "clinical" and "legal" pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id.* "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 includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

Co. v. Crisp, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Furthermore, we conclude, contrary to employer's argument, that the administrative law judge acted within his discretion in finding that Dr. Simpao's opinion was reasoned and documented, and sufficient to satisfy claimant's burden of proving that he has legal pneumoconiosis, given that the physicians of record were in agreement that claimant has a disabling respiratory condition and that Dr. Simpao's conclusion accounted for claimant's lengthy smoking history and his twenty-six year coal dust exposure history. The administrative law judge permissibly found that Dr. Simpao's diagnosis of legal pneumoconiosis was reasoned and documented as it was based on "objective medical evidence such as pulmonary function studies, arterial blood gas testing, a physical examination, and medical and work histories." Decision and Order at 8. Thus, we affirm the administrative law judge's reliance on Dr. Simpao's opinion to find that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). See *Crockett Collieries, Inc., v. Director, OWCP [Barrett]*, 478 F.3d 350, 355, 23 BLR 2-472, 2-482 (6th Cir. 2007); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We further affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R §718.309.

We also reject employer's assertion that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). To the extent that Drs. Jarboe and Rosenberg did not diagnose pneumoconiosis, the administrative law judge properly found that their opinions were entitled to less weight on the issue of the cause of claimant's total disability. *Stephens*, 298 F.3d at 511, 22 BLR at 2-495; *Rowe*, 710 F.2d at 251, 5 BLR at 2-99; see *Toler v. Eastern Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge also acted within his discretion in finding that Dr. Simpao provided a reasoned and documented opinion that claimant is totally disabled due to legal pneumoconiosis, as discussed *supra*. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant satisfied his burden to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge