BRB No. 07-0204 BLA

W.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FLORENCE MINING COMPANY	)	
	)	DATE ISSUED: 11/23/2007
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensberg, Pennsylvania, for claimant.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (04-BLA-5579) of Administrative Law Judge Michael P. Lesniak, 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 the second time.[1] In his original Decision and Order issued on April 6, 2005, the administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis, and, thus, that claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 13. Weighing all of the record evidence as to the merits of claimant's entitlement to benefits, the administrative law judge also found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer appealed to the Board, challenging the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). The Board rejected employer's argument that the administrative law judge improperly assigned additional weight to Dr. Karduck's opinion, that claimant suffers from legal pneumoconiosis, based on his status as claimant's treating physician. *See [W.W.] v. Florence Mining Company*, BRB No. 05-0654 BLA (Oct. 19, 2006) (J. Hall, dissenting) (unpub.), slip. op. at 4. The Board held that the administrative law judge had discretion to rely on Dr. Karduck's opinion since he properly considered the factors specified at 20 C.F.R. §718.104(d)(1)-(4), and since he permissibly determined that Dr. Karduck's opinion was reasoned and documented.[2] *Id*. The Board, however, agreed with employer that the administrative law

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[1] Claimant filed an initial claim for benefits on March 14, 1974, which was denied by the district director on September 7, 1982 for failure to establish any of the requisite elements of entitlement. Director's Exhibit 2. Claimant filed a duplicate claim on June 15, 1993. *Id*. In a Decision and Order dated July 12, 1995, Administrative Law Judge Michael P. Lesniak determined that claimant had demonstrated a material change in conditions under 20 C.F.R. §725.309 (2000), but he denied benefits on the merits because he found the evidence to be insufficient to establish the existence of pneumoconiosis. *Id*. Claimant filed a third claim for benefits on November 7, 1996. Director's Exhibit 3. In a Decision and Order dated May 7, 1998, Administrative Law Judge Daniel L. Leland denied benefits, as he determined that the new evidence failed to establish the existence of pneumoconiosis, and thus, that claimant failed to establish a material change in conditions pursuant to Section 725.309 (2000). *Id.* Claimant took no action with regard to the denial of his third claim, until he filed this subsequent claim on April 18, 2002. Director's Exhibit 1

[2] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), but that claimant had proved his total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See [W.W.] v. Florence Mining Company*, BRB No. 05-0654 BLA (Oct. 19, 2006) (J. Hall, dissenting) (unpub.).

judge erred by failing to consider all of the bases for Dr. Pickerill's opinion, that claimant's chronic obstructive pulmonary disease (COPD) was unrelated to coal dust exposure, prior to assigning it less weight. *Id*. at 3. Thus, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c), and remanded the case for further consideration as to whether claimant established the existence of pneumoconiosis and disability causation. *Id*. at 5.

On remand, after reviewing Dr. Pickerill's report and deposition testimony, the administrative law judge concluded that Dr. Pickerill failed to fully explain his reasons for excluding coal dust exposure as a causative factor for claimant's COPD, and that Dr. Pickerill's opinion was outweighed by the better-reasoned and documented opinions of Drs. Karduck and Schaaf, attributing claimant's disabling COPD, at least in part, to coal dust exposure. *Id.* Relying on the opinions of Drs. Karduck and Schaaf, the administrative law judge found that claimant satisfied his burden of establishing the existence of legal pneumoconiosis pursuant to Section 718.202(a), and that he was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that "the administrative law judge erred in finding that there was substantial credible evidence to support his findings of legal pneumoconiosis and total disability due to pneumoconiosis." Employer's Brief in Support of Petition for Review at 7. Employer specifically contends that the administrative law judge erred in assigning less probative weight to Dr. Pickerill's opinion as to the etiology of claimant's COPD. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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, 363 (1965).

Employer asserts that, in deciding the relative weight to accord the physicians' conflicting opinions at Section 718.202(a)(4), the administrative law judge erred in stating that Dr. Pickerill's opinion was "sparse and somewhat equivocal" as to why claimant's coal dust exposure was not a contributing factor to his COPD. Employer asserts that the administrative law judge's analysis improperly shifts the burden of proof to employer to rule out coal dust exposure as a cause of claimant's COPD. Employer's Brief at 8, citing Decision and Order on Remand at 6. We disagree. Contrary to employer's suggestion, it is not improper for an administrative law judge to require a physician to explain the bases for his opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Such an analysis

does not constitute an improper shifting of the burden of proof. In this case, the administrative law judge followed the Board's directive to evaluate the totality of Dr. Pickerill's opinion, and he permissibly determined that while Dr. Pickerill's opinion was not in conflict with the Act, as he had previously found, the doctor's explanation for why he attributed claimant's respiratory disease solely to smoking was not persuasive. The administrative law judge specifically noted:

> Apart from the general conclusions, Dr. Pickerill articulated few specific reasons for attributing [c]laimant's pulmonary impairment to cigarette smoking: 1) that there was no x-ray evidence of coal workers' pneumoconiosis, 2) that [c]laimant had not been exposed to coal mine dust since 1988 but his impairment had progressed, and 3) that cigarette smoking is the primary cause of COPD. In particular, Dr. Pickerill stated that the primary reason for not attributing [c]laimant's COPD to coal mine dust was the lack of radiographic evidence of coal workers' pneumoconiosis.
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> Dr. Pickerill has acknowledged that there is no aspect of the pulmonary function studies or blood gas studies that can correlate the impairment to a particular etiology. He acknowledged that similar findings on these studies can be caused by coal mine dust. However, he states that his overall clinical impression leads him to attribute [c]laimant's COPD to cigarette smoking and that he cannot with a reasonable degree of medical certainty attribute [c]laimant's COPD to coal mine dust.

Decision and Order on Remand at 6.

In contrast to Dr. Pickerill's opinion, the administrative law judge determined that Dr. Karduck and Dr. Schaaf more persuasively explained the bases for their opinions that claimant's COPD was due to both smoking and coal dust exposure. Noting his prior determination that the causation opinions of Drs. Karduck and Schaaf were reasoned and documented, the administrative law judge had discretion to conclude that claimant had satisfied his burden of establishing the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[3] *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326, 10 BLR 2-220, 2-238 (3d Cir. 1987).

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[3] Employer specifically argues that the administrative law judge erred in finding Dr. Karduck's opinion sufficient to support findings of legal pneumoconiosis and total disability due to pneumoconiosis. The Board, however, has already considered this argument, and affirmed the administrative law judge's finding that Dr. Karduck's opinion was documented and reasoned. *See* [*W.W.*], BRB No. 05-0654 BLA, slip op. at 4. The Board also affirmed the administrative law judge's decision to accord additional weight

In affirming the administrative law judge's credibility determinations as to the etiology of claimant's COPD, we specifically reject employer's assertion that the administrative law judge erred in finding Dr. Schaaf's opinion to be reasoned and documented since the doctor was unable to apportion the degree to which coal dust exposure, versus smoking, was a contributing factor to claimant's respiratory disease. Contrary to employer's assertion, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that a miner is not required to establish relative degrees of causal connection by pneumoconiosis versus smoking in order to demonstrate that he is totally disabled due to pneumoconiosis. *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003). In this case, Dr. Schaaf's opinion, that coal dust exposure was one of two causes for claimant's respiratory condition, is therefore sufficient to support a finding that claimant suffered from legal pneumoconiosis.

Moreover, contrary to employer's contention, the administrative law judge was not required to discredit Dr. Schaaf's opinion on the issue of legal pneumoconiosis simply because Dr. Schaaf concluded, contrary to the administrative law judge's finding, that claimant had radiographic evidence for clinical pneumoconiosis. Under Section 718.201, "legal pneumoconiosis" encompasses a broader range of respiratory conditions than the medical condition known as "clinical pneumoconiosis," and includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Thus, we specifically affirm the administrative law judge's determination that Dr. Schaaf's opinion was reasoned and documented, and entitled to controlling weight under Section 718.202(a)(4).

Essentially, what employer seeks on appeal is for the Board to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). The Board's scope of review is limited to reviewing the administrative law judge's decision to determine whether it is reasoned, supported by substantial evidence, and in accordance with law. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313, 20 BLR 2-76, 2-86 (3d Cir. 1995); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 619, 13 BLR 2-226, 2-234 (3d Cir. 1990). Because the administrative law judge considered the opinions of Drs. Karduck and Schaaf to be credible, documented and reasoned, and sufficient to support claimant's burden of proof at Section 718.202(a)(4), we defer to those credibility findings. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-

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to Dr. Karduck's opinion, based on his status as claimant's treating physician. *Id.* Because employer has not demonstrated any exception to the law of the case doctrine, we decline to revisit our holdings on those issues. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990).

334 (1985). Thus, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis, based on the totality of the evidence at Section 718.202(a). *See Penn Allegheny Coal Co. v. Williams*,114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

As to the issue of disability causation, the administrative law judge noted that Dr. Pickerill was "the only physician of record who did not attribute [c]laimant's total respiratory disability to pneumoconiosis." Decision and Order at 15. The administrative law judge permissibly determined that Dr. Pickerill's opinion "was problematic on the issue of causation of total disability because he did not diagnosis pneumoconiosis." Decision and Order at 15; *see Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Furthermore, the administrative law judge properly found that the preponderance of the reasoned and documented physicians' opinions established that claimant was totally disabled as a result of his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Because the administrative law judge's credibility determinations at Section 718.202(a)(4) are equally applicable to analysis of the medical opinions under Section 718.204(c), we affirm his finding that claimant established total disability due to pneumoconiosis. We therefore affirm the administrative law judge's award of benefits.

As an additional matter, on November 22, 2006, the Board received an application for approval of attorney fees from claimant's counsel, requesting compensation in the amount of $1,531.25 for legal services rendered to claimant from May 5, 2005 to February 2, 2006, when the case was previously before the Board on appeal. The requested fee represents 8.75 hours of legal services billed at the rate of $175.00 per hour.

The regulation pertaining to fees before the Board provides, in relevant part, that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation [and] the complexity of the legal issues involved[.]" 20 C.F.R. §802.203(c). Employer was served with a copy of the fee petition, and has not filed an objection. The Board finds the requested fee to be reasonable. Thus, we hereby approve attorney fees, for services before the Board in BRB No. 05-0654 BLA in the amount of $1,531.25 to be paid directly to claimant's counsel by employer. 33 U.S.C. §928 as incorporated into the Act by 20 C.F.R. §802.203; 20 C.F.R. §802.203(e). Additionally, we note that, in light of our affirmance of the award of benefits in the case, claimant's counsel is also entitled to a fee for work performed in this appeal.

The administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed, and we grant attorney fees to claimant's counsel for his work before the Board as requested.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge