BRB No. 10-0134 BLA

DON HACKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/03/2010
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Richard A. Seid (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits[1] (2008-BLA-5702) of Administrative Law Judge Donald W. Mosser (the administrative law judge) rendered on a subsequent claim,[2] 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).[3] Upon stipulation of the parties, the administrative law judge credited claimant with at least thirteen years of qualifying coal mine employment, and adjudicated the claim, filed on April 25, 2002, pursuant to the provisions at 20 C.F.R Part 718. The administrative law judge determined that, because claimant's prior claim had been abandoned, and the only medical evidence of record to be considered was evidence submitted in support of the instant subsequent claim, the provisions at 20 C.F.R. §725.309(d) were not applicable. The administrative law judge found that the evidence was sufficient to establish the existence of 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). Accordingly, benefits were awarded.

On appeal, employer challenges the propriety of the administrative law judge's consideration of Dr. Vaezy's medical opinion, which constituted claimant's second complete pulmonary evaluation sponsored by the Department of Labor (DOL). Employer also contends that the administrative law judge erred in failing to apply the provisions of Section 725.309(d) to this subsequent claim, and challenges the administrative law judge's weighing of the medical opinion evidence on the issues of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's challenge to claimant's second DOL-

[1] The administrative law judge subsequently issued a Decision and Order on Motion for Reconsideration to correct a mistake on page 13 of the Decision and Order, by substituting "Whitaker Coal Corporation/Sun Coal Company, Inc.," the properly designated responsible operator herein, for the incorrect "Blazing Saddles Coal Corporation."

[2] Claimant's initial claim for benefits, filed on September 26, 1995, was deemed abandoned after claimant failed to respond to the district director's Order to Show Cause - Abandonment of Claim/Denial, dated December 7, 1995. *See* 20 C.F.R. §725.409; Director's Exhibit 32.

[3] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the claim was filed prior to January 1, 2005.

sponsored complete pulmonary evaluation. Employer has replied to claimant and to the Director in support of its position.[4]

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.[5] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. We first address employer's argument that a second pulmonary evaluation sponsored by DOL was improper. Employer maintains that Dr. Baker's June 15, 2002 report of examination satisfied the obligation of the Department of Labor to provide claimant with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406, as Dr. Baker conducted the requisite testing and addressed every element of entitlement. Thus, employer contends that Administrative Law Judge Alice M. Craft erred in remanding this case to the district director to obtain a second complete pulmonary evaluation of claimant from Dr. Vaezy in 2007.[6] Employer submits that the

[4] We grant the Director's motion to strike employer's argument, raised for the first time in employer's reply brief, that liability for this claim should transfer to the Black Lung Disability Trust Fund if Dr. Vaezy's report remains in the record. While employer maintains that its argument merely offers an alternative remedy that is directly responsive to the position asserted in the Director's response brief, *see* 20 C.F.R. §802.213(b), a transfer of liability for the payment of benefits would expand employer's rights in this case, and the issue was not raised at the hearing level. As employer failed to timely raise this new issue, its argument is waived. *See generally Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984).

[5] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 11.

[6] In remanding the case, Administrative Law Judge Alice M. Craft found that Dr. Baker's 2002 examination "contains contradictory findings and is so old that it cannot be deemed to accurately reflect claimant's recent condition." Director's Exhibit 41-50. Judge Craft specified that "Dr. Baker checked 'no' to the question whether claimant has an occupational lung disease caused by coal mine employment, but said '? coal dust exposure ? cardiac' in response to the question regarding the etiology of any pulmonary impairment." *Id*.

appropriate remedy is either to strike Dr. Vaezy's report from the record and remand this case for proper consideration of the admissible evidence under 20 C.F.R. §725.414, or to reverse the award of benefits. Employer's Brief at 15-19. The Director counters that, even assuming that employer is correct in principle, it has suffered no prejudice from the admission of Dr. Vaezy's report into the record, as the administrative law judge relied exclusively on Dr. Baker's 2008 medical opinion, which was supplied by claimant and which does not exceed the evidentiary limitations. *See* 20 C.F.R. §725.414(a)(2)(i). We agree with the Director's position. The record reflects that employer obtained two reports and the deposition of Dr. Rosenberg to rebut the reports of Drs. Vaezy and Baker, and that the administrative law judge accorded determinative weight to Dr. Baker's 2008 opinion and no weight to Dr. Vaezy's opinion. Decision and Order at 9; Director's Exhibit 41; Claimant's Exhibit 1; Employer's Exhibits 5, 6, 7. As employer has demonstrated no prejudice, any error in obtaining and admitting Dr. Vaezy's report into the record was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer next challenges the administrative law judge's weighing of the medical opinion evidence relative to the existence of legal pneumoconiosis at Section 718.202(a)(4). Employer contends that the administrative law judge failed to offer "any valid reasons" for crediting the opinion of Dr. Baker over the contrary opinion of Dr. Rosenberg, thereby failing to comply with the provisions of the Administrative Procedure Act (APA), 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). In this regard, employer argues that Dr. Baker improperly relied on a discredited positive x-ray and an incorrect employment history for claimant, and that the doctor's opinion is too equivocal to carry claimant's burden of proof. Employer also asserts that the administrative law judge erroneously discounted Dr. Rosenberg's reliance on his carboxyhemoglobin testing of claimant; substituted his own interpretation of the pulmonary function study results; and misused the comments in the preamble to the amended regulations. Employer's Brief at 20-29. Employer's arguments lack merit.

In finding the weight of the evidence sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge found that claimant credibly testified that he smoked "a long time ago;" that he never smoked two packs of cigarettes a day; that he is exposed to second-hand smoke within his house every day; and that he has exhaust problems with his truck. Consequently, the administrative law judge determined that claimant "quit smoking several years ago," after a smoking history of one pack per day for fifteen to twenty years. Decision and Order at 11; Hearing Transcript at 19, 21-22, 26-27. The administrative law judge accurately summarized the conflicting medical opinions of Drs. Vaezy, Baker, and Rosenberg, noting their underlying documentation, the employment and smoking histories relied upon, and the physicians' explanations for their respective conclusions. Decision and Order at 9-11. The administrative law judge properly found that the opinions of Drs.

Vaezy and Baker were insufficient to support a finding of clinical pneumoconiosis under Section 718.202(a)(4), as the physicians relied exclusively on their positive x-ray interpretations and claimant's history of coal dust exposure. Decision and Order at 9; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). While both Drs. Vaezy and Baker also diagnosed legal pneumoconiosis, the administrative law judge permissibly accorded no weight to Dr. Vaezy's diagnosis, finding that it was insufficient to support claimant's burden of proof, as the doctor "simply [did] not provide any reasoning for [his] opinion," and "provide[d] no insight as to how the results of his objective testing, findings from his physical examination . . ., or claimant's reported respiratory symptoms and complaints support a diagnosis of legal pneumoconiosis."[7] Decision and Order at 9; Director's Exhibit 41; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). The administrative law judge determined that Dr. Baker's rationale "goes much further than that of Dr. Vaezy," because Dr. Baker discussed the synergistic effects between claimant's coal dust exposure and his smoking history. Thus, the administrative law judge acted within his discretion in finding Dr. Baker's opinion, that claimant's conditions of chronic obstructive pulmonary disease (COPD), hypoxemia, and chronic bronchitis had been "significantly contributed to and substantially aggravated by dust exposure in his coal mine employment," to be documented and reasoned, and entitled to probative weight.[8] Decision and Order at 9-10; Claimant's Exhibit 1; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) *citing Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. By contrast, the administrative law judge determined that Dr. Rosenberg's analysis of the relationship between claimant's pulmonary function study results and his coal dust exposure was based on a premise that conflicted with the prevailing view of medical science underlying the current regulations,[9] and that Dr. Rosenberg believed claimant was still smoking, in direct contradiction to the administrative law judge's finding. Consequently, the administrative law judge rationally

[7] Dr. Vaezy examined claimant on January 16, 2008, performed testing, and diagnosed coal workers' pneumoconiosis and COPD due to coal dust inhalation and smoking. He determined that claimant was unable to perform his job of coal mining due to his moderate obstructive impairment. Director's Exhibit 41.

[8] Contrary to employer's suggestion, we find no evidence that Dr. Baker relied on a work history of 26 or 27 years, as Dr. Baker specifically noted that claimant had a "history of 14 years of coal dust exposure." Claimant's Exhibit 1 at 4.

[9] Dr. Rosenberg opined that claimant's obstructive disease could not be due to coal dust exposure, based on claimant's pattern of obstruction on pulmonary function testing, *i.e.*, a significantly reduced FEV_1, together with a reduced FEV_1/FVC ratio. Employer's Exhibits 5, 6, 7.

concluded that the opinion of Dr. Rosenberg, that claimant's disabling COPD was due entirely to smoking and that claimant did not have legal pneumoconiosis, was entitled to little weight. Decision and Order at 11; *see* 65 Fed. Reg. 79940, 79943 (Dec. 20, 2000); *Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 18 BLR 2-105 (7th Cir. 1994); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125 (2009). Because the administrative law judge addressed all relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for crediting the opinion of Dr. Baker over the contrary opinion of Dr. Rosenberg, his Decision and Order comports with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As substantial evidence supports the administrative law judge's finding, that the weight of the evidence was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), it is affirmed.

Employer next maintains that the administrative law judge erred in finding the opinion of Dr. Baker sufficient to establish disability causation at Section 718.204(c). We disagree. Both Dr. Baker and Dr. Rosenberg concluded that claimant was totally disabled due to his COPD, but disagreed as to the etiology thereof. Based on the administrative law judge's weighing of the conflicting medical opinions of Dr. Baker and Dr. Rosenberg on the issue of legal pneumoconiosis, the administrative law judge permissibly found that Dr. Baker's opinion was reasoned, documented, and entitled to determinative weight on the issue of disability causation. Decision and Order at 12; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 86 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Consequently, we affirm the administrative law judge's finding that the weight of the evidence established disability causation at Section 718.204(c), as supported by substantial evidence.

Lastly, employer contends that the administrative law judge erred in determining that, because claimant's prior claim was abandoned, his current subsequent claim was not subject to the requirements of Section 725.309. Employer's Brief at 19-20. While we agree with employer's argument, we hold that the administrative law judge's error was harmless under the facts of this case. *See Larioni*, 6 BLR at 1-1278. The regulations provide, for purposes of Section 725.309, that a denial by reason of abandonment shall be deemed a finding that claimant has not established any applicable condition of entitlement.[10] 20 C.F.R. §725.409(c). Therefore, claimant could meet his burden under Section 725.309(d) by establishing any of the requisite elements of entitlement with new evidence submitted in support of the instant claim. *See White v. New White Coal Corp.*, 23 BLR 1-1 (2004). As claimant's original claim contained no medical evidence, Director's Exhibit 32, and the administrative law judge found that the evidence submitted

[10] 20 C.F.R. §725.409 provides that, once a claim has been deemed abandoned, a new claim may be filed at any time and new evidence submitted.

in support of claimant's subsequent claim was sufficient to establish every element of entitlement, claimant has demonstrated a change in an applicable condition of entitlement as a matter of law. *See* 20 C.F.R. §725.309(d). We, therefore, affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed, as corrected in his Decision and Order on Motion for Reconsideration.

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