BRB No. 10-0212 BLA

TED L. CRABTREE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FORK COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE	)	DATE ISSUED: 11/29/2010
	)	
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 – Award of Benefits of Administrative Law Judge Larry S. Merck.

John Hunt Morgan, Harlan, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Rita Roppolo (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/carrier (employer) appeals the Decision and Order – Award of Benefits (08-BLA-5458) of Administrative Law Judge Larry S. Merck rendered on a claim 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 accepted the parties' stipulation to thirty years of coal mine employment[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema due, in part, to coal mine dust exposure pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence at Sections 718.202(a)(4) and 718.204(c). Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging the Board to affirm the award of benefits.[2]

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. 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, clamant 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Impact of the Recent Amendments

After the issuance of the administrative law judge's Decision and Order, amendments to the Act, affecting claims filed after January 1, 2005 that were pending on

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3, 8, 9.

[2] We affirm the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), as this finding is not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

or after March 23, 2010, were enacted by Section 1556 of Public Law No. 111-148. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

By Order dated September 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. Claimant responds, stating that the Section 411(c)(4) presumption should be invoked. The Director states that if the award of benefits is not affirmed, the case must be remanded to the administrative law judge for consideration of whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4). Employer states that if the Board affirms the award of benefits, a remand for the administrative law judge to consider the claim pursuant to Section 411(c)(4) is unnecessary. If the case is remanded for consideration under Section 411(c)(4), employer requests that the administrative law judge be instructed to reopen the record for the parties to submit evidence addressing the new legal standard.

Based upon the parties' responses, and our review, we hold that Section 1556 does not affect the disposition of this case. As will be discussed 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 rebuttable presumption that was reinstated by Section 1556.

Legal Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis.[3] The administrative law judge correctly noted that Dr. Rasmussen diagnosed claimant with "COPD/emphysema" due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 16 at 36. The administrative law judge further considered that Drs. Broudy and Dahhan diagnosed COPD and emphysema due to cigarette smoking, and they opined that claimant's coal mine dust exposure did not cause or contribute to his impairment. Employer's Exhibits 1-4. The administrative law judge accorded less weight to the opinions of Drs. Broudy and Dahhan because he found that they "based their opinions on inadequate reasoning." Decision and Order at 21. By contrast, he found that Dr. Rasmussen's diagnosis of legal pneumoconiosis was well-documented and

[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).

well-reasoned and entitled to full probative weight. *Id*. at 10-11. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[4]

Employer argues that Dr. Rasmussen's opinion, that both coal mine dust exposure and smoking caused claimant's COPD, does not constitute a well-reasoned diagnosis of legal pneumoconiosis. Employer's Brief at 6-12. Employer argues further that the administrative law judge erred in his analysis of the opinions of Drs. Broudy and Dahhan, and that he shifted the burden of proof to employer by requiring Drs. Broudy and Dahhan to adequately explain why claimant's coal mine employment played no role in his lung disease. Employer's Brief at 12-16.

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. Contrary to employer's initial argument, substantial evidence supports the administrative law judge's finding that Dr. Rasmussen based his opinion regarding the etiology of claimant's COPD on consideration of clinical findings, the objective evidence, and claimant's history of cigarette smoking and exposure to coal mine dust. Director's Exhibit 16. Therefore, the administrative law judge permissibly found that Dr. Rasmussen's opinion was well-documented and well-reasoned. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-551 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Employer asserts that the administrative law judge erred in his consideration of the opinions of Drs. Broudy and Dahhan. We disagree. The administrative law judge permissibly found that these opinions merited less weight because they were insufficiently reasoned on the issue of the etiology of claimant's COPD and emphysema. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Specifically, substantial evidence supports the administrative law judge's finding that Dr. Broudy's reasoning for excluding coal mine dust as a cause conflicted with the medical science that was credited by the Department of Labor (DOL), because Dr. Broudy opined that focal emphysema is the only type of emphysema that is caused by coal mine dust exposure, that it would be unusual for claimant to have a disabling obstructive impairment due to coal dust in the absence of complicated pneumoconiosis, and, that the purely obstructive nature of claimant's impairment argued against coal mine dust exposure as a cause. Employer's Exhibits 1, 2, 4; *see* 65 Fed. Reg. 79,920, 79,939, 79,943, 79,951 (Dec. 20, 2000).

[4] The administrative law judge also considered claimant's treatment records and CT scan reports and found them entitled to little weight. Decision and Order at 20-21.

Contrary to employer's arguments, a determination of whether Dr. Broudy's opinion is supported by accepted scientific evidence, as determined by DOL in the preamble to the revised regulations, is a valid criterion in deciding whether to credit the opinion. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009). Similarly, the administrative law judge acted within his discretion when he found that Dr. Dahhan also asserted that claimant does not have focal emphysema, the only type that can be caused by coal dust exposure, and that Dr. Dahhan did not adequately explain why the partial reversibility of claimant's COPD necessarily eliminated legal pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

Further, we reject employer's assertion that the administrative law judge shifted the burden of proof to employer to eliminate coal dust exposure as a cause of claimant's COPD and emphysema. The administrative law judge evaluated the conflicting medical opinions to determine whether claimant established, by a preponderance of the evidence, that his pulmonary condition was significantly related to, or substantially aggravated by, coal mine dust exposure. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); 20 C.F.R. §718.201(b); Decision and Order at 21. Our review of the Decision and Order does not indicate that the administrative law judge reversed the burden of proof in considering the credibility of the medical opinions.

Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, they are affirmed. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR 1-155. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[5]

Disability Causation

Pursuant to Section 718.204(c), the administrative law judge found that the evidence established that claimant's totally disabling impairment is due to pneumoconiosis, based upon Dr. Rasmussen's opinion, which he found to be well-documented and well-reasoned. Decision and Order at 26. The administrative law judge noted that he had found the opinions of Drs. Dahhan and Broudy unreasoned regarding

[5] In view of the administrative law judge's finding of legal pneumoconiosis, he correctly determined that he was not required to make a separate finding regarding the etiology of claimant's pneumoconiosis, pursuant to 20 C.F.R. §718.203. *See Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

the existence of legal pneumoconiosis, and he accorded them little weight regarding disability causation, because they did not diagnose legal pneumoconiosis.[6] Decision and Order at 26.

The administrative law judge rationally discounted the opinions of Drs. Dahhan and Broudy because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Moreover, because the administrative law judge rationally relied on the reasoned and documented opinion of Dr. Rasmussen to find that claimant established the existence of legal pneumoconiosis, he also rationally relied on Dr. Rasmussen's opinion to find that claimant is totally disabled due to legal pneumoconiosis. *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Therefore, we affirm the administrative law judge's finding that claimant is totally disabled due to legal pneumoconiosis.

[6] Dr. Rasmussen opined that claimant's coal mine dust exposure is a significant contributing factor to his total disability. Director's Exhibit 16. Dr. Dahhan opined that claimant's pulmonary impairment is unrelated to the inhalation of coal mine dust, Employer's Exhibit 3, and Dr. Broudy opined that smoking caused all of claimant's pulmonary impairment. Director's Exhibit 21.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

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