BRB No. 09-0853 BLA

JAMES P. MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JUSTIN ENERGY, INCORPORATED	)	DATE ISSUED: 10/29/2010
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, 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 appeals the Decision and Order Awarding Benefits (2008-BLA-5413) of Administrative Law Judge Richard A. Morgan with respect to a miner's claim filed on May 1, 2007, 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-eight years of coal mine employment, based on the parties' stipulation. Addressing the merits of this claim, the administrative law judge found that, while the medical evidence failed to establish the existence of clinical pneumoconiosis, it established the existence of legal pneumoconiosis[1] pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the medical evidence failed to establish rebuttal of the presumption that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). With regard to the issue of total respiratory disability, the administrative law judge found that the preponderance of the medical evidence established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b), and that his total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established legal pneumoconiosis pursuant to §718.202(a)(4). Employer argues that the administrative law judge erred in his weighing of the conflicting medical opinion evidence and in failing to consider all of the relevant evidence. Employer also contends that the administrative law judge erred in finding that claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b), arguing that Dr. Zaldivar opined that claimant's respiratory impairment was due to smoking. In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c), arguing that the finding is not supported by substantial evidence. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the administrative law judge's award of benefits as supported by substantial evidence.[2]

[1] Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish clinical pneumoconiosis pursuant to 20 C.F.R.

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.[3] 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).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

In challenging the administrative law judge's finding that legal pneumoconiosis was established at Section 718.202(a)(4), employer contends that the administrative law judge erred in finding that the opinion of Dr. Rasmussen, attributing claimant's respiratory impairment to both coal mine employment and cigarette smoking, supported a finding of legal pneumoconiosis at Section 718.202(a)(4). Employer argues that Dr. Rasmussen's failure to differentiate between the effects of claimant's exposure to cigarette smoke and coal mine dust renders his opinion uncertain, and that, in effect, Dr. Rasmussen was only guessing that legal pneumoconiosis was present. Employer's Brief at 8-9. Further, employer contends that Dr. Rasmussen's opinion is not well-reasoned because it lacks any rationale for Dr. Rasmussen's conclusions. *Id*. Employer also contends that the administrative law judge erred in not according greater weight to the opinion of Dr. Zaldivar, that claimant's respiratory impairment was solely due to smoking. Employer contends that the administrative law judge erred in discrediting Dr. Zaldivar's opinion because it was based on Dr. Zaldivar's negative x-ray interpretation. *Id*. Lastly, employer contends that the administrative law judge erred in failing to consider the opinions of Nurse Practitioner Webb and Dr. Porterfield, as well as claimant's treatment records from Linkous Family Health Care, LLC, which support Dr. Zaldivar's opinion. *Id*. at 10, 12.

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§718.202(a)(1)-(4), but was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Employer's arguments, concerning the issue of legal pneumoconiosis,[4] are premised upon the erroneous assumption that a physician's opinion must specify the relative contributions of coal dust exposure and cigarette smoking, in order to establish that claimant's respiratory impairment constitutes legal pneumoconiosis. The United States Court of Appeals for the Fourth Circuit has held, however, that a physician need not apportion a precise percentage of a miner's lung disease to cigarette smoke and coal dust exposure in order to establish the existence of legal pneumoconiosis, as such particularized findings are not necessary. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). The court emphasized that "the miner is not required to demonstrate that coal dust was the only cause of his current respiratory problems," but need only show that his diagnosed respiratory impairment was "significantly related to, or substantially aggravated by coal mine dust exposure" to establish the existence of legal pneumoconiosis. *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *accord Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *see Gross v. Dominion Coal Corp*., 23 BLR 1-8 (2003); *see* 20 C.F.R. §718.201(b). In this case, Dr. Rasmussen explained that he was unable to differentiate the extent to which smoking and coal dust exposure caused claimant's respiratory impairment, because the physiological reaction to both cigarette smoking particles and coal mine dust particles in the lungs causes similar damage and it is not possible to separate the effects of those processes.[5] The administrative law judge,

[4] In weighing the medical opinions at Section 718.202(a)(4), the administrative law judge determined that both Dr. Rasmussen and Dr. Zaldivar agreed that claimant suffered from asthma and emphysema, but that they disagreed as to the etiology of these respiratory conditions. Decision and Order at 16. Considering the explanations provided by the doctors, the administrative law judge found that Dr. Rasmussen attributed claimant's respiratory impairment to both claimant's fifty pack year history of smoking and his twenty-six plus years of coal mine dust exposure, as the two etiologies could not be separated. The administrative law judge found that Dr. Zaldivar opined that claimant's respiratory impairment was due entirely to claimant's smoking history. Decision and Order at 8-9, 16; *compare* Director's Exhibit 9; Employer's Exhibit 6 *with* Employer's Exhibit 3.

[5] Dr Rasmussen stated:

> Cigarette smoke particles and coal mine dust particles are both engulfed by lung scavenger cells in a normal fashion as part of a regular defense mechanism. However, in those individuals, smokers or miners who are susceptible, those scavenger cells release abnormal chemicals, which in turn unleash a cascade of cellular and enzymatic processes, which basically dissolve lung

therefore, properly found that Dr. Rasmussen provided a sufficient rationale for his conclusion that claimant's respiratory impairment was due to both smoking and coal dust exposure. Decision and Order at 16; Director's Exhibit 9. Consequently, the administrative law judge reasonably found that Dr. Rasmussen's opinion was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). 20 C.F.R. §718.201(b); *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Gross*, 23 BLR at 1-18; Decision and Order at 16; Director's Exhibit 9.

Additionally, contrary to employer's contention, the administrative law judge reasonably exercised his discretion in finding that Dr. Zaldivar's opinion was entitled to diminished weight on the issue of legal pneumoconiosis at Section 718.202(a)(4). Contrary to employer's argument, the administrative law judge did not discredit Dr. Zaldivar's opinion solely because he found an x-ray that was negative for clinical pneumoconiosis. Instead, the administrative law judge noted that while Dr. Zaldivar stated that it was well known that "any agent that irritates the lungs can worsen asthma" and that claimant's smoking exposure was such an irritant, the doctor failed to discuss the effect of claimant's coal dust exposure in the same terms. Employer's Exhibit 3; Decision and Order at 16. Consequently, the administrative law judge rationally found that because Dr. Zaldivar failed to adequately address the effect that coal dust exposure could have on claimant's respiratory impairment, his opinion was entitled to diminished weight. *See Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); Decision and Order at 16; Employer's Exhibit 3. Further, contrary to employer's argument, the administrative law judge considered the opinions of Nurse Practitioner Webb and Dr. Porterfield, as well as claimant's treatment records from Linkous Family Health Care, LLC, attributing claimant's respiratory impairment to smoking, but permissibly rejected this evidence for the same reason he rejected Dr. Zaldivar's opinion. Decision and Order at 15.

Therefore, because the administrative law judge found that Dr. Rasmussen provided a more persuasive rationale for his conclusion, that claimant's respiratory impairment was due to both coal mine employment and cigarette smoking, the administrative law judge permissibly accorded dispositive weight to Dr. Rasmussen's opinion on the issue. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763-64, 21 BLR 2-587, 2-605-06 (4th Cir. 1999); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Fagg v. Amax Coal*

> tissue leading to all types of emphysema, centriacinar, panacinar, bullous, etc. There is no way of separating those effects.

Director's Exhibit 9.

Co., 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Further, as the administrative law judge provided valid reasons for his credibility determinations, and his findings are supported by substantial evidence, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4), and that claimant established the existence of pneumoconiosis overall, by a preponderance of the evidence under Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer next contends that it was error for the administrative law judge to find claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment at Section 718.203(b), and that, even if the presumption were applicable, it was rebutted. In light of the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4), *see* discussion, *supra*, it was unnecessary for the administrative law judge to apply the Section 718.203(b) presumption in this case, as a finding of causality at Section 718.203(b) is subsumed in the administrative law judge's finding that claimant's respiratory impairment arose out of coal mine employment at Section 718.202(a)(4). *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equipment Co*., 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co., Inc*., 21 BLR 1-147, 1-151 (1999). Employer's argument on this issue is, therefore, rejected.

Pursuant to Section 718.204(c), employer contends that the administrative law judge erred in according greater weight to Dr. Rasmussen's opinion, as the better reasoned opinion. Employer argues that Dr. Rasmussen's opinion is not well-reasoned on the issue of disability causation, because it offers no rationale for the doctor's conclusion that claimant's total disability was due to both smoking and coal dust exposure. Instead, employer contends that Dr. Zaldivar's opinion is well-reasoned and should have been accorded greater weight by the administrative law judge because it was better supported by medical data.

We reject employer's contention that the administrative law judge erred in finding Dr. Rasmussen's opinion both well-reasoned and better reasoned than Dr. Zaldivar's opinion. Contrary to employer's contention, the administrative law judge could accept, as reasoned, Dr. Rasmussen's opinion, that claimant's total disability was due to both coal mine employment and cigarette smoking, in spite of the fact that the effects of those causes on claimant's disability could not be separated. *See* discussion, *infra*; *see Mays*, 176 F.3d at 763-64, 21 BLR at 2-605-06; S*tephens*, 298 F.3d at 522, 22 BLR at 2-513; *Gross*, 23 BLR 1-17-18; *Fagg*, 12 BLR at 1-79; Decision and Order at 22. Consequently, the administrative law judge reasonably concluded that Dr. Rasmussen's opinion that legal pneumoconiosis "significantly contributed" to his disability was sufficient to establish disability causation at Section 718.204(c). 20 C.F.R. §718.204(c)(1)(i). The

administrative law judge properly accorded little weight to Dr. Zaldivar's opinion, that claimant's disabling respiratory impairment was unrelated to coal mine employment, because the doctor did not diagnose the existence of legal pneumoconiosis, in direct contradiction of the administrative law judge's finding that legal pneumoconiosis was established. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 21-22. The administrative law judge, therefore, properly relied on the opinion of Dr. Rasmussen, that legal pneumoconiosis was a substantially contributing cause of claimant's total respiratory disability, and that Dr. Rasmussen's opinion was sufficient to establish disability causation at Section 718.204(c). *See* 20 C.F.R. §718.204(c)(1)(i); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 BLR 2-304, 2-320 n.8 (4th Cir. 1995). We, therefore, affirm his finding that the medical evidence established disability causation at Section 718.204(c).

In conclusion, therefore, we affirm the administrative law judge's finding that claimant is entitled to benefits, as he has established the requisite elements of entitlement.[6] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[6] Because we affirm the administrative law judge's decision awarding benefits in this case, we need not consider the effect of the 2010 amendments to the Act on the claim.

Accordingly, the administrative law judge Decision and Order Awarding 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