

BRB No. 06-0520 BLA

JAMES RAY WOODS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
FOLA COAL COMPANY)	
)	DATE ISSUED: 04/26/2007
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John C. Cline and Mary Z. Natkin (Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Mary Rich Malloy and Christopher M. Hunter (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6047) of Administrative Law Judge Michael P. Lesniak awarding benefits on a 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). The administrative law judge credited claimant with thirty years of coal mine employment and considered the claim, filed on February 25, 2002, pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence supported a finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Based upon this determination, the administrative law judge further found that claimant also established that his totally disabling impairment was due to pneumoconiosis

pursuant to 20 C.F.R. §718.204(b), (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 was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, indicated that he will not file a substantive response unless he is specifically requested to do so.¹

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Zaldivar, Crisalli, Mullins, and Cohen. Director's Exhibits 12, 27; Employer's Exhibits 3, 4, 8, 9; Claimant's Exhibits 2, 10, 11. Drs. Zaldivar and Crisalli examined claimant on October 1, 2003 and September 13, 2004, respectively, and interpreted the x-ray evidence as negative for coal workers' pneumoconiosis; although both physicians acknowledged claimant's smoking history and noted the presence of bullous emphysema on x-ray. Director's Exhibit 27; Employer's Exhibits 3, 8 at 18-19, 45; 9 at 13, 38-39. Dr. Zaldivar explained that pneumoconiosis never causes bullous disease of the lungs, but observed that such findings are typical in a smoker. Director's Exhibit 27; Employer's Exhibits 8 at 31, 54, 60, 63. Dr. Crisalli explained that bullous emphysema is found in individuals with a heavy smoking history or a hereditary predisposition to developing emphysema. Employer's Exhibits 3, 9 at 29-30. The physicians agreed that claimant was totally disabled, and opined that claimant's impairment is solely attributable to smoking. Director's Exhibit 27; Employer's Exhibits 3, 8 at 54, 60, 71, 9 at 29.

¹ The parties do not challenge the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3); that the presumption that claimant's pneumoconiosis arose from his coal mine employment was not rebutted pursuant to 20 C.F.R. §718.203(b); and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). These findings are, therefore, affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Dr. Mullins examined claimant on April 15, 2002. Director's Exhibit 12. The physician diagnosed claimant with coal workers' pneumoconiosis, and attributed it to coal dust exposure. *Id.* The physician diagnosed claimant as having severe chronic obstructive pulmonary disease and hypoxia at rest, which she attributed to both coal mine employment and smoking. *Id.* Dr. Mullins opined that claimant was totally disabled, and that fifty percent of claimant's impairment was due to pneumoconiosis, while fifty percent was due to the other conditions. *Id.*

Dr. Cohen reviewed the available medical evidence and issued a report on May 10, 2004. Claimant's Exhibit 2. Dr. Cohen opined that claimant has pneumoconiosis arising from his coal mine employment, based upon claimant's employment history, the relevant medical literature, physical examination findings, qualifying pulmonary function and arterial blood gas studies, and x-ray evidence. *Id.* Dr. Cohen explained that bullous emphysema is not caused only by tobacco smoke exposure, but that both coal dust and smoking cause obstruction, diffusion impairment, and emphysema. Claimant's Exhibit 11 at 27-28. Dr. Cohen questioned Dr. Zaldivar's ability to determine that claimant's emphysema is a type that is unrelated to coal dust exposure in the absence of biopsy or autopsy evidence, and cited medical literature supporting the proposition that the pathogenesis of smoking-related emphysema and dust-related emphysema are identical. Claimant's Exhibit 11 at 28-30. Dr. Cohen explained that although coal dust exposure and smoking have an additive effect, the severity of the emphysema and the resulting impairment does not depend upon which agent caused the emphysema, but rather by the susceptibility of the host. Claimant's Exhibit 11 at 14-15, 25, 30. Dr. Cohen further opined that claimant was very sensitive to these toxic exposures, each of which significantly contributed to his disease. Claimant's Exhibits 11 at 14-15, 25.

The administrative law judge addressed this evidence pursuant to Section 718.202(a)(4), noting the consensus among the physicians, that claimant has a totally disabling respiratory impairment, and that the medical evidence establishes the presence of emphysema. Decision and Order at 13. The administrative law judge then stated that because the evidence regarding the presence of clinical pneumoconiosis was inconclusive, the present case turned on whether claimant could prove that his totally disabling obstructive impairment met the definition of legal pneumoconiosis, which includes "any chronic lung disease or impairment...arising out of coal mine employment." Decision and Order at 13; 20 C.F.R. §718.201(a)(2). The administrative law judge accorded the most weight to Dr. Cohen's opinion, finding that his analysis of claimant's history, subjective complaints, clinical testing and medical literature is better reasoned and documented than the other physicians' opinions. Decision and Order at 13-14. In particular, the administrative law judge noted Dr. Cohen's statement that the qualifying pulmonary function tests, showing little, if any, reversibility, were consistent with the irreversible nature of pneumoconiosis. Decision and Order at 13. The administrative law judge also noted Dr. Cohen's reference to medical literature

supporting the proposition that emphysema is related to cigarette smoking and coal dust exposure. *Id.* Regarding Dr. Mullins's opinion, the administrative law judge determined that although it supported Dr. Cohen's diagnoses, it was entitled to less weight "because her analysis was rather cursory." *Id.*

The administrative law judge also found that the opinions of Drs. Zaldivar and Crisalli were entitled to less weight than the opinion of Dr. Cohen because they focused on their finding of bullous emphysema, which they asserted cannot be related to pneumoconiosis, when some of the radiological interpretations cited by the physicians indicate that claimant has emphysema, but no bullae. Decision and Order at 13-14. The administrative law judge also found the physicians' analysis of the medical literature regarding the relationship between bullous emphysema and coal dust exposure to be less thorough and less persuasive than that provided by Dr. Cohen. *Id.* The administrative law judge concluded that because the medical opinion evidence was sufficient to establish that coal dust exposure was a significant contributing cause of claimant's impairment, claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Id.* The administrative law judge further found that the medical opinion evidence, when weighed with the other evidence of record relevant to the existence of pneumoconiosis, established the existence of legal pneumoconiosis under Section 718.202(a). Decision and Order at 14.

Employer raises several allegations of error regarding the administrative law judge's weighing of the medical opinions under Section 718.202(a)(4).² Employer argues that because Drs. Crisalli and Zaldivar actually examined claimant, their opinions should be given greater weight than Dr. Cohen's opinion, which was developed from a review and analysis of the available medical evidence. Employer also contends that the administrative law judge erred in crediting Dr. Cohen's "generalized" medical opinion over the "well-reasoned" opinions of Drs. Zaldivar and Crisalli. Employer's Brief at 7. In addition, employer alleges that the administrative law judge erred by failing to address Dr. Cohen's "highly selective analysis" of the medical literature, as indicated by Dr.

² Employer also contends that the administrative law judge erred in finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In rendering his finding under 20 C.F.R. §718.204(c), however, the administrative law judge merely referred to his findings under 20 C.F.R. §718.202(a)(4). Decision and Order at 15. Therefore, we will address employer's arguments regarding the cause of claimant's total disability in the context of the administrative law judge's findings at 20 C.F.R. §718.202(a)(4).

Crisalli in his report.³ Employer further contends that the administrative law judge erred by failing to explain how the presence or absence of findings of bullae on the x-ray evidence impacted the reliability of the analysis provided by Drs. Zaldivar and Crisalli concerning the etiology of claimant's emphysema. Employer also maintains that Dr. Cohen's opinion is insufficient to establish that claimant's impairment is related to coal dust exposure and is hostile to the Act because it is "based on the presumption that any miner with an impairment has legal pneumoconiosis." Employer's Brief at 5. These allegations of error are without merit.

Regarding Dr. Cohen's status as a non-examining physician, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has determined that an administrative law judge should not "mechanistically credit[], to the exclusion of all other testimony," the testimony of an examining or treating physician solely because the doctor personally examined the claimant.⁴ *Milburn Colliery Company v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 335 (4th Cir. 1998), quoting *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-273-274 (4th Cir. 1997). In addition, contrary to employer's assertion, the record reflects that when Dr. Cohen discussed the medical literature concerning coal dust exposure and lung disease, he related it to the miner's physical and objective test findings in this case, specifically noting that he considers a patient's coal dust exposure, smoking history, medical history, and individual sensitivity in assessing the etiology of a miner's impairment. Claimant's Exhibit 11 at 11-15, 18-19, 24-27, 30-31, 54-62. Also, the record reflects that Dr. Cohen did not reject the medical literature to which employer refers because it was inconsistent with his diagnosis of legal pneumoconiosis. Rather, in response to employer's questions regarding the text on occupational illnesses authored by Morgan and Seaton, Dr. Cohen described it as "ancient" and explained that he read it "a long time ago," and indicated that he prefers to use "the most recent textbook" that he was aware of, which was published in 2004. *Id.* at 83-85.

In addition, the administrative law judge acted rationally in according less weight to the opinions of Drs. Zaldivar and Crisalli, stating that claimant has bullous emphysema, which is not related to pneumoconiosis, because these opinions conflicted with the radiological evidence indicating that claimant has emphysema, but no bullae.

³ Dr. Crisalli criticized Dr. Cohen's opinion that claimant's lung disease is related to coal dust exposure by citing to *Occupational Lung Disease* by Morgan and Seaton. Employer's Exhibit 3.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's last year of coal mine employment occurred in Virginia. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Decision and Order at 13; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-128 (1985). The administrative law judge's finding that Dr. Cohen's opinion is not similarly flawed is supported by substantial evidence, as Dr. Cohen indicated that the type of emphysema suffered by claimant had no bearing upon determining its etiology. *Id.*; Claimant's Exhibit 2 at 7-10.

Finally, the administrative law judge did not err in failing to classify Dr. Cohen's medical opinion as hostile to the Act on the ground that Dr. Cohen presumes that any respiratory or pulmonary impairment suffered by a miner is related to coal dust exposure. In finding that the evidence of record established claimant's entitlement to benefits, the administrative law judge placed the burden of proving that his impairment arose out of coal mine employment on claimant and rationally determined that Dr. Cohen's opinion was sufficient to establish the presence of legal pneumoconiosis. The administrative law judge permissibly found that Dr. Cohen thoroughly analyzed the data, considered claimant's history, clinical test results, and subjective complaints, and incorporated medical literature to support his professional opinion that claimant suffers from a totally disabling respiratory impairment, due both to claimant's "extensive coal mine employment and cigarette smoking histories." *Clark*, 12 BLR 1-149, 1-155; *Lucostic*, 8 BLR 1-46, 1-47; *Peskie*, 8 BLR 1-126, 1-128.

The Fourth Circuit has held that in weighing medical opinions, the administrative law judge is called upon to consider their quality, i.e., the quality of the experts, their reasoning, their reliance on objectively determinable symptoms and established science, and the level of detail of their analysis. *Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). Since employer has not shown that the administrative law judge's determination of the relative credibility of the evidence is irrational, we affirm the administrative law judge's finding that Dr. Cohen's opinion was sufficient to establish the presence of legal pneumoconiosis pursuant to Section 718.202(a). *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187, 22 BLR 2-564, 2-570-571 (4th Cir. 2002); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

In determining that claimant had established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered and weighed all of the evidence relevant to causation pursuant to Section 718.204(c). Accordingly, he gave greatest weight to Dr. Cohen's opinion that claimant's coal mine employment significantly contributed to his totally disabling respiratory impairment, and properly determined that Dr. Cohen's opinion, as supported by Dr. Mullins's opinion, established causation under Section 718.204(c). Thus, we affirm the administrative determination that claimant established that he is totally disabled due to pneumoconiosis. 20 C.F.R.

§718.204(c)(1); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). In light of our affirmance of the administrative law judge's finding that claimant has established all of the elements of entitlement under Part 718, we also affirm the award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge