BRB No. 08-0502 BLA

B.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 04/16/2009
	)	
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (06-BLA-5626) of Administrative Law Judge Daniel F. Solomon, rendered 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 at least twenty-five years of coal mine employment, and adjudicated this claim, filed on May 23, 2005, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's evaluation of the medical opinions of record in finding the existence of pneumoconiosis established at Section 718.202(a)(4) and disability causation established at Section 718.204(c). Employer further asserts that the administrative law judge failed to provide findings and conclusions that comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §551 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a) and 33 U.S.C. §919(d). Claimant responds, urging affirmance of the award of benefits, and employer has filed a reply brief. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[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.[2] 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).

At Section 718.202(a)(4), employer contends that the administrative law judge erred in crediting the medical opinions of Drs. Simpao and Cole, over the contrary opinions of Drs. Repsher and Fino, in finding the existence of pneumoconiosis established. Employer asserts that Drs. Simpao and Cole failed to provide "reasoned" opinions, because they were unable to "separate out the effects of coal dust from the effects of cigarette smoking," and assumed an improper "cause and effect relationship between any pulmonary condition and [coal dust exposure]." Employer's Brief at 11-12. Next, employer contends that the opinion of Dr. Cole should not have been credited because he "did not even know what 'legal pneumoconiosis' was," and because his diagnosis of clinical pneumoconiosis was rejected by the administrative law judge. Employer's Brief at 5, 12-13; Claimant's Exhibit 4. Finally, employer maintains that the administrative law judge improperly credited Dr. Cole's opinion based on his status as an examining physician, and failed to provide valid reasons for discrediting the opinions of Drs. Repsher and Fino. Employer's arguments are without merit.

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of coal mine employment, and his finding that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, because the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3 at 1.

Reviewing the evidence relevant to a determination of the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge accurately summarized the four medical opinions of record and the qualifications of the physicians. Dr. Simpao, the Director of the Coal Miner's Clinic of the Muhlenberg Community Hospital since the early 1970's, diagnosed both restrictive and obstructive legal pneumoconiosis based on pulmonary function studies, arterial blood gas studies, symptomotology and physical findings. Decision and Order at 7; Claimant's Exhibit 1 at 5-11, 15-17. He opined that claimant's total respiratory disability is due to both coal mining and smoking, and that it is impossible to differentiate between the two, as they produce the same symptoms. Decision and Order at 8; Claimant's Exhibit 1 at 15, 16, 18, 26-28. Dr. Cole, a Board-certified family practitioner, treated claimant from March 2005, through hospitalizations in October 2005 and April 2007, primarily for his respiratory condition. Claimant's Exhibit 2 at 15. Dr. Cole diagnosed clinical and legal pneumoconiosis, with severe obstructive and restrictive impairments, and was unable to quantify the impact of smoking versus coal dust exposure on claimant's lung condition. Decision and Order at 8-10; Claimant's Exhibit 2 at 11-12, 38-40. With respect to the contrary medical opinions, the administrative law judge acknowledged that Drs. Repsher and Fino are highly qualified Board-certified pulmonologists. Decision and Order at 9. Dr. Repsher performed a pulmonary evaluation and opined that claimant's severe COPD is due solely to smoking, and not to the inhalation of coal dust. Employer's Exhibit 11; Decision and Order at 9. Dr. Fino, based on a review of the medical evidence, also found that claimant's severe disabling respiratory impairment is the result of smoking and not coal dust exposure. Employer's Exhibit 3 at 11. Drs. Repsher and Fino provided medical literature in support of their opinions. Decision and Order at 9, 10-11.

We will address employer's arguments *seriatim*. First, contrary to employer's assertion, where a physician opines that both smoking and coal dust exposure had a material adverse effect on a miner's respiratory condition, he need not apportion the relative contributions of smoking and coal dust exposure. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1998). Further, an administrative law judge may rationally rely on a physician's judgment that the effects of smoking versus coal dust exposure cannot necessarily be medically differentiated. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). In the present case, the inability of Drs. Simpao and Cole to so differentiate does not demonstrate that they relied on a "possibility of disease causation" as employer argues. Employer's Brief at 12. Rather, Dr. Simpao indicated that smoking and coal dust inhalation produced the same symptoms, and opined that claimant's disabling pulmonary condition was caused by both smoking and coal dust exposure. Dr. Simpao also noted that claimant's objective testing revealed destruction in the lung causing hyperinflation due to coal dust inhalation, and that his physical findings were consistent with pulmonary disease caused by black lung or dust inhalation. Claimant's Exhibit 1 at 12, 15, 16-18. Thus, the administrative law judge properly concluded that the opinion constituted a diagnosis of legal

pneumoconiosis, and we reject employer's assertion that Dr. Simpao's opinion is insufficient as a matter of law to establish the existence of legal pneumoconiosis. *See 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 (1898)(*en banc*); *see generally Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985). Similarly, as Dr. Cole testified on deposition that a causative relationship exists between claimant's COPD and his coal dust exposure, and that coal dust inhalation is the primary cause of claimant's COPD, emphysema and chronic bronchitis, Claimant's Exhibit 2 at 11-12, 45, 58-60, the administrative law judge properly found that Dr. Cole's opinion was sufficient to support a finding of legal pneumoconiosis at Section 718.202(a)(4).

We also find no merit in employer's further challenges to the administrative law judge's evaluation of Dr. Cole's opinion. Contrary to employer's arguments, an administrative law judge may credit a medical opinion that is based in part on a discredited x-ray or where the x-ray evidence is found to be negative for the existence of pneumoconiosis. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1986); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1986). Additionally, the administrative law judge "discount[ed] Dr. Cole's testimony in part because he read [an x-ray] that was not included by the parties under the rules for limitations on evidence." Decision and Order at 10. As the administrative law judge is allowed wide discretion in evaluating a medical opinion that relies in part on evidence in excess of the evidentiary rules, and as the exclusion of a medical report in its entirety is disfavored, *see Brasher v. Pleasant View Mining Co*., 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co*., 23 BLR 1-47 (2004)(*en banc*); *Johnson v. Royal Coal Co*., 22 BLR 1-132 (2002)(Hall, J., dissenting); *see also Cochran v. Consolidation Coal Co*., 12 BLR 1-136 (1989), the administrative law judge's determination to discount that portion of Dr. Cole's medical opinion diagnosing clinical pneumoconiosis was a reasonable resolution of the evidentiary issue. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*).

We also reject employer's assertion that because Dr. Cole was unfamiliar with the regulatory definition of pneumoconiosis, his opinion is invalid. In evaluating the sufficiency and persuasive value of medical evidence in the context of entitlement under the Act, the administrative law judge's focus should be on a doctor's description of a miner's lungs and not on his use of a legal term of art. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761, 21 BLR 2-587, 2-602 (4th Cir. 1999). The administrative law judge specified that he did not accord controlling weight to the opinion of Dr. Cole based on his status as treating physician, but rationally found that Dr. Cole was competent to diagnose pneumoconiosis, and that he "obtained insight into the nature of the disease by observing and examining [the miner] and treating the symptoms." Decision and Order at 8-9, 10-11; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir.

2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Substantial evidence therefore supports the administrative law judge's determination to credit Dr. Cole's opinion, that claimant's COPD was due to both smoking and coal dust exposure, as a diagnosis of legal pneumoconiosis. Decision and Order at 9; Claimant's Exhibit 2 at 4, 11-15, 18, 25, 59; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 1-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

In evaluating the conflicting medical opinions of record at Section 718.202(a)(4), the administrative law judge accurately summarized the physicians' underlying documentation and explanations for their conclusions, and acted within his discretion in finding that Drs. Simpao and Cole provided better reasoned medical opinions. Decision and Order at 9-13. Moreover, as part of his deliberative process, the administrative law judge permissibly examined whether the various medical rationales were consistent with the conclusions expressed in the scientific studies that the Department of Labor (DOL) relied upon in drafting the definition of legal pneumoconiosis. Decision and Order at 11; *see* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Barrett*, 478 F.3d 350, 23 BLR 2-472; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. He found that the medical literature offered by Drs. Repsher and Fino, to support their position that one can differentiate between the effects of coal dust exposure and smoking, did not mention legal pneumoconiosis as defined in the amended regulations promulgated by DOL, or address the proposition that the combined risks of the two exposures are additive. Decision and Order at 9-1l; *see* 20 C.F.R. §718.201(a); 65 Fed. Reg. 79940 (Dec. 20, 2000). The administrative law judge, therefore, identified deficiencies in their underlying documentation, and permissibly concluded that the rationales of Drs. Repsher and Fino were flawed, whereas the rationales advanced by Drs. Simpao and Cole were supported by the studies relied upon by DOL, including the Attfield and Hodous study referenced by Dr. Repsher. *Id*. We reject, as unfounded, employer's assertion that the administrative law judge improperly applied a presumption of legal pneumoconiosis, or substituted his opinion for that of a medical professional. Further, our review indicates that the administrative law judge did not discredit Dr. Fino's opinion on the ground that the physician did not examine claimant, as employer asserts; rather, the administrative law judge permissibly considered this factor in his evaluation of the probative value of Dr. Fino's opinion. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). Based on the foregoing, we conclude that the administrative law judge's determination to credit the opinions of Drs. Simpao and Cole over the contrary opinions of Drs. Repsher and Fino constitutes a valid exercise of his discretion to evaluate and weigh conflicting medical evidence. *See Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal

pneumoconiosis under Section 718.202(a)(4). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer next argues that the administrative law judge improperly invoked the presumption of causality under Section 718.203(b) based on claimant's twenty-five years of coal mine employment, although the evidence failed to establish the existence of clinical pneumoconiosis. We find this contention without merit, however, because in addition to referencing claimant's twenty-five years of coal dust exposure, the administrative law judge specifically credited Dr. Simpao's testimony on disease causality.[3] Decision and Order at 12; *see* 20 C.F.R. §718.201; *Anderson v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

Finally, employer contends that the administrative law judge erred in finding disability causation established pursuant to Section 718.204(c), again challenging the administrative law judge's determination to credit the opinions of Drs. Simpao and Cole over those of Drs. Repsher and Fino. Employer also asserts that it is not clear whether the administrative law judge applied the proper standard of proof. Employer's arguments lack merit. The administrative law judge rationally discounted Dr. Repsher's opinion, that claimant's respiratory disability was caused entirely by smoking, because the physician's failure to diagnose the existence of legal pneumoconiosis was contrary to the weight of the evidence of record as a whole. Decision and Order at 12; *cf. Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Additionally, the administrative law judge found that the medical opinion of Dr. Fino was "derivative" of that of Dr. Repsher, and permissibly concluded that both opinions exhibited flawed logic. *Id*.; *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610-611, 22 BLR 2-288, 2-303 (6th Cir. 2001); *Crisp*, 866 F.2d at 179, 12 BLR at 2-121. Contrary to employer's arguments, the administrative law judge applied the proper standard and acted within his discretion in finding that the opinions of Drs. Simpao and Cole were sufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's disability at Section 718.204(c). Decision and Order at 12-13; *see Kirk*, 264 F.3d at 610-611, 22 BLR at 2-303; *Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-17 (2003). Further, we reject employer's contention that the administrative law judge's decision fails to satisfy the duty of rational explanation imposed by the APA. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). We, therefore, affirm the administrative law judge's finding of disability causation at Section 718.204(c), as supported by substantial evidence, and affirm the award of benefits.

[3] We note that disease causality is subsumed in a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.201.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge