BRB No. 10-0234 BLA

LLOYD MARCUM (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MILBURN COLLIERY COMPANY	)	
	)	DATE ISSUED: 12/22/2010
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Ann Marie Scarpino (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5614) of Administrative Law Judge Thomas F. Phalen, Jr., awarding benefits 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). This case involves a subsequent claim filed on May 24, 2005.[1] After crediting claimant with at least seventeen years of coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2005 claim on the merits. The administrative law judge found that the evidence, as a whole, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the evidence established that claimant was totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Employer further contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Finally, employer argues that its due process rights were violated because the district director failed to provide the administrative law judge and the parties with a complete record. Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting

[1] Claimant's previous claim for benefits, filed on May 3, 1994, was ultimately denied by an administrative law judge on August 28, 2002, because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. The Board, and the United States Court of Appeals for the Fourth Circuit, subsequently affirmed the denial of benefits. *Marcum v. Milburn Colliery Co.*, BRB No. 02-0876 BLA (Aug. 28, 2003) (unpub.); *Marcum v. Milburn Colliery Co.*, No. 03-2156 (4th Cir. Mar. 31, 2004). There is no indication that claimant took any further action in regard to his 1994 claim.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 3-A. Accordingly, the Board will apply the law of the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[3] Claimant died on April 19, 2010, while employer's appeal was pending before the Board. Claimant's claim is being pursued by his surviving spouse.

that the Board reject employer's contention that its due process rights were violated. In a reply brief, employer reiterates its previous contentions.[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. 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).

Impact of the Recent Amendments

Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. Claimant and the Director assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits. Employer agrees that Section 1556 is applicable to this claim, based on its filing date.[5]

As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried his burden to establish each element of entitlement by a preponderance of the evidence, there is no need to consider whether he could establish entitlement with the aid of the rebuttable presumption reinstated by Section 1556.

Section 725.309

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the

[4] Because no party has challenged the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4). As the Director, Office of Workers' Compensation Programs, notes, claimant filed his claim after January 1, 2005.

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis. Director's Exhibit 43. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing the existence of pneumoconiosis.[6] 20 C.F.R. §725.309(d)(2), (3).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7] In this case, the administrative law judge considered the new medical opinions of Drs. Gaziano, Rasmussen, Crisalli, and Castle.[8] Drs. Gaziano and

[6] Based on his finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because claimant's prior claim was not denied based on his failure to establish total disability pursuant to 20 C.F.R. §718.204(b), that element is not an applicable condition of entitlement in this case. *See* 20 C.F.R. §725.309(d)(2). However, because the administrative law judge's finding, that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), is affirmed, *see* discussion, *infra*, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] "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).

[8] The administrative law judge noted that the record also contains medical opinion evidence submitted in connection with claimant's 1994 claim. However, the administrative law judge reasonably relied upon the more recent medical opinions, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 20.

Rasmussen diagnosed legal pneumoconiosis, opining that claimant suffered from chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibit 9A; Claimant's Exhibit 1. Drs. Crisalli and Castle diagnosed cigarette smoking-induced emphysema. Director's Exhibit 17A; Employer's Exhibits 1-3. Drs. Crisalli and Castle opined that claimant's coal mine dust exposure did not contribute to his emphysema. *Id.*

The administrative law judge accorded less weight to the opinions of Drs. Crisalli and Castle because he found that the doctors failed to adequately explain how they eliminated claimant's seventeen years of coal mine employment as a contributor to his disabling emphysema.[9] Decision and Order at 22. Conversely, the administrative law judge found that Dr. Rasmussen's diagnosis of legal pneumoconiosis was well-reasoned and well-documented. *Id.* at 21-22. The administrative law judge credited Dr. Rasmussen's opinion because he found that it is consistent with the regulations. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion to support a finding of legal pneumoconiosis. Employer asserts that Dr. Rasmussen's opinion is not sufficient to satisfy claimant's burden of proof because Dr. Rasmussen's "conclusory opinion [is] based on nothing but his unsubstantiated belief." Employer's Brief at 17. Employer also maintains that the administrative law judge provided claimant with an impermissible presumption that his COPD arose from his coal mine dust exposure. *Id.* These arguments are without merit.

Dr. Rasmussen explained that coal mine dust and smoking "not only cause identical types of chronic obstructive lung disease, but they do so by the same mechanisms." Claimant's Exhibit 1. Given claimant's seventeen-year coal mine dust exposure history and his sixty pack-year smoking history, Dr. Rasmussen explained that it would be "medically unreasonable" to attribute his COPD exclusively to either his coal mine dust exposure or his smoking. *Id.* Rather, Dr. Rasmussen opined that both exposures caused claimant's COPD. *Id.* Because the administrative law judge specifically found that Dr. Rasmussen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's disabling COPD was due to both smoking and coal dust exposure, we affirm the administrative law judge's permissible finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis is "well-reasoned," and sufficient to satisfy claimant's burden of

[9] The administrative law judge also accorded less weight to Dr. Gaziano's diagnosis of legal pneumoconiosis because he found that it was not sufficiently reasoned. Decision and Order at 22.

proof.[10] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *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); Decision and Order at 21-22. Moreover, because Dr. Rasmussen specifically opined that claimant's coal mine dust exposure caused his COPD, we affirm the administrative law judge's conclusion that Dr. Rasmussen's opinion is sufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b).

The administrative law judge also permissibly accorded greater weight to Dr. Rasmussen's opinion because he found that it is consistent with the Department of Labor's recognition that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms – namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with the decrease in positive enzymes in the lungs." Decision and Order at 21, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

We reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Crisalli and Castle. The administrative law judge permissibly questioned the opinions of Drs. Crisalli and Castle, that claimant's emphysema was due solely to smoking, because neither physician adequately explained how he eliminated claimant's coal dust exposure as a source of claimant's obstructive impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 22-23. The administrative law judge permissibly found that Drs. Crisalli and Castle did not adequately explain why claimant's seventeen years of coal dust exposure did not contribute, along with claimant's smoking history, to his COPD. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Crisalli and Castle.[11]

[10] We reject employer's contention that the administrative law judge erred in not considering Dr. Rasmussen's 2007 medical report in light of the doctor's previous January 29, 2002 deposition testimony. Dr. Rasmussen's current opinion, set forth in his August 27, 2007 report, is based upon the doctor's review of reports and studies that were generated subsequent to the date of his 2002 deposition. Claimant's Exhibit 1.

[11] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Crisalli and Castle, *i.e.*, that they did not adequately explain why claimant's coal dust exposure did not contribute to his COPD, the administrative law judge's error, if any, in according less weight to their opinions for

Because it is supported by substantial evidence, the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD arising out of coal mine employment, is affirmed. In light of our affirmance of the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(4), we also affirm the administrative law judge's determination that the applicable condition of entitlement has changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309.

The administrative law judge also found that all of the evidence of record, when weighed together, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 24. Because it is supported by substantial evidence, this finding is affirmed.[12]

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's contention lacks merit. The administrative law judge rationally discounted the opinions of Drs. Crisalli and Castle because they did not diagnose legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 28. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Rasmussen to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Rasmussen's opinion supported a finding that claimant was totally disabled due to legal pneumoconiosis. Consequently, we affirm the administrative law judge's finding that claimant established

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other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Crisalli and Castle.

[12] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found that he was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 24.

total disability due to pneumoconiosis pursuant to Section 718.204(c). We, therefore, affirm the administrative law judge's award of benefits.

Due Process

Employer contends that it was deprived of its right to due process because the district director did not provide the parties with a complete record. Employer, therefore, argues that it should be dismissed from the case, and liability transferred to the Black Lung Disability Trust Fund (the Trust Fund).

Background

At the September 25, 2007 hearing, employer notified the administrative law judge that the district director had not provided it with all of the evidence associated with claimant's prior claim.[13] Director's Exhibit 26A at 22-24. In response, the administrative law judge informed the parties that he would request the records from the district director. *Id.* at 26.

By Order dated May 7, 2008, the administrative law judge found that the district director failed to provide a complete record of claimant's prior claim. Consequently, the administrative law judge ordered the district director to show cause, within ten days, why liability should not be transferred to the Trust Fund. By letter dated May 19, 2008, the Director responded that the documents associated with the prior claim were located in a separate office. The Director notified the administrative law judge that that office was in the process of forwarding those documents to the administrative law judge and the parties. The Director requested that liability for the 2005 claim not be transferred to the Trust Fund, because there was no showing that the failure to produce the documents in question resulted in a violation of a core due process right.

By Order dated June 19, 2008, the administrative law judge indicated that the district director had provided his office with the "necessary information to complete the files in question." Administrative Law Judge's June 19, 2008 Order at 1. Because the district director had fulfilled his obligation to produce a complete file, the administrative law judge denied employer's motion to transfer liability to the Trust Fund. *Id.* at 2.

By Supplemental Order dated September 2, 2009, the administrative law judge returned the file to the district director, and ordered him to "complete an accurate

[13] At the hearing, employer's counsel acknowledged that, by virtue of his firm's representation of employer in the 1994 claim, he had possession of at least some of the evidence that was admitted in connection with that claim. Director's Exhibit 26A at 25.

separation, collation, and pagination" of the documents in the record. Director's Exhibit 28A. The administrative law judge ordered the district director to return the documents to his office and the parties by September 30, 2009. *Id.* The administrative law judge informed the parties that they could submit modifications to their evidence summary forms by October 15, 2009, and could submit closing briefs by November 2, 2009.[14] *Id.*

The district director complied with the administrative law judge's Order on September 17, 2009, providing the administrative law judge and the parties with an index to the files. Director's Exhibits 30A.

Discussion

Employer contends that the district director did not provide all of the evidence associated with claimant's prior claim.[15] Employer argues that the lack of a complete record in this case has deprived it of a meaningful hearing, and, therefore, it requests that liability be transferred to the Trust Fund.

The Director contends that the Board need not address employer's contention because it has been waived. We agree. Once the district director complied with the administrative law judge's order to supply the missing exhibits, employer failed to raise any objection regarding the completeness of the record until the case was before the Board. Thus, employer waived its argument regarding the completeness of the record. *See generally Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Prater v. Director, OWCP*, 8 BLR 1-461 (1986).

[14] The administrative law judge noted that the district director confirmed that the parties received the additional documents associated with claimant's prior claim. Director's Exhibit 28A. The administrative law judge further indicated that he received no objections to his previous finding that the district director fulfilled his obligation to produce a complete file in the case. *Id.*

[15] Employer notes that the previous administrative law judge, in his August 28, 2002 Decision and Order denying the prior claim, admitted twelve Employer's Exhibits into the record. Employer notes that those exhibits are not included in the current record. Employer also notes that the transcript of the 2002 hearing, along with several of the claimant's exhibits considered by the previous administrative law judge, are also not found in the record. In support of its contention, employer has attached a copy of Employer's Exhibit 8, as well as a copy of the 2002 hearing transcript, to its brief. Employer's Brief, Attachments 2, 3.

Accordingly, the administrative law judge's Decision and Order awarding 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