

BRB No. 12-0058 BLA

JACKIE W. HUFFMAN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 10/25/2012
)	
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 on Third Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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 Award of Benefits on Third Remand (2004-BLA-05913) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on February 1, 2002, pursuant to the provisions of the Black Lung

Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ This case is before the Board for a fourth time. The procedural history of the case is set forth in *Huffman v. Consolidation Coal Co.*, BRB No. 10-0284 BLA (Feb. 7, 2011) (unpub.). The parties have stipulated that claimant worked 22.9 years in coal mine employment. Director's Exhibit 45. Most recently, the Board held that the subsequent claim was timely filed and further affirmed, as unchallenged, the administrative law judge's determination that, because the newly submitted evidence is sufficient to establish total disability, claimant has demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Huffman*, BRB No. 10-0284 BLA at 2, n.2, 3-4. With regard to the issue of legal pneumoconiosis,² the Board held that the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Crissali, that coal dust exposure did not contribute to claimant's disabling respiratory condition, as they expressed views that were inconsistent with the Department of Labor's discussion of the prevailing medical science in the preamble to the revised regulations. *Id.* at 5. The Board also affirmed the administrative law judge's determination that Dr. Rasmussen's opinion is reasoned and documented and supportive of a finding that claimant has legal pneumoconiosis.³ *Id.* However, the Board vacated the administrative law judge's award of benefits because he did not properly weigh Dr. Castle's opinion. *Id.* at 6. The case was remanded for further consideration of whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 6-7.

In his Decision and Order Award of Benefits on Third Remand, dated September 30, 2011, the administrative law judge assigned controlling weight to Dr. Rasmussen's opinion, that claimant's disabling obstructive respiratory condition is significantly related to coal dust exposure, over the contrary opinion of Dr. Castle. Thus, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Relying on Dr. Rasmussen's opinion, the administrative law judge also found that claimant satisfied his burden to establish total disability due to

¹ The 2010 amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, do not apply to this claim, as it was filed before January 1, 2005.

² "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).

³ The administrative law judge previously found that a preponderance of the x-ray evidence fails to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). November 15, 2006 Decision and Order Award of Benefits at 7.

pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge failed to follow the Board's remand instructions and did not properly explain the bases for his credibility determinations, as required by the Administrative Procedure Act (APA).⁴ Employer requests that the case be assigned to a different administrative law judge. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁵ 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 (1965).

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

Employer's sole argument on appeal is that the administrative law judge erred in discrediting Dr. Castle's opinion. Employer maintains that the administrative law judge's credibility findings with regard to Dr. Castle are not properly explained and that the case must be assigned to a different administrative law judge. We disagree.

The Board remanded this case for further consideration of Dr. Castle's opinion relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Board held that the administrative law judge mischaracterized Dr. Castle's opinion,

⁴ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

insofar as the administrative law judge stated that Dr. Castle cited “total reversibility” of claimant’s obstruction as a basis for excluding coal dust exposure as a causative factor for claimant’s respiratory condition. *See Huffman*, BRB No. 10-0284 BLA, slip op. at 6. The Board directed the administrative law judge to consider that Dr. Castle described variability in claimant’s test results over time and diagnosed “markedly reversible air obstruction” due to smoking-induced asthma. *Id.*, quoting Employer’s Exhibit 16 at 21.

The administrative law judge clarified on remand that he assigned less weight to Dr. Castle’s opinion because Dr. Castle did not adequately explain why the *irreversible* portion of claimant’s respiratory obstruction is not due to coal dust exposure.⁶ *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App’x 227, 237 (4th Cir. 2004); Decision and Order Award of Benefits on Third Remand at 3. The administrative law judge also reiterated that Dr. Castle’s opinion is less credible because Dr. Castle is “preoccupied with clinical rather than legal pneumoconiosis.” Decision and Order Award of Benefits on Third Remand at 4. As the administrative law judge law judge noted in an earlier decision, Dr. Castle stated that in order to diagnose legal pneumoconiosis he expected “other findings that would be consistent with coal workers’s [sic] disease, including x-ray abnormalities or physical abnormalities or blood gas abnormalities.” May 30, 2008 Decision and Order on Remand at 5, quoting Employer’s Exhibit 16 at 26-27.

We consider employer’s argument, with regard to Dr. Castle, to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge provided valid reasons for giving Dr. Castle’s opinion less weight, we reject employer’s assertion of error. *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, 2-275-76 (4th Cir. 1997).

We previously affirmed the administrative law judge’s finding that Dr. Rasmussen’s opinion constitutes substantial evidence in support of a finding of legal pneumoconiosis. *See Huffman*, BRB No. 10-0284 BLA, slip op. at 5. Because the administrative law judge has properly explained, in accordance with the APA, the weight accorded the conflicting medical opinions, we affirm the administrative law judge’s finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21

⁶ The Board has affirmed the administrative law judge’s finding that claimant has a combination of reversible and irreversible respiratory obstruction. *See Huffman v. Consolidation Coal Co.*, BRB No. 10-0284 BLA, slip op. at 6 n.8 (Feb. 7, 2011) (unpub.).

BLR at 2-275-76; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In addition, we affirm, as supported by substantial evidence, the administrative law judge's overall finding that claimant satisfied his burden to prove that he suffers from pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); Decision and Order Award of Benefits on Third Remand at 4.

Because we have affirmed the administrative law judge's rejection of Dr. Castle's opinion, relevant to the cause of claimant's disabling respiratory condition, and employer does not raise any additional arguments with regard to the administrative law judge's findings on the issue of disability causation, we affirm the administrative law judge's determination that Dr. Rasmussen's opinion is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).⁷ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. We, therefore, affirm the award of benefits.

⁷ In light of our affirmance of the award of benefits, employer's request to remand this case to a different administrative law judge is moot.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge