BRB No. 05-0743 BLA

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<tr><td>CHARLES R. LEEK

Claimant-Petitioner

v.

PEABODY COAL COMPANY

and

OLD REPUBLIC INSURANCE COMPANY

Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>DATE ISSUED: 04/26/2006

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph J. Reiswerg, Indianapolis, Indiana, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the administrative law judge's Decision and Order – Denying Benefits (03-BLA-0134) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) on a claim for benefits 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 procedural history of this case is as follows. Claimant filed his application for benefits on February 4, 1992. After holding a hearing, Administrative Law Judge Rudolf L. Jansen issued his Decision and Order on May 3, 1994. Judge Jansen awarded benefits, payable by the Director, Office of Workers' Compensation Programs (the Director). Director's Exhibit 30. In a Decision on Motion for Reconsideration issued on May 26, 1994, Judge Jansen indicated that he had erroneously ordered the Director to pay benefits and, instead, ordered employer to pay claimant's benefits. Director's Exhibit 31.

On employer's appeal, the Board vacated Judge Jansen's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000),[1] and further vacated Judge Jansen's causation finding pursuant to 20 C.F.R. §718.203(b). The Board also vacated Judge Jansen's finding that total disability was demonstrated by medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4) (2000), and his finding of disability causation pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the case was remanded to Judge Jansen for further consideration[2]. *Leek v. Peabody Coal Co.*, BRB No. 94-2698 BLA (June 27, 1995)(unpub.); Director's Exhibit 33.

On May 16, 2005, the administrative law judge issued his Decision and Order – Denial of Benefits, which is the subject of the instant appeal.[2] The administrative law

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[2] Once the case was remanded by the Board, Judge Jansen further remanded the case to the district director to allow all parties the opportunity to fully develop evidence. Director's Exhibit 33. The case was then returned to Judge Jansen. Director's Exhibit 44. Subsequently, in an Order of Remand issued February 6, 1998, Judge Jansen remanded the case to the district director to allow the parties to fully develop the medical evidence and to provide claimant's counsel with a complete copy of the exhibits in the formal record. Director's Exhibit 45. The case was returned to Judge Jansen on June 29, 2000. Director's Exhibit 57. In an Order of Remand issued January 25, 2002, Judge Jansen remanded the case to the district director to allow claimant the opportunity to resubmit missing exhibits, and allowed employer the opportunity to respond. Director's Exhibit 59.

judge credited claimant with thirty-two years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and he found that claimant, therefore, also failed to establish causation pursuant to 20 C.F.R. §718.203. The administrative law judge further found the evidence insufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contests the administrative law judge's findings that the evidence is insufficient to establish each of the elements of entitlement. Employer responds, urging affirmance of the denial of benefits. Employer asserts that claimant has not provided a valid basis for disturbing the administrative law judge's findings. If the Board addresses the merits of the administrative law judge's findings, employer contends that they may be affirmed. The Director has not submitted a brief in this appeal.[3]

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).

We first consider the administrative law judge's findings on the existence of pneumoconiosis at 20 C.F.R. §718.202. Regarding the administrative law judge's weighing of the x-ray evidence, claimant asserts that although the administrative law judge noted that he is not required to defer to the numerical superiority of the x-ray interpretations, "human nature being what it is, the Administrative Law Judge cannot but help to look at the volume of readings." Claimant's Brief at 3. Claimant also contends that "one can assume" that Dr. Konijiti is a radiologist. Claimant's Brief at 3.

In evaluating the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge considered each film, *see* Decision and Order at 5-10; Director's Exhibits 11, 12, 21, 28, 37, 49, 61-65, 67, 68; Employer's Exhibits 40, 41, 43, 44, 47-49. He summarized the x-ray evidence as containing fifty-three negative interpretations and seven positive interpretations by Board-certified radiologists and B readers. *See* Decision and Order at 24. After evaluating the number of interpretations, positive and negative, of

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[3] The administrative law judge's finding of thirty-two years of coal mine employment and his finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2) or (a)(3) are not challenged on appeal, and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

each film, as well as the qualifications of the physicians providing each interpretation, he found the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* Decision and Order at 22-24. Since the administrative law judge rationally considered both the quality and the quantity of the evidence, we affirm the administrative law judge's finding that claimant has not carried his burden to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[4] *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk & Western Railroad Co*., 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

We next consider claimant's challenges to the administrative law judge's findings at Section 718.202(a)(4). Claimant briefly summarizes the medical opinions addressing the existence of pneumoconiosis, and states "The Board is permitted to view the opinions of [Drs. Repsher, Myers and Tuteur] with a jaundiced eye given the party affiliation of these experts…." Claimant's Brief at 4. Claimant also asserts that the administrative law judge "seems to go overboard in favoring those opinions submitted by the operator and totally discounts the opinion of the favorable findings provided on behalf of the claimant." Claimant's Brief at 5.

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[4] Claimant suggests that the qualifications of Dr. Konijiti (which are not in the record) can be assumed. We reject this allegation, as it is the responsibility of the party who attempts to rely on medical evidence to establish that physician's qualifications. *See Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54 (1985).

The administrative law judge detailed the medical opinion evidence of record[5] and noted the qualifications of the physicians, as well as the bases for their opinions. Decision and Order at 12-21. After considering each medical opinion individually, Decision and Order at 25-30, the administrative law judge concluded that that Dr. Repsher's opinion is well-reasoned, based upon objective medical evidence, and corroborated by the opinions of Drs. Dahhan, Renn Tuteur, Myers and Bhuptani, the CT scan interpretations and the treatment notes. The administrative law judge accorded less weight to the opinions of Drs. Theertham, Combs and Lenyo, finding that these opinions are not well-reasoned. Decision and Order at 30. The administrative law judge therefore found that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

As an initial matter, we reject claimant's allegation of bias on the part of the administrative law judge. Because claimant's allegation is not supported by any evidence and a review of the record does not reveal any prejudice on the part of the administrative law judge, we reject any assertion that the administrative law judge demonstrated bias in his consideration of this case. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Claimant also asserts that, in view of the party affiliation of Drs. Repsher, Myers and Tuteur, the opinions of these physicians should be viewed "with a jaundiced eye." Claimant's Brief at 4. The Board has held that the identity of the party who hires a

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[5] The administrative law judge noted that Dr. Theertham diagnosed coal workers' pneumoconiosis. Director's Exhibits 19, 37, 61. Dr. Combs diagnosed a significant lung impairment "substantially related" to claimant's coal mine dust exposure. Director's Exhibit 61; Claimant's Exhibits 1, 11. Dr. Lenyo diagnosed chronic bronchitis, chronic obstructive pulmonary disease, and pneumoconiosis. Director's Exhibits 9, 61. Dr. Repsher opined that claimant does not have pneumoconiosis or any disease caused by coal dust exposure, Director's Exhibits 62, 63; Employer's Exhibits 22, 29, 43, 46. Dr. Dahhan opined that claimant has no coal dust induced lung disease. Director's Exhibit 65. Dr. Renn opined that the miner does not suffer from pneumoconiosis. Director's Exhibit 67. Dr. Tuteur opined that there is no evidence to indicate the presence of coal workers' pneumoconiosis. Director's Exhibit 63; Employer's Exhibit 20. Dr. Myers diagnosed chronic bronchitis of unknown origin. Director's Exhibits 42, 63. Dr. Bhuptani opined that claimant does not suffer from pneumoconiosis. Director's Exhibit 62; Employer's Exhibit 16. The administrative law judge also noted Dr. Wiot's depositions, wherein he discussed his x-ray interpretations. Director's Exhibit 63; Employer's Exhibit 47. The administrative law judge noted the treatment notes of Drs. Patel and Theertham, which do not address the existence of pneumoconiosis. Director's Exhibit 63. The administrative law judge also noted the negative CT interpretations. Employer's Exhibits 45, 47. *See* Decision and Order at 12-21, 30.

medical expert does not, by itself, demonstrate partiality on the part of the physician. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Since claimant does not point to any specific evidence of partiality on the part of the physicians in this case, and because none is apparent, we reject his assertion. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984); *but see Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997)(holding that an administrative law judge should consider whether an opinion is, to any degree, the product of bias in favor of the party retaining the expert and paying the fee).

In addition, we reject claimant's contention that the opinions of his treating physicians should be accorded "significant deference." Claimant's Brief at 4. The United States Courts of Appeals for both the Sixth and Seventh Circuits have held that there is no rule requiring deference to the opinion of a treating physician. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Helms*, 901 F.2d 571, 13 BLR 2-449 (7th Cir. 1990). Accordingly, claimant's assertion is misplaced.

Because claimant has not further challenged the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(4). In view of our holding that claimant has not established the existence of pneumoconiosis, one of the essential elements of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits. Consequently, we need not address claimant's challenges to the administrative law judge's remaining findings.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge