

BRB No. 04-0516 BLA

PHYLLIS LITTLEPAGE, on behalf of)
CHARLES LITTLPAGE (deceased))
)
Claimant-Petitioner)
)
v.)
)
FREEMAN UNITED COAL MINING) DATE ISSUED: 02/28/2005
COMPANY)
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Theodore F. Kommers (Gould & Ratner), Chicago, Illinois, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (00-BLA-0646) of Administrative Law Judge Jeffrey Tureck, which denied benefits on a miner's 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).¹ The miner filed his claim on June 9, 1998. Director's Exhibit 1. Judge Tureck issued a Decision and Order denying benefits on July 1, 2002. The administrative law judge found that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The miner subsequently died and his widow, claimant herein, pursued the claim on appeal. On June 26, 2003, the Board vacated the award of benefits and remanded the claim for further consideration of whether claimant established the existence of coal workers' pneumoconiosis pursuant 20 C.F.R. §718.202(a)(1), (4). *Phyllis Littlepage (on behalf of Charles Littlepage) v. Freeman United Coal Mining Company*, BRB No. 02-0743 BLA (Jun. 26, 2003) (unpublished). On remand, the administrative law judge again found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and thus denied benefits.

Claimant appeals, alleging that Judge Tureck erroneously refused to follow the Board's remand instructions, and therefore, that the denial should be vacated and the case reassigned to a different administrative law judge on remand. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, filed a brief alleging that the administrative law judge erred in his consideration of the opinions of Drs. Cohen and Houser pursuant to 20 C.F.R. §718.202(a)(4). Director's Brief at 2-4. The Director maintains that the denial of benefits must be vacated and the case remanded for further consideration. Director's Brief at 5.

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 (1965).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm as supported by substantial evidence the administrative law judge's denial of benefits. Specifically, we reject claimant's contention that the administrative law judge erred in finding that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

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 Board previously remanded this case for the administrative law judge to resolve the weight assigned the conflicting x-ray evidence and to further explain how he determined the relative qualifications of the readers at 20 C.F.R. §718.202(a)(1). *Littlepage*, BRB No. 02-473 BLA at 3-4. Contrary to claimant's contention, we find no error with the administrative law judge's decision to take judicial notice of the National Institute of Occupational Safety and Health (NIOSH) B-reader List, in which he found Drs. Castle, Hippensteel, and Wheeler to be listed as B-readers. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); Decision and Order on Remand at 2. With respect to the identity of "JAW," the administrative law judge also pointed out on remand that he relied on employer's list of exhibits identifying all of these readings as having been done by Dr. John A. Worrell, a B-reader. Decision and Order on Remand at 2. The administrative law judge also noted that Dr. Worrell was listed as a B-reader on the NIOSH B-reader list. *Id.* Having resolved on remand the basis for his determination concerning the qualifications of the readers, we affirm the administrative law judge's finding that the x-ray evidence was equally balanced between negative and positive readings, and his finding that claimant failed to satisfy her burden of proof to establish by preponderance of the evidence that the miner had pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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); *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996); Decision and Order on Remand at 2; Decision and Order (July 1, 2002) at 3-4. We therefore affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

With respect to 20 C.F.R. §718.202(a)(4), we reject claimant's contention that the administrative law judge erred in rejecting Dr. Cohen's opinion that the miner had pneumoconiosis. In remanding the case, the Board held that the administrative law judge improperly substituted his opinion for that of Dr. Cohen when he stated that the miner's smoking history of 75 pack years was far more significant than his 22 years of coal mine employment. *Littlepage*, BRB No. 02-0743 BLA at 6. The Board also concluded that the administrative law judge erred when he held that it was statistically improbable that the miner suffered legal pneumoconiosis in light of his smoking history. *Littlepage*, BRB No. 02-0743 BLA at 7. On remand, however, the administrative law judge explained that his conclusion that the 75 year smoking history was more significant than the 22 years of coal mine employment was based on Dr. Cohen's statement that "[coal] dust-caused impairment is *at a level comparable to that of cigarette smoking...*" Claimant's Exhibit 10; Decision and Order on Remand at 2. The administrative law judge further noted that Dr. Cohen cited a study, which equated a year of coal mining to a year of cigarette smoking. *Id.* Thus, the administrative law judge reasonably concluded, based on Dr. Cohen's logic, that a 75 pack year history was much more significant than a 21-22 year coal mine history. *Id.* The administrative law judge therefore properly questioned the basis for Dr. Cohen's opinion that claimant's impairment was due to coal dust exposure

when Dr. Cohen did not adequately address claimant's more significant smoking history, and the fact that claimant's respiratory condition seriously deteriorated after he left the mines but continued to smoke heavily. Decision and Order on Remand at 2. The administrative law judge specifically explained in accordance with the Board's directive:

I was not attempting to make a finding that claimant's impairment was caused by smoking because his condition deteriorated after he left the mines and while he was still smoking heavily. Rather, I was pointing out that Dr. Cohen's failure to address the fact that claimant's condition seriously deteriorated after he left the mines but while he was still smoking heavily was a serious deficiency in Dr. Cohen's reasoning. In this regard, it should be noted that I discredited Dr. Kelly's opinion in part because he "rules out the possibility that simple pneumoconiosis can progress after exposure to coal mine dust ceases."

Id. Furthermore, the administrative law judge permissibly found that Dr. Cohen's opinion was outweighed by the credible report of Dr. Shelby and the records of claimant's treating physicians, none of whom diagnosed pneumoconiosis.² Decision and Order on Remand at 3.

Additionally, we reject claimant's argument that the administrative law judge improperly substituted "his personal view that smoking was more to blame for the miner's condition than his work history." Claimant's Brief at 9. The administrative law judge properly explained that he assigned less probative weight to the opinions of Drs. Cohen and Houser because neither physician had adequately explained the role of cigarette smoking to the *deterioration* of the miner's respiratory impairment after he stopped working in coal mine employment.³ The administrative law judge may properly

² Claimant challenges that the administrative law judge erred in crediting Dr. Shelby's opinion because Dr. Shelby did not set forth the basis for his opinion that claimant had adult onset asthma. Claimant's Brief at 8, n.1. The Board previously affirmed the administrative law judge's decision to credit Dr. Shelby's opinion as documented and reasoned. *Phyllis Littlepage (on behalf of Charles Littlepage) v. Freeman United Coal Mining Company*, BRB No. 02-0743 BLA (Jun. 26, 2003) (unpublished) at 7-8. We further note that Dr. Shelby's report identified that at the time of his examination claimant was taking asthma medication, including Prednisone, for his breathing problems. Director's Exhibit 28.

³ The Director's argues, based on statements contained in footnote 2 of the original Decision and Order that the administrative law judge assumed that claimant's disability began after he left the mines and therefore that the administrative law judge ignored claimant's testimony that the miner had respiratory symptoms while he was still working

consider the total picture of the miner's circumstances when evaluating the probative value of medical opinions. He may discredit reports that fail to account for, or adequately consider the significance of, a lengthy smoking history while attributing respiratory impairment to coal mine employment. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order on Remand at 3. The weight and credibility of the medical opinions is within the province of the administrative law judge. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *see also Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990).

Thus, for the above reasons, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), benefits are precluded.

in the mines. This argument is without merit. The administrative law judge specifically distinguished in his Decision and Order on Remand that the miner's condition "seriously deteriorated" after he left the mines, thereby acknowledging that the miner had some respiratory problems prior to the mine closure. Decision and Order on Remand at 2-3.

Accordingly, the administrative law judge's Decision and Order on Remand-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge