BRB No. 07-0669 BLA

T.E. Claimant-Respondent v. CONSOL OF KENTUCKY, INCORPORATED and ACORDIA EMPLOYERS SERVICE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/30/2008 DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 – Award of Benefits (2005-BLA-05240) of Administrative Law Judge Larry S. Merck 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 accepted the parties' stipulation that claimant had twenty-five years of coal mine employment and determined that the evidence was sufficient to establish the existence of legal 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)(i), (iv), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(c). Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's argument that the administrative law judge erred in assigning less weight to those physicians' opinions on the issue of disability causation who did not opine that the miner had legal pneumoconiosis, contrary to the administrative law judge's finding.

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.[1] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in finding the existence of legal pneumoconiosis[2] established at Section 718.202(a)(4).[3] Specifically, employer

[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[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). This definition

argues that the administrative law judge erred in crediting the opinions of Drs. Forehand and Sundaram, that claimant has a respiratory condition due, at least in part, to coal dust exposure, over the contrary opinions of Drs. Wicker, Repsher and Jarboe, that claimant's respiratory condition is unrelated to his coal mine employment. We disagree.

Contrary to employer's contention, in evaluating the medical opinion evidence at Section 718.202(a)(4), the administrative law judge gave permissible reasons for assigning less weight to the opinions of Drs. Wicker, Repsher and Jarboe. In addressing Dr. Wicker's opinion, the administrative law judge properly noted that Dr. Wicker, who is Board-certified in Internal Medicine and a B-reader, performed the Department of Labor examination on December 5, 2003. Director's Exhibit 11. Dr. Wicker reported no evidence of clinical pneumoconiosis by x-ray and did not list any cardiopulmonary diagnoses. *Id*. However, on the Department of Labor examination form, when asked to opine whether claimant suffered any respiratory impairment due to a cardiopulmonary diagnosis, and to address the severity of any such impairment, Dr. Wicker stated that "this individual's respiratory capacity does not appear to be adequate to perform his duties in the coal mining industry due to cigarette abuse." *Id*. Because Dr. Wicker's report did not make a definitive diagnosis as to the nature of claimant's respiratory condition, with references to the objective evidence, we affirm the administrative law judge's determination that Dr. Wicker's opinion was inadequately reasoned and entitled to little weight at Section 718.202(a)(4). *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 11.

Regarding the opinion of Dr. Repsher, the administrative law judge properly noted that Dr. Repsher, a Board-certified internist with a sub-specialty in Pulmonary Disease and a B-reader, examined claimant on November 10, 2004 and interpreted claimant's x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Dr. Repsher diagnosed claimant with severe chronic obstructive pulmonary disease (COPD) due solely to smoking and concluded that claimant did not have pneumoconiosis or any other pulmonary condition caused or aggravated by coal mine employment. *Id*. Although the

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includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and his finding that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

administrative law judge cited several reasons as to why he found Dr. Repsher's opinion unpersuasive, we agree with the administrative law judge that the conclusions reached by Dr. Repsher in his medical report as to the etiology of claimant's respiratory condition were undermined by the doctor's deposition testimony. As noted by the administrative law judge, in his medical report, Dr. Repsher "declared that [c]laimant does not have, and never has had pneumoconiosis and that [c]laimant's COPD was not caused by coal dust exposure." Decision and Order at 22, citing Employer's Exhibit 1. However, as noted by the administrative law judge, during his deposition, Dr. Repsher "stated that his diagnoses of [c]laimant's condition and his assertions regarding causation were based on statistical probability, and not on [c]laimant's actual condition." Decision and Order at 22, citing Employer's Exhibit 5. The administrative law judge reasonably found that Dr. Repsher's opinion, that claimant's COPD was not due to coal dust exposure, was undermined because it was based upon statistical probability, not record evidence. Accordingly, the administrative law judge properly found Dr. Repsher's opinion to be neither well-reasoned nor well-documented and entitled to little weight at Section 718.202(a)(4). *See Stephens*, 298 F.3d at 522, 22 BLR at 512; *Rowe*, 710 F.2d at 255, 5 BLR at 103; *Clark*, 12 BLR at 1-151; Decision and Order at 22

We also reject employer's contention that the administrative law judge erred in his consideration of Dr. Jarboe's opinion. Dr. Jarboe is Board-certified in Internal Medicine, with a Sub-specialty in Pulmonary Disease, and is a B-reader. Director's Exhibit 29. He examined claimant on May 18, 2004, and testified at the hearing. Director's Exhibit 29; Hearing Transcript at 33-74. Dr. Jarboe read claimant's x-ray as negative for clinical pneumoconiosis and diagnosed chronic bronchitis, bronchial asthma and pulmonary emphysema related to smoking. Director's Exhibit 29 at 4-5. Dr. Jarboe opined that claimant did not have clinical or legal pneumoconiosis or any other disease arising out of coal dust exposure, but instead suffers from an obstructive airway disease caused entirely by a combination of smoking and bronchial asthma, and not due to coal dust exposure. *Id* at 6-7. The administrative law judge properly noted that Dr. Jarboe's causation opinion was based, in part, on his interpretation of claimant's pulmonary function study results as showing a reversible impairment inconsistent with pneumoconiosis, which is accepted to be an irreversible disease process. The administrative law judge, however, explained why he found Dr. Jarboe's causation opinion to be less credible:

> In this case, Dr. Jarboe expressly relied on the improvement in [c]laimant's pulmonary functions [sic] results after the administration of bronchodilator in determining that [c]laimant's impairment is caused by a combination of tobacco abuse and asthma. He also acknowledged that dust exposure could aggravate both asthma and emphysema, and that [c]laimant's post-bronchodilator pulmonary function test still produced qualifying results, which demonstrates that a portion of claimant's impairment is irreversible. Accordingly, I find that Dr. Jarboe does not adequately address or explain

> why claimant's significant history of coal dust exposure has not exacerbated [his] respiratory diseases.

Decision and Order at 26. Because the administrative law judge reasonably found that the presence of a fixed impairment undermined Dr. Jarboe's opinion that claimant had no respiratory condition attributable to coal dust exposure, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *see also Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. 2004), we affirm his decision to accord Dr. Jarboe's opinion less weight as to the presence or absence of legal pneumoconiosis under Section 718.202(a)(4).

In contrast to his findings regarding the opinions of Drs. Wicker, Jarboe and Repsher, the administrative law judge permissibly determined that the opinions of Drs. Forehand and Sundaram, attributing claimant's respiratory condition to both smoking and coal dust exposure, were reasoned and documented and sufficient to establish that claimant suffers from legal pneumoconiosis.[4] *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003).[5] Although employer contends that the Drs. Forehand and Sundaram underestimated claimant's smoking history and that the administrative law judge did not adequately address the results of the carboxyhemoglobin test performed by Dr. Jarboe, the administrative law judge specifically addressed claimant's testimony with respect to the length of his smoking habit and also outlined all of the smoking histories relied upon by the physicians of record. Employer's Brief at 17; Decision and Order at 4.

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[4] Dr. Forehand is Board-certified in Allergy and Immunology and Pediatrics and Board-eligible in Pediatric Pulmonary Medicine. Claimant's Exhibit 1. He examined claimant on April 26, 2005. *Id*. Dr. Forehand opined that claimant suffered from a totally disabling respiratory condition due to a combination of coal dust exposure and smoking. *Id*. Similarly, Dr. Sundaram, who is Board-certified in Internal Medicine, examined claimant on November 7, 2002 and opined that claimant was totally disabled by a respiratory condition due to both smoking and coal dust exposure. Director's Exhibit 27. He also noted that it is "[d]ifficult to separate impairment from coal dust [versus] cigarette smoking." *Id*.

[5] Employer contends that the administrative law judge erred in failing to credit the opinions of Drs. Jarboe and Respher over Dr. Forehand, because they are Board-certified in Pulmonary and Internal Medicine, while Dr. Forehand is not similarly qualified. Contrary to employer's contention, the administrative law judge was not required to defer to the physicians' qualifications in weighing the conflicting medical opinions, particularly when the administrative law judge specifically found that the opinions of Drs. Jarboe and Repsher were not well-reasoned. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

The administrative law judge found the evidence regarding claimant's smoking history to be "inconsistent and somewhat contradictory" and therefore was unable to determine claimant's exact smoking history.[6] *Id*. Because the administrative law judge was unable to make a definitive finding as to the length of claimant's smoking history, we see no error in his decision to rely on the opinions of Drs. Forehand and Sundaram, as these doctors were aware of claimant's history of both smoking and coal dust exposure in rendering their causation opinions.[7]

[6] In his consideration of claimant's smoking history, Decision and Order at 3-4, the administrative law judge noted that claimant testified he began smoking when he was sixteen to eighteen years old and smoked between half a pack to a pack of cigarettes on-and-off, quit altogether for about eight to ten years, smoked cigars when he resumed smoking, and quit smoking during the winter prior to the hearing. Hearing Transcript at 25-26, 30. Dr. Wicker reported a smoking history of half a pack of cigarettes a day from age eighteen until one year ago. Director's Exhibit 11. Dr. Forehand reported that claimant smoked a half pack of cigarettes for fifteen years. Dr. Sundaram reported that claimant quit smoking a year prior to his examination, but he did not state the rate at which claimant smoked. Director's Exhibit 27. Dr. Jarboe reported that claimant started smoking about half a pack of cigarettes or five or six small cigars a day at age eighteen or nineteen, but quit on and off over the years. Director's Exhibit 29. Dr. Repsher reported that claimant smoked up to half a pack of cigarettes a day, stopped and restarted several times, quitting after ten years, but that claimant's carboxyhemoglobin level suggested he currently smoked one and a half packs per day. Employer's Exhibit 1.

[7] Additionally, employer asserts that the administrative law judge erred by failing to discredit the opinions of Drs. Forehand and Sundaram because they based their diagnoses of pneumoconiosis, in part, on their own x-ray readings, which were not admitted into the record. Employer's Brief at 15. Contrary to employer's assertion, the administrative law judge acknowledged that Drs. Forehand and Sundaram relied on inadmissible positive x-ray readings and found that their reliance on inadmissible evidence did not undermine the credibility of their opinions on the existence of legal pneumoconiosis. Decision and Order at 13, 15-16. The administrative law judge specifically noted that both physicians based their diagnoses of legal pneumoconiosis on evidence other than the undesignated readings, including claimant's smoking and work histories, his symptoms, clinical findings and the results of the objective studies. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 13, 16. We conclude that the administrative law judge acted within his discretion under the dictates of *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, BLR , BRB No. 05-0335 BLA (Mar. 15, 2007) (*en banc*) and *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ.,

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR at 1-151; *Anderson*, 12 BLR at 1-113. Essentially, in this case, employer is asking the Board to overturn the administrative law judge's credibility determinations; however, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has categorically emphasized that it is for the administrative law judge as fact-finder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter'." *Stephens*, 298 F.3d at 522, 22 BLR at 2-512, *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In *Stephens*, the Sixth Circuit court stated that it deferred to the administrative law judge's authority on the findings of fact. *Stephens*, 298 F.3d at 836, 22 BLR at 2-513; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge rationally explained why he accorded dispositive weight to the opinions of Drs. Forehand and Sundaram at Section 718.202(a)(4), we affirm his finding that claimant established the existence of legal pneumoconiosis. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003).

Lastly, we reject employer's contention that the administrative law judge erred in weighing the medical opinions at Section 718.204(c). We agree with the Director that, contrary to employer's contention, the administrative law judge acted properly in giving less weight to opinions of Drs. Wicker, Repsher and Jarboe on the issue of disability causation since these doctors were not of the opinion that claimant had legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidation Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Because the administrative law judge permissibly determined that the opinions of Drs. Forehand and Sundaram, diagnosing that claimant was totally disabled due in part to coal dust exposure, were reasoned and documented, we affirm the administrative law judge's finding at Section 718.204(c) as supported by substantial evidence. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). In light of our affirmance of the administrative law judge's finding that claimant has established all of the elements of

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concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

entitlement under 20 C.F.R. Part 718, we also affirm the award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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