

BRB No. 05-0482 BLA

DONALD D. STALCUP)
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 Claimant-Petitioner)
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 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 12/23/2005
)
 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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (1999-BLA-0445) of Administrative Law Judge Rudolf L. Jansen 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). This case is on appeal before the Board for the third time.¹ In the last appeal, the Board vacated the administrative law judge's

¹ In previous appeals, the Board affirmed the administrative law judge's findings that claimant had thirty years of qualifying coal mine employment and that the weight of

findings that the weight of the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2)(iv), (c), and remanded the case for a reevaluation of this evidence. The Board instructed the administrative law judge to consider Dr. Tuteur's opinion as supportive of a finding that claimant does not have pneumoconiosis, and to consider all of the evidence bearing on the credibility of the opinions of Drs. Cohen and Koenig, as well as the contrary opinions of Drs. Castle, Tuteur and Dahhan, and provide an adequate rationale for his credibility determinations. As the administrative law judge's conclusions with respect to the relevance of Dr. Cohen's and Dr. Koenig's Board-certification in critical care medicine did not have evidentiary support in the record, the Board also instructed the administrative law judge to provide a valid basis for finding the qualifications of these physicians superior to those of the other pulmonary experts of record. Further, the administrative law judge was instructed, when weighing the evidence, to do so consistent with the decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), that in order to accord greater weight to an opinion on the ground that it was submitted by an examining physician, there must be a medical reason for preferring the views of a doctor who examined claimant over the views of a doctor who did not. *Stalcup v. Peabody Coal Co.*, BRB No. 03-0304 BLA (Jan. 30, 2004)(unpub.).

On remand, the administrative law judge found the weight of the evidence insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(b). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence at Sections 718.202(a)(4) and 718.204(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). The Board also found no error in the administrative law judge's credibility determinations in discounting the medical opinions of Drs. Repsher, Carandang, Combs and Cook on the issue of the existence of pneumoconiosis, and in discounting the opinions of Drs. Repsher, Cook, Dahhan, Tuteur and Carandang on the issue of total respiratory disability. The full procedural history of this case is set forth in *Stalcup v. Peabody Coal Co.*, BRB No. 03-0304 BLA (Jan. 30, 2004)(unpub.).

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).

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, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant contends that the administrative law judge erred in finding the weight of the medical opinions of record insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), arguing that the administrative law judge performed a mechanical head count of experts rather than engaging in reasoned decision-making. Claimant asserts that the opinions of employer's experts are not supported by scientific authority or the record evidence; that the administrative law judge failed to resolve the conflicts in the opinions regarding the etiology of claimant's respiratory condition; and that the administrative law judge failed to analyze the respective qualifications of the physicians with regard to their expertise in occupational diseases. Claimant's Brief at 9-15. Claimant's arguments are without merit.

In his 2002 Decision and Order, the administrative law judge accurately reviewed the conflicting medical opinions of record, their underlying documentation, the explanations of the physicians' medical findings and the bases for their diagnoses, and found that the opinions of Drs. Cohen, Koenig, Castle, Tuteur and Dahhan were all well reasoned and documented. 2002 Decision and Order at 4-7; see also 2001 Decision and Order at 7-10. On remand, the administrative law judge, following the Board's instructions, determined that the qualifications and expertise of both claimant's and employer's experts were essentially equal, as all were Board-certified in internal medicine and pulmonary disease, and had researched and written extensively in this specialty area of medicine.² Decision and Order on Remand at 4. The administrative law

² While claimant asserts that Drs. Cohen and Koenig possess superior qualifications in the specialty area of occupational diseases, and that the Seventh Circuit has recognized Dr. Cohen's expertise in black lung disease, see Claimant's Brief at 13-15, employer correctly notes that the Seventh Circuit has also recognized Dr. Tuteur's expertise, see *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992), and employer

judge also found no medical basis for according greater weight to the opinion of Dr. Cohen on the ground that he examined claimant, as the administrative law judge found that the opinions of the remaining physicians were “based on a comprehensive collection of evidence, including all narrative reports and objective test results that were available as of the date of their reports.” Decision and Order on Remand at 5; *see McCandless*, 255 F.3d at 468, 22 BLR at 2-315-316. The administrative law judge acted within his discretion in finding that all five opinions were well-documented, reasoned, and entitled to equal weight, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and permissibly concluded that, since three out of the five reliable medical opinions of record found no pneumoconiosis, claimant failed to meet his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4) by a preponderance of the evidence. Decision and Order at 5; *see Director, OWCP [Ondecko] v. Greenwich Collieries*, 512 U.S. 267, 18 BLR 2A-1 (1994). As the administrative law judge’s findings under Section 718.202(a)(4) are supported by substantial evidence, they are affirmed. Consequently, we affirm the administrative law judge’s denial of benefits, and need not reach claimant’s arguments regarding the remaining issue of total respiratory disability. *See Anderson*, 12 BLR 1-111.

maintains that Drs. Castle and Dahhan possess comparable qualifications. Employer’s Brief at 16-17.

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

BETTY JEAN HALL
Administrative Appeals Judge