

BRB No. 06-0457 BLA

DONALD E. BEELER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 02/28/2007
	)	
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 Awarding Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

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

Gary B. Nelson and Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-5111) of Administrative Law Judge Stephen L. Purcell 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). Claimant filed a claim for benefits on August 21, 2001. Director's Exhibit 1. On August 12, 2002, the district director issued a proposed Decision and Order denying benefits. Claimant requested a hearing, which was held on April 14, 2005. In his Decision and Order issued on February 24, 2006, the administrative law judge determined that claimant worked thirteen years in coal mine employment, that the evidence was sufficient to establish that the miner suffered from coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and that claimant had established that his total respiratory disability was due to pneumoconiosis

under 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.<sup>1</sup>

Employer asserts that the administrative law judge erred in his consideration of the evidence at Section 718.202(a)(4) because he failed to discuss claimant's treatment records or the CT scan evidence. Employer asserts that the administrative law judge failed to rationally explain the basis for his decision to credit Dr. Cohen's opinion, that claimant's respiratory condition was due in part to coal dust exposure, over the contrary opinions of employer's experts, Drs. Tuteur and Renn, that claimant's respiratory condition was unrelated to his coal mine employment. Employer further contends that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis under 20 C.F.R. §718.204(c), because that finding was based on his erroneous determination that claimant suffers from legal pneumoconiosis. Claimant responds to employer's appeal, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief. Employer has also filed a reply brief.

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.<sup>2</sup> 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).

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<sup>1</sup> The parties stipulated to fifteen years of coal mine employment, but the administrative law judge determined that the record only supported a finding of thirteen years of coal mine employment. Decision and Order at 8 n.10. The administrative law judge determined that the x-ray evidence was insufficient to establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), that there was no biopsy evidence of record to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), and that claimant was ineligible to establish pneumoconiosis based the presumptions described at 20 C.F.R. §718.202(a)(3). Decision and Order at 9.

Employer concedes that claimant suffers from a totally disabling respiratory or pulmonary impairment. Employer's Brief in Support of Petition for Review at 16. Therefore, we affirm, as unchallenged, the administrative law judge's determination that claimant established his total respiratory disability under 20 C.F.R. §718.204(b)(2). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 15-16.

<sup>2</sup> Because claimant's most recent coal mine employment occurred in Illinois, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

After consideration of the administrative law judge's findings, and the issues raised on appeal, we affirm, as supported by substantial evidence, the administrative law judge's award of benefits. We specifically reject employer's assertion that the administrative law judge erred in finding that claimant is totally disabled as a result of legal pneumoconiosis.<sup>3</sup>

Under Section 718.202(a)(4), employer challenges the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, first asserting that the administrative law judge failed to discuss relevant evidence, namely the negative CT scans and claimant's treatment records. Employer's Brief at 7. Employer, however, has failed to identify what specific item of evidence was overlooked by the administrative law judge. With respect to the CT scan evidence, the administrative law judge specifically stated in his Decision and Order that the CT scans dated January 29, 1997 and July 29, 2003 did *not* support a finding of clinical pneumoconiosis. Employer's Exhibits 2, 4, 6; Decision and Order at 9 n.11. Because the CT scans were interpreted as showing emphysema, a form of chronic obstructive pulmonary disease, the administrative law judge properly focused his analysis on the specific medical opinions addressing the etiology of this condition, in order to determine whether claimant established the existence of legal pneumoconiosis. Decision and Order at 9. The administrative law judge also specifically noted that he had taken into consideration all of claimant's medical records, and chose only to reference x-rays, physicians' statements and objective test results contained among the various treatment records when they were relevant to his consideration of the individual elements of entitlement. Decision and Order at 8. We see no error in the administrative law judge's approach to evaluating the CT scan and treatment record evidence. Therefore, we reject employer's assertion that the administrative law judge ignored relevant evidence under Section 718.202(a).

Turning to the administrative law judge's analysis of the medical opinion evidence under Section 718.202(a)(4), employer contends that the administrative law judge cited improper reasons for rejecting the opinions of employer's experts, that claimant's chronic obstructive pulmonary disease was due to smoking and not coal dust exposure. We disagree. As noted by the administrative law judge, Dr. Tuteur unequivocally opined that claimant suffered from "cigarette smoke induced severe obstructive pulmonary disease[.]" with absolutely no contribution whatsoever from coal dust exposure.

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<sup>3</sup> In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Decision and Order at 10, citing Employer's Exhibit 2 at 3. In determining the probative value to be placed on Dr. Tuteur's diagnosis, the administrative law judge noted Dr. Tuteur's statement that, "on rare occasions the inhalation of coal mine dust in the absence of cigarette smoke can produce a clinical situation similar to the picture of chronic obstructive pulmonary disease." He also questioned whether this statement was inconsistent with the prevailing view of the medical community, cited by the Department of Labor when it adopted the revised regulations, that coal dust exposure can be an independent cause of obstructive respiratory impairment. Decision and Order at 10-11. Although we agree with employer, that it may be possible to interpret Dr. Tuteur's opinion as being consistent with the proposition that "coal dust exposure *can* cause obstructive pulmonary disease," *see* 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000) (emphasis added), Employer's Brief at 8-9, employer has not demonstrated that the administrative law judge erred in his interpretation of Dr. Tuteur's statements as contrary to the Act. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). Because we are limited by substantial evidence review, we refuse to disturb the administrative law judge's credibility determination merely because employer has advanced one of several interpretations of Dr. Tuteur's opinion, and not the only permissible interpretation of his opinion. *See Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 492, 23 BLR 2-18, 29 (7th Cir. 2004).

Furthermore, in weighing the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge had discretion to credit Dr. Cohen's opinion, over employer's experts, because he determined that Dr. Cohen's causation findings were documented, better reasoned, and better supported by the objective evidence. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 13. In comparison to employer's experts, the administrative law judge specifically noted that Dr. Cohen had persuasively explained why claimant's specific respiratory condition was due, in part, to coal dust exposure, by referencing how the objective studies supported his opinion. He noted that Dr. Cohen explained that claimant's pulmonary function studies showed minimal reversibility after administration of bronchodilator and that he had an abnormal diffusion capacity, consistent with a respiratory condition related to coal dust exposure. Claimant's Exhibit 6; Decision and Order at 13. In contrast, the administrative law judge assigned diminished weight to Dr. Tuteur's disease causation opinion because he found that Dr. Tuteur based his opinion on medical literature and did not focus his diagnosis on the specifics of claimant's condition. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Decision and Order at 12. The administrative law judge also permissibly rejected Dr. Renn's opinion because he found that it was devoid of any explanation as to why claimant's respiratory condition was due only to smoking, and could not be related, at least in part, to coal dust exposure as suggested by Dr. Cohen. Decision and Order at 13;

see *McCandless*, 255 F.3d at 465, 22 BLR at 2-311; *Clark*, 12 BLR at 1-149. Because the credibility of the medical experts is a matter of discretion within the purview of the trier-of-fact, we affirm the administrative law judge's decision to assign determinative weight to Dr. Cohen's opinion at Section 718.202(a)(4). See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); see also *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Moreover, there is no merit to employer assertion that the administrative law judge improperly shifted the burden of proof to employer to disprove that claimant's chronic obstructive pulmonary disease was not due to coal mine dust exposure. Under Section 718.202(a)(4), the administrative law judge properly evaluated the conflicting medical opinion evidence, cognizant that it was claimant who bore the burden of establishing the existence of legal pneumoconiosis. Decision and Order at 10. He properly evaluated that conflicting medical opinions in order to ascertain which physician better explained claimant's respiratory impairment in light of all of the potential causative factors for claimant's chronic obstructive disease. *Id.* The administrative law judge properly found that claimant satisfied his burden of proof based on the reasoned and documented opinion of Dr. Cohen, which opinion outweighed the contrary reports of employer's experts. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant established the existence of legal pneumoconiosis under Section 718.202(a)(4). See also *Shores*, 358 F.3d at 486, 23 BLR at 2-18; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

Finally, we reject employer's contention that, based on the administrative law judge's "erroneous" determination as to the existence of legal pneumoconiosis, the Board should vacate the administrative law judge's finding at 20 C.F.R. §718.204(c).<sup>4</sup> Employer's Petition for Review and Brief at 17. Because we have affirmed the administrative law judge's determination that claimant suffers from legal pneumoconiosis, employer has presented no basis for disturbing the administrative law judge's disability causation finding. Decision and Order at 16. We therefore affirm the

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<sup>4</sup> Under 20 C.F.R. §718.204(c), the administrative law judge states:

For the reasons set forth above regarding my finding that [claimant's chronic obstructive pulmonary disease] was caused in substantial part by his [thirteen] years of underground coal mine employment, I find that [c]laimant is totally disabled from performing his prior coal mine employment by his legal pneumoconiosis.

Decision and Order at 16.

administrative law judge's determination, under Section 718.204(c), that claimant is totally disabled as a result of his legal pneumoconiosis.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is hereby affirmed.

SO ORDERED.

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NANCY S. DOLER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge