BRB No. 02-0625 BLA

CLEO E. DUNCAN (Widow of WILLIAM W. DUNCAN) Claimant-Petitioner	)	
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ZEIGLER COAL COMPANY	)	DATE ISSUED: 07/21/2003
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 B Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Tab R. Turano (Greenberg Traurig), LLP, Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order B Awarding Benefits (01-BLA 0409) of Administrative Law Judge Robert L. Hillyard on a survivor=s claim[1] 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).[2] The administrative law judge credited the miner with thirty-one years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718 (2000). The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(4) and death due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c). Accordingly, benefits were awarded.

[1] Claimant, Cleo E. Duncan, is the widow of the miner, William W. Duncan, who died on October 14, 1999. Director=s Exhibit 2. Claimant filed a survivor=s claim on November 17, 1999. Director=s Exhibit 1.

[2] 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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, employer contends that the administrative law judge erred in his weighing of the evidence regarding the issue of the existence of pneumoconiosis and its role in the miner=s death. Claimant responds, urging affirmance of the administrative law judge=s award of benefits. The Director, Office of Workers= Compensation Programs, has declined to participate in this appeal.

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).

Benefits are payable on a survivor=s claim filed on or after January 1, 1982, only when the claimant establishes that the miner had pneumoconiosis arising out of coal mine employment and that the miner=s death was due to pneumoconiosis. *See* 20 C.F.R. ''718.1, 718.202(a), 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP* , 11 BLR 1-39 (1988). Pursuant to Section 718.205(c)(5), pneumoconiosis is considered a substantially contributing cause of death if it hastened the miner=s death. 20 C.F.R. '718.205(c)(5); *see also Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

In considering whether the evidence establishes the existence of pneumoconiosis by medical opinion evidence, the administrative law judge accorded weight to the opinions in the record which diagnosed the existence of pneumoconiosis. Decision and Order at 25B26. The administrative law judge stated that Dr. Oestmann, the miner=s treating physician, Drs. Goldstein and Schuller, examining physicians, and Drs. Koenig and Cohen, consulting physicians, concluded that the miner had pneumoconiosis. Director=s Exhibits 3, 4, 5, 20; Claimant=s Exhibits 2, 6, 8, 9; Employer=s Exhibit 1. The administrative law judge found these opinions to be better reasoned and documented than the opinions that did not diagnose pneumoconiosis, by Drs. Sanjabi, Fine, Renn, Fino, Dahhan, Tuteur, Meyer, Spitz, Perme and Wiot. Employer=s Exhibits 2, 5-7, 11; Director=s Exhibits 27B32, 37; Decision and Order at 27B29. Thus, he concluded that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

On appeal, employer initially argues that the administrative law judge erred in rejecting opinions by Drs. Dahhan, Fino and Tuteur on the basis that these physicians premised their conclusions that the miner did not suffer from a coal-dust related respiratory impairment in part on the fact that twenty-three years passed from the time that the miner

ceased his coal mine employment until he first developed respiratory impairments.[3] Employer contends that the Director has conceded that pneumoconiosis is rarely latent or progressive, citing *National Mining Ass=n v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002)(NMA). Employer=s Brief at 17. Employer asserts that claimant is therefore required to prove that the miner=s pneumoconiosis was a rare case of latent and progressive pneumoconiosis.[4] Employer=s Brief at 17. We reject employer=s argument. In considering the opinions by Drs. Dahhan, Fino and Tuteur, the administrative law judge rationally accorded less weight to the opinions by physicians who based their opinions on the length of time between the cessation of coal dust exposure and the development of pneumoconiosis, which is in conflict with the latent and progressive nature of pneumoconiosis. *See* 20 C.F.R. ' 718.201(c); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh=g denied*, 484 U.S. 1047 (1988); *Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369 (7th Cir. 1996). Because the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit have held this view, we reject employer=s argument that NMA, by its terms, invalidates the law developed by the Supreme Court and the circuit court within whose jurisdiction this case arises.

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[3] Employer does not challenge the weighing of the opinions by Drs. Fine, Meyer, Perme, Renn, Sanjabi, Spitz and Wiot. These findings, in addition to the administrative law judge=s determination that pneumoconiosis was not established pursuant to Section 718.202(a)(1)B(3), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1B710 (1983).

[4] In further support of this argument, employer contends that claimant cannot prove that there was any progression of pneumoconiosis because, according to employer, the record Aclearly demonstrates the absence of any chronic pulmonary or respiratory impairment during the twenty-three years following William=s retirement in June 1976.@ Employer=s Brief at 18.

Employer also challenges the administrative law judge=s determination to credit the opinions by Drs. Oestmann, Koenig, Cohen, Schuller and Goldstein, that the miner suffered from pneumoconiosis. Employer contends that the administrative law judge erroneously credited Dr. Oestmann=s Alitigation letters@ which are unsupported by the physician=s treatment notes, in which Dr. Oestmann never once diagnosed pneumoconiosis or suggested the possibility of a coal-dust related disease. Employer=s Brief at 22. Employer also contends that the administrative law judge erred by according determinative weight to Dr. Oestmann=s opinion based upon his status as treating physician and in violation of the Seventh Circuit=s prohibition against mechanically crediting a treating physician=s report as stated in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

The administrative law judge found that Dr. Oestmann based his opinion that the miner suffered from pneumoconiosis on the miner=s 30 year work history, negative smoking history, pulmonary function studies that revealed a moderate restrictive defect, and the miner=s symptomatology[5] prior to the development of pulmonary emboli. Decision and Order at 25; Claimant=s Exhibit 6. The administrative law judge further found that Dr. Oestmann listed the basis for his diagnosis and referred to the data which supported his conclusions. Therefore, the administrative law judge, acting within his discretion, found that the opinion was a well-reasoned and documented opinion. *See Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge additionally noted that Dr. Oestmann had treated the miner for nine years, had the benefit of frequent examinations and was familiar with the miner=s condition. Contrary to employer=s contention, the administrative law judge did not accord substantial weight to the opinion simply because it was by the treating physician. Rather, the administrative law judge also reasonably relied on the physician=s well-reasoned medical assessment and supporting documentation based on his frequent examinations over a nine year period. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

Similarly, we reject employer=s contention that the administrative law judge erred in his consideration of Dr. Cohen=s opinion. Employer contends that the record does not support Dr. Cohen=s opinion that the miner had a long history of respiratory complaints, shortness of breath, chronic bronchitis and rales and crackles. Employer=s Brief at 27. The administrative law judge found that Dr. Cohen=s opinion was based upon a review of the evidence from 1975 to 1999, consisting of several chest x-rays, two pulmonary function tests,

[5] Dr. Oestmann stated that he observed problems with the miner=s Aworsening shortness of breath@ on exertion prior to his terminal pulmonary emboli. Claimant=s Exhibit 7. Dr. Oestmann noted that the miner had a history of dyspnea and chronic bronchitis. *Id.*

four arterial blood gas studies, treatment records, medical opinions by Drs. Sanjabi and Tuteur, and the miner=s death certificate. Decision and Order at 15; Claimant=s Exhibit 2. The administrative law judge permissibly found that the physician=s interpretations of the medical data were reasoned and documented. *See Cooper, supra; Clark, supra; Fields, supra*. The Seventh Circuit has previously observed that it was rational Ato give great weight to Dr. Cohen=s viewsY@ in light of his superior knowledge and clinical expertise. *Consolidation Coal Co. v. Director, OWCP [Stein],* 294 F.3d 885, 895, 22 BLR 2-409 2-418 (7th Cir. 2002). Thus, we affirm the weight accorded to Dr. Cohen=s opinion.

Employer also contends that the administrative law judge erred by according weight to the opinions by Drs. Goldstein and Schuller, because the physicians= opinions fail to constitute substantial evidence of the presence of the disease. This contention has merit in part. The record indicates that the miner was admitted to the hospital in August 1999 for chest pain and dyspnea. Director=s Exhibit 5. Based upon a follow-up examination on September 13, 1999, Dr. Goldstein dictated a report signed by Dr. Schuller that diagnosed pulmonary edema on underlying chronic interstitial lung disease, possibly due to coal workers= pneumoconiosis. Director=s Exhibit 5. Dr. Goldstein noted in his report that the miner Aapparently was told previously that he may have had black lung, but this part of the history is unclear.@ Director=s Exhibit 5. Dr. Schuller subsequently reported in January 2000, that the miner suffered from Ainterstitial lung disease with mixed obstructive and restrictive dysfunction. The etiology of this is unclear and the differential diagnosis included pneumoconiosis, lymphangitic spread, and idiopathic.@ Employer=s Exhibit 1.

While the administrative law judge acknowledged the specific diagnosis made by Drs. Goldstein and Schuller, he accorded the opinions substantial weight based upon the physicians= examination of the miner, and their identification of the studies upon which they relied. Decision and Order at 25-26. The administrative law judge failed to provide an adequate rationale for finding that the equivocal diagnoses by Drs. Schuller and Goldstein constitute a credible diagnosis of pneumoconiosis and are thus entitled to substantial weight. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Claimant asserts that the hospital Diagnosis Related Group Worksheet, submitted by Dr. Schuller for billing purposes, specifically lists coal workers= pneumoconiosis as a secondary diagnosis. Claimant=s Exhibit 1. However, this worksheet is not signed by Dr. Schuller and it does not appear that the administrative law judge relied on it. Nevertheless, because the administrative law judge permissibly accorded weight to the diagnoses of pneumoconiosis by Drs. Oestmann, Koenig and Cohen, and acted within his discretion in according less weight to the contrary opinions of record, we hold that administrative law judge=s partial reliance on the opinions by Drs. Goldstein and Schuller is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1- 1276 (1984).

Employer also argues that the administrative law judge erred in concluding that the opinions of Drs. Cohen and Koenig establish clinical, not legal pneumoconiosis. Employer=s Brief at 29B30. We agree. The administrative law judge=s finding that Anone of the physicians of record diagnosed the Miner as suffering from a chronic lung disease or impairment and its sequelae arising out of coal mine employment@ is not supported by the record or his own findings regarding the contents of each physician=s opinions. Decision and Order at 14B15, 29. Dr. Koenig stated that the miner=s chronic obstructive pulmonary disease was the result of his coal dust exposure. Claimant=s Exhibit 9. Dr. Cohen stated that the miner=s chronic respiratory condition was substantially related to his over 30 years of coal mine employment. Claimant=s Exhibit 2. Contrary to this statement, the administrative law judge=s findings pursuant to Section 718.202(a)(4) and the diagnoses of Drs. Koenig and Cohen are consistent with the definition of Alegal pneumoconiosis@ defined in the regulations as including any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. '718.201(a)(2). The administrative law judge=s statement therefore is incorrect but since it is extraneous to his ultimate decision, it is not necessary to remand the case for him to correct it. *See Larioni*, *supra*.

Employer next challenges the administrative law judge=s determination that the evidence established that the miner=s death was hastened by pneumoconiosis. Employer argues that the opinions credited by the administrative law judge lack any scientific proof that the miner=s pulmonary reserve was lessened by his pneumoconiosis, which ultimately hastened his death due to pulmonary emboli. Employer also argues that the administrative law judge erred by rejecting the opinions by Drs. Tuteur and Fino because they failed to offer an alternative explanation for the miner=s death.

The administrative law judge found that the Aconsistency and completeness of the reports by Drs. Koenig and Cohen bolsters their reliability.@ Decision and Order at 31. The administrative law judge further found that these opinions were supported by Dr. Oestmann. The administrative law judge found that all three opinions are reasoned, documented and entitled to substantial weight. The administrative law judge next found that the three opinions outweigh Dr. Renn=s opinion that death was due to a malignancy, Dr. Dahhan=s opinion that death was caused solely by a pulmonary embolism, and the opinions by Drs. Tuteur and Fino that death was not hastened by pneumoconiosis but did not offer an alternative explanation as to the cause of death. *Id*. While the administrative law judge acknowledged the various opinions on the miner=s death, he found that Drs. Oestmann, Koenig and Cohen provided the better reasoned and documented opinions which were supported by the evidence of record. Contrary to employer=s assertions, the administrative law judge acted within his discretion. As the Seventh Circuit stated in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), Athe judge did exactly what he was supposed to do: give these varying opinions more or less weight based on his view of the credibility of the witnesses, the reliability of their medical analyses, and the depth

of support for their conclusions.@ *See also McCandless*, 255 F.3d at 469, 22 BLR at 2-318. In light of the administrative law judge=s permissible consideration of the evidence, we affirm his determination that the preponderance of the evidence establishes that pneumoconiosis was a contributing cause in the miner=s death pursuant to Section 718.205(c). *See Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Neeley, supra.*

The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1B111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1B77 (1988). Thus, we reject employer=s contention that the administrative law judge should have accorded determinative weight to the opinions of Drs. Tuteur, Fino and Dahhan, over the contrary, better reasoned and documented opinions by Drs. Oestmann, Koenig, and Cohen. As the administrative law judges= findings are supported by substantial evidence, we affirm the award of benefits.

Accordingly, the administrative law judge=s Decision and Order B 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