BRB No. 03-0700 BLA

JOANN FINGER (Widow of ROBERT J. FINGER) Claimant-Respondent v. ZEIGLER COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/20/2004 DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (00-BLA-0053) of Administrative Law Judge Rudolf L. Jansen on a duplicate

miner's claim and 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] In an initial Decision and Order dated February 6, 2001, the administrative law judge credited the miner with sixteen years of coal mine employment, and adjudicated both claims pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). The administrative law judge found the new evidence submitted in support of the miner's duplicate claim sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(4) (2000), an element of entitlement previously adjudicated against the miner, and thus sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Weighing all of the relevant old and new evidence of record together, the administrative law judge found that claimant, the miner's widow, established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4) (2000) and 718.203(b) (2000), total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000), and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Consequently, benefits were awarded on both claims.

Employer appealed. The Board affirmed the administrative law judge's findings that the biopsy evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(2) (2000), and that a material change in conditions was established under Section 725.309 (2000). *Finger v. Zeigler Coal Co.*, BRB No. 01-0490 BLA (Apr. 1, 2002)(unpublished). The Board further affirmed, as unchallenged on appeal, the administrative law judge's decision to credit the miner with sixteen years of coal mine employment, and his finding of

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[1]The miner filed an initial claim on August 29, 1989. Director's Exhibit 26. This claim was finally denied on February 12, 1990 by the district director, who found that the miner failed to establish any of the elements of entitlement under 20 C.F.R. Part 718 (2000). *Id*. The miner filed a duplicate claim on September 15, 1993. Director's Exhibit 1. The miner died on September 23, 1995, while his claim was pending. Director's Exhibit 35. Claimant, the miner's widow, filed her survivor's claim on March 14, 1996. Director's Exhibit 34. The two claims were consolidated and referred to the administrative law judge, who held a hearing on May 16, 2000. Director's Exhibit 67.

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

invocation of the presumption at Section 718.203(b) (2000), with no rebuttal. *Id*. The Board also affirmed the administrative law judge's finding that total disability was established pursuant to Section 718.204(c) (2000). *Id.* The Board vacated, however, the administrative law judge's finding that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), and vacated the administrative law judge's findings that the miner's total disability and death were due to pneumoconiosis pursuant to Sections 718.204(b) (2000) and 718.205(c) (2000). *Id*.

In a Decision and Order on Remand, dated June 25, 2003, the administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), and total disability and death due to pneumoconiosis under Sections 718.204(c) and 718.205(c). Consequently, he awarded benefits. On appeal, employer challenges the administrative law judge's weighing of the evidence under Sections 718.202(a)(4), 718.204(c) and 718.205(c). Employer also renews its contention, made in the prior appeal, that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(2), and in finding total disability established pursuant to Section 718.204(b)(2). Claimant has filed a response brief in support of the decision awarding benefits. Employer has filed a reply brief, reiterating contentions raised in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend 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).

As an initial matter, we reject employer's renewed arguments in this appeal with respect to the administrative law judge's prior findings under Sections 718.202(a)(2) and 718.204(b)(2)(i)-(iv). The Board previously considered employer's arguments and affirmed the administrative law judge's findings that the biopsy evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), and that the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *Finger v. Zeigler Coal Co.*, BRB No. 01-0490 BLA (Apr. 1, 2002)(unpublished), slip op. at 3-4, 7-8. Because employer has not demonstrated an exception to the law of the case doctrine, the law of the case doctrine is controlling on these issues. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983).

In challenging the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis under Section 718.202(a)(4), a finding upon which the administrative law judge's disability and death causation findings at Sections 718.204(c) and 718.205(c) were predicated, employer contends that the administrative law judge improperly credited the medical opinions of Drs. Cohen, Hinkamp, Combs, Koenig and Jeevan, while improperly discounting the contrary opinions of Drs. Tuteur, Renn, Naeye and Hippensteel. Several of employer's contentions have merit.

We reject, however, employer's contention that the administrative law judge erred in considering the reports of Drs. Cohen and Hinkamp to be well-reasoned opinions that the miner's chronic obstructive pulmonary disease was due, in part, to coal dust exposure. Employer suggests that Drs. Cohen and Hinkamp based their diagnoses of legal pneumoconiosis on two impermissible assumptions, *i.e.*, 1) that because coal dust exposure can cause pulmonary obstruction, it must have caused the miner's obstruction in this case, and 2) that pneumoconiosis is usually progressive even absent further coal dust exposure. Contrary to employer's contention, however, it was proper for the administrative law judge to find these opinions to be well-reasoned and documented because the two physicians reviewed all of the medical evidence of record and supported their opinions with a detailed explanation of the miner's condition, and how specific medical studies with regard to the effects of smoking and coal dust exposure lead them to their respective conclusions that the miner's condition was related to coal dust exposure in addition to cigarette smoking. *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 4-6; Director's Exhibit 26. Furthermore, contrary to employer's argument, it is well-settled that pneumoconiosis, even in the absence of further coal dust exposure, may be a progressive disease. *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); 65 Fed. Reg. 79970 (Dec. 20, 2000). Moreover, a miner need not show that he suffers from a particular kind of pneumoconiosis that is likely to manifest a latent and progressive form. *Shores*, 358 F.3d at 490-491, 23 BLR at 2-27.

Employer also contends that the administrative law judge erred in relying upon Dr. Combs's opinion, which employer argues is conclusory and undocumented. Contrary to employer's contention, the administrative law judge did not rely upon, or accord any determinative weight to, Dr. Combs's opinion that the miner suffered from pneumoconiosis and that the miner's total disability and death were due to pneumoconiosis. Decision and Order at 6-9; Director's Exhibit 12. Regardless, as the Board held in its previous Decision and Order, *see Finger v. Zeigler Coal Co.*, BRB No. 01-0490 BLA (Apr. 1, 2002)(unpublished), slip op. at 7, n.12, the administrative law judge could properly find that Dr. Combs's opinion is minimally sufficient to qualify as a reasoned opinion since Dr. Combs's

opinion supported the conclusions of other physicians of record, and because Dr. Combs's October 26, 1993 report included the examination findings, history, symptoms and objective studies upon which the opinion was based. *Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); Director's Exhibit 12.

Employer further suggests that Dr. Koenig based his opinion, that the miner's coal dust exposure was a significant contributing factor in his totally disabling chronic obstructive pulmonary disease and death, entirely on an invalid pulmonary function study administered on November 23, 1994. Thus, employer argues, the administrative law judge should have rejected Dr. Koenig's opinion under Section 718.202(a)(4) as unreliable. Pulmonary function studies are relevant only to the issue of total disability and not the existence of pneumoconiosis. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Moreover, Dr. Koenig did not base his opinion, as employer would suggest, solely upon the November 23, 1994 pulmonary function study. Claimant's Exhibit 9. The administrative law judge properly found that Dr. Koenig, who reviewed and discussed all of the available objective studies and medical opinion evidence of record, submitted a well-reasoned opinion supported by extensive medical information. *See Clark*, 12 BLR at 1-155; Decision and Order at 5-6; Claimant's Exhibit 9. The administrative law judge also properly considered Dr. Koenig's Board-certification in pulmonary medicine. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 5-6; Claimant's Exhibit 9.

While we disagree with employer's contentions with regard to the opinions of Drs. Cohen, Hinkamp, Combs and Koenig, we find merit in employer's contention that the administrative law judge mechanically credited Dr. Jeevan's opinion on remand on the basis that Dr. Jeevan was the miner's treating physician, without adequately considering whether there was a medical reason for crediting Dr. Jeevan's opinion, that the miner had pneumoconiosis and that his death was due to the disease, pursuant to *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).[3] Employer emphasizes that, in the previous Decision

[3]The United States Court of Appeals for the Seventh Circuit held in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), that the administrative law judge must have a medical reason for preferring one physician's conclusion over another's, and that a treating physician's views "must be supported by medical reasons if they are to be given legal effect." *McCandless*, 255 F.3d at 470, 22 BLR at 2-318, 319. The court in *McCandless* thus held that it was not enough for the administrative law judge to conclude simply that the treating physician was by definition more familiar with the miner's condition than the non-treating physicians.

and Order, the administrative law judge discounted Dr. Jeevan's opinion as unreasoned and undocumented, 2001 Decision and Order at 17-18, but that on remand, the administrative law judge failed to explain why Dr. Jeevan's treating physician status "trumps the infirmities in Dr. Jeevan's opinion...." Petition for Review and Brief at 22. The administrative law judge concluded that Dr. Jeevan was "most familiar with the miner's condition at the time of his death" by virtue of the fact that Dr. Jeevan was the miner's treating physician during the last three months of the miner's life. Decision and Order at 4-5; Director's Exhibit 59. The administrative law judge also found it significant that Dr. Jeevan treated the miner throughout his final hospitalization in September 1995, frequently observing the miner, regularly monitoring his baseline vitals, and regularly ordering objective studies such as EKG's, EEG's, CT scans, chest x-rays and blood work. *Id.* As employer contends, however, the administrative law judge did not discuss whether Dr. Jeevan provided medical reasons supporting his notations of a "past history of black lung disease" and "black lung – severe" in the September 1995 hospitalization report and death certificate, respectively. Director's Exhibits 35, 59. Thus, the administrative law judge did not adequately explain why he found Dr. Jeevan's opinion to be well-reasoned and documented, particularly in light of his finding in his prior Decision and Order that Dr. Jeevan's opinion was inadequately documented and reasoned and, therefore, entitled to diminished weight.

There is also merit to employer's contention that the administrative law judge improperly discounted the opinions of Drs. Tuteur, Renn, Naeye and Hippensteel in weighing the evidence pursuant to Section 718.202(a)(4). In its previous Decision and Order, the Board vacated the administrative law judge's finding that Dr. Tuteur's diagnosis in 1998, that the miner did not have clinically, radiographically, physiologically or pathologically significant pneumoconiosis, constituted a positive finding of pneumoconiosis, albeit "insignificant."[4] *Finger v. Zeigler Coal Co.*, BRB No. 01-0490 BLA (Apr. 1, 2002)(unpublished), slip op. at

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[4]The Board held that substantial evidence did not support the administrative law judge's conclusion in this regard because Dr. Tuteur's report and deposition testimony described his findings of smoking-induced chronic obstructive pulmonary disease manifested by chronic bronchitis and emphysema unrelated to coal dust exposure. *Finger v. Zeigler Coal Co.*, BRB No. 01-0490 BLA (Apr. 1, 2002)(unpublished), slip op. at 5. The Board noted that the administrative law judge had improperly relied upon the Board's unpublished decision in *Mooney v. Peabody Coal Co.*, BRB No. 93-1507 BLA (Oct. 30, 1996)(unpublished), without realizing that the United States Court of Appeals for the Fourth Circuit reversed the Board's decision in *Mooney* on appeal. *Id.*; *see Peabody Coal Co. v. Director, OWCP [Mooney]*, No. 00-1299 (4th Cir. May 2, 2001)(unpublished).

5; Employer's Exhibit 4. On remand, the administrative law judge repeated his error, finding that Dr. Tuteur's 1998 opinion constituted a positive finding of pneumoconiosis. The administrative law judge, therefore, erred in failing to treat Dr. Tuteur's opinion as an unequivocal opinion that the miner did not have pneumoconiosis, and in failing to consider the reasoning Dr. Tuteur provided in support of his opinion.[5] Decision and Order at 5-6; Employer's Exhibits 4, 10. In addition, we agree with employer that the administrative law judge did not adequately consider the reasoning of Drs. Renn and Hippensteel, who found that claimant did not have pneumoconiosis and that the miner's chronic obstructive pulmonary disease was not due, even in part, to coal dust exposure. Rather, the administrative law judge erred by merely finding the opinions of Drs. Renn and Hippensteel outnumbered by those physicians who diagnosed legal pneumoconiosis. *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); Decision and Order at 6; Employer's Exhibits 4, 5. The administrative law judge also improperly discounted Dr. Naeye's opinion that the miner did not have pneumoconiosis on the basis that Dr. Naeye stated that he could "not completely rule out the possibility that pneumoconiosis could have been observed by other physicians who had possibly examined different biopsy slides than the ones provided for his review." Decision and Order at 5. In discounting Dr. Naeye's opinion on this ground, the administrative law judge improperly shifted the burden of production to employer. *White v. Director, OWCP*, 6 BLR 1-368 (1983). Accordingly, we vacate the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and remand the case for the administrative law judge to reweigh the medical opinions thereunder. Consequently, we also vacate the administrative law judge's disability causation and death causation findings pursuant to Sections 718.204(c) and 718.205(c), and remand the case for further consideration of these issues, if reached.[6]

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[5]Employer correctly contends that the administrative law judge did not adequately discuss the reasons Dr. Tuteur provided in support of his opinion, including the doctor's opinion as to why a CT scan which was administered in 1995 did not support a finding that the miner's emphysema was due, even in part, to coal dust exposure. Employer's Exhibit 3. Dr. Tuteur disagreed with Dr. Koenig that the bullous emphysema indicated on the CT scan was consistent with coal dust-induced disease. Claimant's Exhibit 9; Employer's Exhibit 3. On remand, the administrative law judge must discuss the reasoning of each of the physicians of record, including resolving the conflicting interpretations of Drs. Tuteur and Koenig with respect to the 1995 CT scan.

[6]We note that if the administrative law judge reaches the issues of disability causation and death causation on remand, the administrative law judge may

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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permissibly discount a medical opinion which rejects the possibility that the miner had pneumoconiosis. *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990). In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002), the United States Court of Appeals for the Seventh Circuit held that the administrative law judge permissibly discredited a physician's opinion that pneumoconiosis was not a contributing cause of a miner's total disability because the physician did not believe the miner even had pneumoconiosis, contrary to the administrative law judge's finding that he did. *Chubb*, 312 F.3d at 890, 22 BLR at 2-528. The court further held that "[i]t is not our province to weigh expert opinions; that is the province of the ALJ." *Chubb*, 312 F.3d at 890-891, 22 BLR at 2-528, 529, *citing Livermore v. Amax Coal Co.*, 297 F.3d 668, 672, 22 BLR 2-399 (7th Cir. 2002).