BRB No. 08-0657 BLA

G.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 07/29/2009
	)	
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 on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan & Voegelin, L.C.), Wheeling, West Virginia, for claimant.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-5444) of Administrative Law Judge Ralph A. Romano awarding benefits on a subsequent 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 before the Board for the second time.[1] In the prior appeal, the Board vacated the administrative law

[1] The miner's first claim for benefits, filed on June 11, 1982, was finally denied on April 20, 1987, for failure to establish total disability. Director's Exhibit 1. His second claim, filed on February 23, 1996, was finally denied on July 25, 1996, for failure to

judge's award of benefits, and remanded the case for further consideration. The Board affirmed, as unchallenged, the administrative law judge's determination that the evidence developed since the prior denial established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), based on employer's concession that claimant was totally disabled. On the merits, the Board affirmed the administrative law judge's finding that the x-ray evidence of record established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). However, the Board vacated the administrative law judge's finding that the medical opinions of record established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as he failed to adequately explain why Dr. Cohen's opinion was more persuasive than the contrary opinions of Drs. Brooks and Rosenberg. Further, he did not provide a reason for discrediting the opinions of Drs. Oesterling and Tomashefski, consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). The Board directed the administrative law judge, on remand, to weigh all relevant evidence together on the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a), in accordance with the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[2] The Board also vacated the administrative law judge's findings that the miner's pneumoconiosis arose out of coal mine employment and that his total disability was due to pneumoconiosis at 20 C.F.R §§718.203(b), 718.204(c), and remanded the case for further consideration of the evidence relevant to those issues, if reached. *G.H. v. Valley Camp Coal Co*., BRB No. 07-0171 BLA (Oct. 30, 2007) (unpub.).

On remand, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's weighing of the medical opinions of record under Section 718.202(a)(4), and maintains that the administrative law judge failed to properly weigh all relevant evidence together at Section 718.202(a), in accordance with the Board's remand instructions. As a result, employer argues, the administrative law judge's findings of disease causality and disability causation under Sections 718.203(b) and 718.204(c) are also flawed, and should again be vacated. In response, claimant urges that the award of benefits be

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establish total disability. Director's Exhibit 2. The instant claim was filed on June 19, 2003. Director's Exhibit 4.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner's coal mine employment occurred in West Virginia. Director's Exhibit 5 at 1; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. At Section 718.202(a)(4), the administrative law judge accurately summarized the conflicting medical opinions of record, and determined that the physicians agreed that claimant had diffuse interstitial pulmonary fibrosis (IPF), but disagreed as to whether the IPF was related to coal dust exposure. Decision and Order on Remand at 6. Specifically, of the pulmonary specialists of record, Drs. Rao and Cohen opined that claimant's IPF was caused by coal dust exposure, while Drs. Rosenberg and Brooks concluded that claimant's IPF was idiopathic and was unrelated to coal dust exposure. Director's Exhibits 16, 11, 17, 14; Employer's Exhibit 5. A computerized tomography (CT) scan taken in conjunction with Dr. Brooks's pulmonary evaluation was interpreted by Dr. Carney as showing changes most consistent with idiopathic pulmonary fibrosis, in the absence of further medical history, and Dr. Wiot reviewed the CT scan and opined that the changes were idiopathic and did not represent coal workers' pneumoconiosis (CWP). Director's Exhibit 14. Two pathologists, Drs. Oesterling and Tomashefski, reviewed biopsy slides and stated that they were not adequate to evaluate for the presence of occupational lung disease. Decision and Order on Remand at 4; Director's Exhibit 17; Employer's Exhibits 2, 4. Dr. Oesterling additionally reviewed the CT scan reports, and concluded that the pattern of fibrosis described was not typical of CWP, but stated that he was unable to provide further comments regarding the presence or absence of CWP, given the insufficiency of the biopsy evidence. Director's Exhibit 17. Dr. Tomashefski also reviewed medical records and opined that, based on the clinical and radiological findings, claimant had advanced interstitial fibrosis and honeycombing, but not CWP. Dr. Tomashefski indicated that diffuse IPF is not in the pathological standards for CWP. Employer's Exhibits 2, 4.

After reviewing the conflicting medical opinions of record, their underlying documentation, and the physicians' explanations for their conclusions, the administrative law judge acknowledged that Drs. Oesterling and Tomashefski were highly qualified pathologists whose opinions persuasively established that claimant's biopsy slides were inadequate to evaluate the presence of pneumoconiosis or occupational lung disease. Decision and Order on Remand at 4. Noting Dr. Tomashefski's admission that the

relationship between IPF and CWP is uncertain and controversial, the administrative law judge permissibly found that, when compared to the reports of the pulmonary specialists of record, the opinions of the pathologists were less persuasive in determining whether claimant's pulmonary condition constituted legal pneumoconiosis at Section 718.202(a)(4), and thus were outweighed by the opinions of Drs. Rao, Cohen, Rosenberg and Brooks. Decision and Order on Remand at 4-5; *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). As the administrative law judge's credibility determination was rational and within his discretion as trier-of-fact, we reject employer's argument that he failed to provide a valid reason for according less weight to the opinions of Drs. Oesterling and Tomashefski.

Next, of the pulmonary specialists, the administrative law judge found that the opinions of Drs. Rao and Cohen were well-reasoned and more persuasive than the contrary opinions of Drs. Brooks and Rosenberg. Decision and Order on Remand at 4-6. Employer challenges the administrative law judge's weighing of these opinions, arguing first that the administrative law judge appears to have accorded special deference to Dr. Rao's medical opinion because he examined the miner on behalf of the Department of Labor. Employer's Brief at 7-8; *see* Decision and Order on Remand at 5, 6. It is well settled that, "unless the opinions of the physicians retained by the parties are properly held to be biased, based on evidence in the record, the opinions of Department of Labor physicians should not be accorded greater weight due to their impartiality, and absent a foundation in the record for a finding that the Department of Labor's expert is independent, the administrative law judge may not accord his opinion greater weight on that basis alone." *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*). However, the administrative law judge also permissibly credited Dr. Rao's opinion as well-reasoned and supported by the physician's findings on examination, pulmonary testing, and in consideration of the miner's medical, social and work histories. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-18, 1-20 (1996); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1984). Further, the administrative law judge found that Dr. Rao's opinion was consistent with findings made by the miner's treating physicians, as well as the prior examination reports of record in claimant's earlier claims. Because the foregoing comprise ample support for crediting the opinion of Dr. Rao, any error in according it special deference due to its impartiality would be harmless, and would not affect the disposition of this case. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-378 (1983). We also reject employer's argument that Dr. Rao's x-ray interpretation of August 7, 2003, diagnosing "chronic interstitial pulmonary fibrosis [IPF] probably secondary to pneumoconiosis," Director's Exhibit 11 at 13, is equivocal and should have precluded consideration of his medical opinion under Section 718.202(a)(4). Employer's Brief at 8-9. As Dr. Rao's examination report of August 7, 2003 is not limited to his x-ray interpretation but encompasses his pulmonary evaluation of the miner and reflects a diagnosis of chronic interstitial pulmonary fibrosis attributable to coal dust exposure, Director's Exhibit 11 at

4, employer's argument is without merit. *See generally Allen v. Mead Corp.*, 22 BLR 1-163, 1-67 n.7 (2000); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Next, employer contends that Dr. Cohen's medical opinion improperly relied on general medical literature lacking specific applicability to the miner, and that the administrative law judge erred in failing to address Dr. Rosenberg's critique of the opinion. Employer's arguments lack merit. The administrative law judge fully summarized both physicians' opinions, and noted Dr. Rosenberg's disagreement with Dr. Cohen's conclusions.[3] *See* Decision and Order on Remand at 4-6. Specifically, Dr. Rosenberg opined that the linear changes located predominantly in the lower lung fields, as shown on claimant's x-rays and CT scan, represented interstitial lung disease unrelated to coal dust exposure, and that the type of deterioration in claimant's pulmonary function test results was demonstrative of interstitial diseases of a linear character. Decision and Order on Remand at 4; Employer's Exhibit 5 at 15-17, 20-21, 33-41. Dr. Rosenberg noted that "there are studies that can be utilized to conclusively state with reasonable certainty that linear lung disease relates to coal mine dust," but concluded that "from my perspective those studies do not allow a reasoned opinion that coal dust exposure causes IPF." Employer's Exhibit 5 at 34, 43. Dr. Cohen opined to the contrary, stating: "there is no basis for an IPF diagnosis of unknown etiology where, as here, there are clear and convincing historical, clinical, pathologic and radiographic findings specific for coal dust induced lung diseases." Director's Exhibit 16 at 8-9, 10.

While noting that Dr. Rosenberg "discounted" the medical literature relied upon by Dr. Cohen, the administrative law judge observed:

> [O]n further questioning, Dr. Rosenberg did agree that mixed dust exposure can cause a linear fibrosis as established by medical literature. He also agreed that coal mine dust can include silicates which can cause linear changes. Dr. Rosenberg also agreed his written report did not include citations to medical authorities to support his statements. Finally, Dr. Rosenberg stated that 15% of miners do get linear changes, but stated further these changes are still nodules which appear in a linear pattern but are not changes of linear interstitial fibrosis.

[3] In his original decision, the administrative law judge summarized Dr. Rosenberg's medical opinion and disagreement with the rationale of Dr. Cohen as to the characteristics of changes caused by coal mine dust exposure. *See G.H. v. Valley Camp Coal Co.*, 2005-BLA-05444 (Oct. 10, 2006)(unpub.), slip op. at 9-10. Subsequently, on remand, the administrative law judge's summaries and descriptions of the medical evidence were incorporated by reference. Decision and Order on Remand at 2.

Decision and Order on Remand at 4. Analyzing Dr. Rosenberg's testimony, the administrative law judge identified specific reasons why he found the physician's opinion "less persuasive" than the contrary opinions of Drs. Cohen and Rao, stating:

> [Dr. Rosenberg] agreed on cross examination that mixed dust exposure, such as coal mine dust exposure can include silicates which can cause linear fibrosis. Under these circumstances, Dr. Rosenberg's reliance upon the linear character of the fibrosis present as a determinative factor in finding the pulmonary changes were not due to coal mine dust exposure is accorded less weight since he himself agreed that coal mine dust exposure can cause linear fibrosis. In addition, Dr. Rosenberg stated that when linear changes are present with coal worker's [sic] pneumoconiosis it is because nodules appear in linear fashion rather than linear fibrosis being present. But again, this finding by Dr. Rosenberg does not address the authorities cited by Dr. Cohen and acknowledged by his own testimony that linear fibrosis can be present as a result of coal mine dust exposure.

Decision and Order on Remand at 6. We reject, as unfounded, employer's assertion that the administrative law judge selectively analyzed the evidence. Employer's Brief at 13-14. Comparing Dr. Rosenberg's opinion with that of Dr. Cohen, as buttressed by the medical authorities cited by Dr. Cohen and the conclusions of Dr. Rao, the administrative law judge acted within his discretion in finding that Dr. Rosenberg's conclusions were insufficiently supported. Decision and Order at 5-6; *see Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Collins v. J & L Steel*, 21 BLR 1-181 (1999). Similarly, the administrative law judge permissibly found that Dr. Brooks's opinion, that claimant's interstitial fibrosis was idiopathic and unrelated to coal dust exposure, was less persuasive, as the physician did not cite any medical studies to support his finding that fibrotic changes in the lower lungs were not consistent with pneumoconiosis, and he did not address Dr. Cohen's representation that the medical literature establishes that interstitial fibrosis can be due to coal dust exposure. Decision and Order on Remand at 5; Director's Exhibit 14; *see Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

An administrative law judge need not accept any particular medical theory or the opinion of any particular medical expert, but must weigh all the evidence and draw his own conclusions. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge's findings and inferences are supported by substantial evidence, we affirm his findings that the weight of the medical opinions of record established the existence of pneumoconiosis at Section 718.202(a)(4), and that the weight of all relevant evidence together established the existence of pneumoconiosis under Section 718.202(a).[4] *See*

[4] As the administrative law judge discussed the CT scan interpretations of record in conjunction with his evaluation and weighing of the conflicting medical opinions of

Compton, 211 F.3d 203, 22 BLR 2-162. Since employer raises no substantive arguments with respect to the administrative law judge's findings of disease causality and disability causation at Sections 718.203 and 718.204(c), we affirm his findings thereunder, and affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

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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record, and as we affirm his factual determination that the pulmonary fibrosis consistently diagnosed by the physicians of record herein was not idiopathic, we reject employer's assertion that the administrative law judge's omission of further specific mention of the CT scan evidence in his overall analysis under 20 C.F.R. §718.202(a) constitutes reversible error. The administrative law judge's weighing of all relevant evidence together was adequately comprehensive, and substantial evidence supports his conclusions. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).