

BRB No. 09-0673 BLA

RALPH WEBBER)
)
 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 07/28/2010
)
 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 – Denying Benefits on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

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

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits on Remand (2003-BLA-5243) of Administrative Law Judge C. Richard Avery rendered on a miner’s claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Richard D. Mills credited claimant with twenty-two years of qualifying coal mine employment, as stipulated by the parties, found a forty-five pack-year smoking history, and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. Judge Mills further found that the x-ray, CT scan, and medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, the Board vacated Judge Mills’s denial of benefits, and remanded the case for further consideration of the relevant evidence of record. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff’d on recon.*, 24 BLR 1-1 (2007)(*en banc*). The Board held that digital x-rays are properly considered at 20 C.F.R. §718.107, and that an administrative law judge must determine, on a case-by-case basis, whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement. The Board vacated Judge Mills’s digital x-ray finding and instructed him to require employer to select and submit only one reading of the May 14, 2002 digital x-ray. The Board further held that Section 718.107 allows for the submission, as part of a party’s affirmative case, of one reading of each separate test or procedure undergone by claimant. Accordingly, the Board vacated Judge Mills’s ruling regarding the CT scan evidence, and instructed him to require employer to select and submit only one reading of the May 14, 2002 CT scan. The Board also held that Judge Mills properly admitted, pursuant to Section 718.107(b), the deposition testimony of Dr. Wiot pertaining to the medical acceptability and relevancy of digital x-rays and CT scans. On the merits of the case, the Board vacated Judge Mills’s finding of a forty-five pack year smoking history, as he did not explain why he chose to credit Dr. Uhrig’s summary over the other documented histories. The Board affirmed Judge Mills’s findings at Section 718.202(a)(1), (2), (3), that the evidence was insufficient to establish the existence of pneumoconiosis. At Section 718.202(a)(4), the Board held that Judge Mills properly discounted the medical opinion of Dr. Sparks, but vacated his findings regarding the opinions of Drs. Renn, Tuteur, and Cohen because his credibility determinations were based, in part, on the multiple negative CT scan and digital x-ray

¹ Claimant filed his initial application for benefits on May 8, 2001. Director’s Exhibit 1. Prior to the adjudication of the first claim, the miner filed a second claim on September 12, 2001, which was merged with the first claim, pursuant to 20 C.F.R. §725.309(b). Director’s Exhibit 1.

readings in the record, as well as a forty-five pack year smoking history. Accordingly, the Board remanded the case for further consideration of the appropriate relevant evidence and for specific findings regarding the existence of clinical and legal pneumoconiosis.

On remand, Administrative Law Judge C. Richard Avery² (the administrative law judge) accepted employer's designation of Dr. Wiot's negative interpretations of the May 14, 2002 CT scan and digital x-ray, but declined to consider claimant's newly-submitted rebuttal CT scan and digital x-ray evidence, as it was not part of the existing record on remand. The administrative law judge reviewed claimant's smoking history and determined that, while an exact number of years and packs per year could not be accurately determined, claimant smoked over many years and the evidence was sufficient to support the medical opinions that took claimant's reported smoking history into consideration. In accordance with the Board's instructions, the administrative law judge reevaluated the opinions of Drs. Renn, Tuteur, and Cohen and concluded that the weight of the evidence was insufficient to establish either clinical or legal pneumoconiosis at Section 718.202(a). Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's refusal to admit his rebuttal digital x-ray and CT scan evidence into the record, and contends that the administrative law judge failed to follow the Board's instructions to determine an accurate smoking history. Claimant also argues that the administrative law judge erred in his analysis of the medical opinion evidence and failed to discuss the issues of causality, total disability or disability causation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief in this case. Claimant, employer, and the Director have each filed supplemental briefs, asserting that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005, *see* Director's Exhibit 1.

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30

² Due to the retirement of Administrative Law Judge Richard D. Mills, the case was assigned to Administrative Law Judge C. Richard Avery on remand. Decision and Order on Remand at 2.

³ The law of the United States Court of Appeals for the Seventh Circuit is applicable, as the miner was employed in the coal mining industry in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Hearing Transcript at 31-32.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the evidentiary issue, claimant contends that the administrative law judge erred in refusing to admit his rebuttal digital x-ray and CT scan evidence into the record, arguing that the administrative law judge’s determination is contrary to the Board’s decision.⁴ Claimant’s Brief at 5-7. Claimant’s argument lacks merit.

On remand, the administrative law judge notified the parties that the case had been reassigned to him, and indicated that he did not believe that any additional evidence was required to adjudicate the case, but that he would consider counsel’s motions if the parties disagreed. In his Decision and Order, the administrative law judge reviewed the Board’s instructions to admit only one reading each of the May 14, 2002 CT scan and digital x-ray, and to then consider the evidence “in conjunction with any rebuttal evidence submitted by claimant pursuant to 20 C.F.R. §725.414(a)(2)(ii).” Decision and Order on Remand at 3. The administrative law judge declined to accept rebuttal evidence submitted by claimant for the first time on remand, noting that “neither the Board nor I provided for additional new evidence.” Decision and Order on Remand at 3. As the administrative law judge has broad discretion in procedural matters, and our instructions did not mandate that rebuttal evidence be admitted, only that it be considered if present, we affirm the administrative law judge’s ruling in this regard. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Turning to the merits, in order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 initially contends that the administrative law judge failed to follow the Board’s instruction to determine claimant’s smoking history. Claimant alleges that the administrative law judge avoided the issue, and did not summarize the conflicting histories or resolve the conflict. Claimant’s Brief at 7-8. We disagree. In considering the evidence of record pertaining to claimant’s smoking history, the administrative law judge noted that there was “no dispute that claimant smoked over many years.” Decision and Order on Remand at 5. The administrative law judge also determined that claimant provided varying smoking histories to the physicians, noting that Dr. Cohen relied on a

⁴ Claimant sought to admit into the record the digital x-ray and CT scan readings by Dr. Smith. Claimant’s Exhibits 7, 8.

half a pack a day for fifty years; Dr. Renn reported twenty-two to forty-five and a half pack years; and Dr. Tuteur believed that claimant smoked between a quarter of a pack to one pack daily over forty-seven years. Decision and Order on Remand at 5; Claimant's Exhibits 5, 6; Employer's Exhibits 2, 3, 4; Director's Exhibit 22. The administrative law judge reviewed claimant's reported smoking histories and reasonably found that he was unable to determine an exact number of years that claimant smoked or the exact number of packs he smoked. Accordingly, because the administrative law judge considered and discussed the varying reported smoking histories of record, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant's smoking history was "significant over many years" and exceeded the length of his coal mine employment by at least ten years. Decision and Order on Remand at 5; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Claimant next challenges the administrative law judge's weighing of the CT scan and digital x-ray evidence of record at Section 718.107, arguing that the administrative law judge failed to review or discuss the doctors' evaluations and erred in finding Dr. Wiot qualified to interpret a CT scan. Claimant's Brief at 9-10. Claimant's contentions lack merit. The administrative law judge determined that the CT scan and digital x-ray evidence was medically acceptable and relevant, based on Dr. Wiot's deposition testimony. Employer's Exhibit 5; Director's Exhibit 25. In reviewing the CT scan evidence, the administrative law judge permissibly determined that Dr. Wiot was qualified to interpret a CT scan, and permissibly accorded great weight to the sole negative reading by Dr. Wiot "based on the thoroughness of his deposition testimony and his qualifications."⁵ *See Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); Decision and Order on Remand at 4. Regarding the digital x-ray evidence, the administrative law judge properly noted that Dr. Wiot interpreted the digital x-ray as negative, while Dr. Alexander interpreted the x-ray as positive under the International Labour Organization (ILO) classification system, a classification not currently permitted for digital x-rays by the National Institute for Occupational Safety and Health (NIOSH). *See* 20 C.F.R. §718.102; Decision and Order on Remand at 3-4; Director's Exhibit 25; Claimant's Exhibit 3. Accordingly, we find no error with the administrative law judge's conclusion that the CT scan and digital x-ray

⁵ The administrative law judge additionally stated that even if Dr. Smith's interpretations of the digital x-ray and CT scan were admitted into evidence and considered, his "readings would do no more than establish true doubt." Decision and Order on Remand at 4, n.2. We decline to address claimant's contention that the administrative law judge failed to explain what he meant by "true doubt," as Dr. Smith's CT scan and digital x-ray interpretations were not admitted into evidence. Claimant's Brief at 9; Decision and Order on Remand at 4 n. 2; 5 n. 3.

evidence of record did not support a finding of clinical pneumoconiosis pursuant to Section 718.107.

Lastly, claimant contends that the administrative law judge's finding, that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), is not supported by substantial evidence, is not rational, and is not in accordance with law. In this regard, claimant notes that the United States Court of Appeals for the Seventh Circuit, in *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008), "flatly rejected" Dr. Tuteur's rationale for excluding occupational exposure as a cause of the miner's chronic obstructive pulmonary disease, *i.e.*, that miners rarely have clinically significant obstructive impairments from coal dust exposure, and claimant asserts that Dr. Tuteur's opinion in the present case should have been similarly discounted. Claimant further argues that Dr. Renn appears to require evidence of clinical pneumoconiosis before he will attribute an obstructive lung disease to occupational exposure, which claimant asserts is contrary to the position taken by the Department of Labor. Claimant maintains that the administrative law judge failed to properly reweigh the evidence on remand, but instead adopted the reasoning of Judge Mills in crediting the opinions of Drs. Renn and Tuteur over the opinion of Dr. Cohen, thereby failing to comply with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). Claimant's Brief at 9-12. Claimant's contentions lack merit.

The administrative law judge complied with the Board's remand instructions to reconsider the relevant medical opinions at Section 718.202(a)(4) in light of the smoking histories relied upon and the CT scan and digital x-ray evidence admitted into the record, and concluded that, regardless of his inability to determine an exact number of years or exact number of packs claimant smoked, the reasons stated by Judge Mills for crediting the opinions of Drs. Renn and Tuteur over that of Dr. Cohen were supported by the evidence and were not undermined. The administrative law judge adopted and reiterated in his decision Judge Mills's previous findings, which he found to be "well said." Decision and Order on Remand at 5-6. Specifically, the administrative law judge agreed with Judge Mills's finding that the opinions of Drs. Tuteur and Renn, that claimant did not have clinical or legal pneumoconiosis, were entitled to greater weight than the contrary opinion of Dr. Cohen, as they were more consistent with the negative evidence of clinical pneumoconiosis; the significant reversibility shown on the valid pulmonary function study, which was inconsistent with the progressive and irreversible nature of pneumoconiosis; and claimant's occupational and smoking histories.⁶ *See generally*

⁶ Judge Mills noted that, while pneumoconiosis is a latent disease which may sometimes manifest itself after exposure has ended, claimant's 22-year coal mine employment ended in 1990, whereas claimant smoked during most of the period from

Livermore v. Amax Coal Co., 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002). As the administrative law judge's rationale is supported by substantial evidence, we find no error in his agreement with Judge Mills's findings. See *Lafferty*, 12 BLR at 1-192; *Fagg*, 12 BLR at 1-79; *Stark*, 9 BLR at 1-37. Contrary to claimant's argument, the administrative law judge was not required, consistent with *Beeler*, to discount the opinion of Dr. Tuteur, as the physician ruled out coal dust exposure as a cause of claimant's obstructive impairment, based on evidence particular to claimant, *i.e.*, physical examination findings, occupational and smoking histories, pulmonary function study and blood gas study results, and x-ray and CT scan evidence.⁷ Director's Exhibit 22; Employer's Exhibit 3. Furthermore, as Dr. Renn opined that a finding of medical pneumoconiosis was not necessary for a diagnosis of legal pneumoconiosis, we reject claimant's assertion that Dr. Renn's opinion was contrary to the Department of Labor's position. Employer's Exhibit 2 at 2. Because the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, we affirm the administrative law judge's finding that the evidence was insufficient to establish either clinical or legal pneumoconiosis pursuant to Section 718.202(a). See *Clark*, 12 BLR at 1-55; *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); Decision and Order on Remand at 4-6. Consequently, entitlement to benefits is precluded. See *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

October 1951 until January 2000, and claimant resumed smoking in April 2001. As claimant smoked for many years after he left the coal mines, Judge Mills concluded, and the administrative law judge agreed, that claimant's development of significant breathing problems since leaving the mines coincided more closely with his continued smoking, rather than with his less extensive and more remote history of coal dust exposure. Decision and Order on Remand at 6.

⁷ Dr. Tuteur testified that "I recognize that one can develop COPD uniquely as a result of the inhalation of coal mine dust, however, it is an unusual and infrequent occurrence in contrast to the same clinical picture and the chronic inhalation of tobacco smoke." Employer's Exhibit 3 at 33.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge