BRB No. 98-1099 BLA

NORRIS GRACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	Date Issued: 7/14/99
	)	
Party-in-Interest	)	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.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

Terri L. Bowman (Arter & Hadden, LLP), Washington, D.C., for employer.

Gary K. Stearman (Henry L. Solano, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order On Remand -- Awarding Benefits (95-BLA-1071) of Administrative Law Judge Rudolf L. Jansen 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). This case is

before the Board for the second time. In his initial Decision and Order, the administrative law judge found that claimant established twenty-six years of coal mine employment, and based on the filing date, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge further found that claimant established all elements of entitlement at Part 718, and consequently, awarded benefits. Employer appealed, and in *Grace v. Peabody Coal Co.*, BRB No. 97-0113 BLA (Aug. 17, 1998)(unpub.), the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(b). On remand, the administrative law judge again found the existence of pneumoconiosis established at Section 718.202(a)(4) and total disability due to pneumoconiosis at Section 718.204(b), and awarded benefits. Employer appeals, contending that the administrative law judge erred in finding the existence of pneumoconiosis and total disability due to pneumoconiosis at Sections 718.202(a)(4) and 718.204(b). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a response brief, contending that, contrary to employer's assertion, the administrative law judge applied the correct standard at Section 718.204(b).

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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).

Employer contends that the administrative law judge erred in failing to follow the Board's instructions by failing to explain how he credited the medical opinions of Drs. Baker and Harrison, who stated that had the x-ray interpretations been negative, they would not have made a diagnosis of pneumoconiosis. Employer claims the administrative law judge mischaracterized Dr. Baker's testimony, incorrectly gave greater weight to the opinion of Dr. Harrison, unreasonably credited Dr. Simpao's opinion, and generally, at Section 718.202(a)(4), failed to fully explain his reasons in compliance with the Administrative Procedure Act (APA). *See* 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). Employer also contends that because Dr. McGhee did not provide a reasoned opinion, the administrative law judge erred in according greater weight to that opinion based on Dr. McGhee's status as claimant's treating physician.

The evidence of record contains the medical opinions of six physicians. Dr. Baker diagnosed the presence of pneumoconiosis based upon his x-ray interpretation, as well as a physical examination, claimant's significant history of coal dust exposure and a pulmonary function study. Dr. Baker also found that the miner's respiratory impairment was due to pneumoconiosis, an obstructive ventilatory defect and chronic bronchitis. Employer's Exhibit 3; Director's Exhibit 18. Dr. Harrison also diagnosed the presence of pneumoconiosis and stated that claimant's restrictive defect is at least partially caused by his pneumoconiosis. Employer's Exhibit 4; Director's Exhibit 19. Dr. McGhee, claimant's treating physician, diagnosed pneumoconiosis and found that claimant's shortness of breath was predominantly and significantly due to pneumoconiosis. Claimant's Exhibit 1. Dr. Simpao found that claimant's pneumoconiosis was the sole cause of his respiratory impairment. Director's Exhibit 21. Drs. Anderson and Dineen both found no evidence of pneumoconiosis, and concluded that pneumoconiosis could not have contributed to claimant's disability. Employer's Exhibit 2; Director's Exhibit 20.

Initially, we reiterate our previous holding, that as the treating physician is entitled to greater weight, the administrative law judge made no error in crediting the opinion of Dr. McGhee. *See Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Brown v. Rock Creek Coal Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Grace, supra; see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Moreover, contrary to employer's contention, the administrative law judge accurately characterized the opinions of Drs. Baker and Harrison when he found that Dr. Baker based his finding of pneumoconiosis not only upon an x-ray, but also upon claimant's history of coal dust exposure, a physical examination and a pulmonary function study, and found that Dr. Harrison based his opinion of pneumoconiosis on an entire pulmonary evaluation. Decision and Order on Remand at 4. Moreover, the administrative law judge found that when Drs. Baker and Harrison testified that they would not have diagnosed pneumoconiosis if they found the x-ray evidence negative, they were merely responding to a hypothetical situation. The administrative law judge permissibly, and within his discretion, found their opinions reasoned and documented, as they each provided a basis for their diagnosis beyond just an x-ray reading. *See* Decision and Order on Remand at 4; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984). We further note that, contrary to employer's contention, the administrative law judge committed no error in crediting medical reports that were based in part on positive x-ray interpretations under Section 718.202(a)(4) when he also found the x-ray evidence as a whole to be insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). *See Church v. Eastern*

Associated Coal Co., 20 BLR 1-8 (1996).

We reject employer's contention that the administrative law judge erred in crediting Dr. Simpao's opinion, as the Board previously affirmed the administrative law judge's reliance upon his opinion. *See Grace,* slip op. at 3. Therefore, the administrative law judge reasonably found Dr. Simpao's opinion supports Dr. McGhee's opinion, and no error was committed. Decision and Order on Remand at 5. Moreover, as the administrative law judge fully discussed all the evidence of record and gave sufficient reasons for his crediting of the various medical opinions, his Decision and Order on Remand complies with the requirements of the APA.[1] *See Wojtowicz v. Duquesne Light Co.* 12 BLR 1-162 (1989). We therefore affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Employer next contends that the administrative law judge erred in applying the incorrect standard for total disability due to pneumoconiosis at Section 718.204(b), failed to adequately explain his findings, and failed to follow the Board's instructions. We disagree. The United States Court of Appeals for the Sixth Circuit, wherein jurisdiction of this case lies, has held that in order to meet his burden under Section 718.204(b), a claimant must prove that his totally disabling respiratory impairment is due at least in part to his pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The court also held that a claimant must establish more than a *de minimis* or infinitesimal contribution by pneumoconiosis to his total disability. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). As the Director correctly notes, *Smith* does not require remand in this case, as the administrative law judge did not find an infinitesimal contribution, but rather credited physicians who found "some degree of contribution," which implies a significant or actual role, not an immeasurable or incalculably small one. The fact that the administrative law judge found more than a *de minimis* contribution does not mean that he applied the incorrect standard. In this case, the administrative law judge found that Drs. Baker, Harrison, McGhee and Simpao all found that pneumoconiosis contributed, to some degree, to claimant's pulmonary disability, a finding which is unchallenged by employer. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710

[1] We also reject employer's contention that the administrative law judge failed to weigh the medical opinion evidence under 20 C.F.R. §718.202(a)(4) in accordance with the Board's remand instructions. *See Grace v. Peabody Coal Co.*, BRB No. 97-0112 BLA (Aug. 17, 1998)(unpub.); Decision and Order on Remand at 4-5.

(1983); Decision and Order on Remand at 6. Therefore, their opinions satisfy the Sixth Circuit standard and establish total disability due to pneumoconiosis. *See Smith, supra; Adams, supra.*

Moreover, the administrative law judge permissibly accorded less weight to the opinions of Drs. Anderson and Dineen on the issue of cause of disability, on the ground that the physicians failed to find any pneumoconiosis present.[2] *See generally Adams, supra*; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 6. Additionally, the administrative law judge referred to his discussion at Section 718.202(a)(4), and accorded greater weight to the opinion of Dr. McGhee, as supported by the opinions of Drs. Baker, Harrison and Simpao. Decision and Order on Remand at 6. Thus, we reject employer's contention that the administrative law judge did not comply with the Board's remand instructions to further consider the relevant evidence.[3] We therefore affirm the administrative law judge's finding that the medical evidence is sufficient to establish total disability due to pneumoconiosis at Section 718.204(b).

As we affirm the administrative law judge's finding of pneumoconiosis arising out of coal mine employment at Sections 718.202(a) and 718.203(b) and total disability due to pneumoconiosis at Section 718.204(b), (c), claimant has satisfied all elements of entitlement.[4] *See Adams, supra*; *Trent v. Director,*

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[2] In vacating the administrative law judge's finding at 20 C.F.R. §718.204(b), the Board held that it was unreasonable for the administrative law judge to accord different weight to the opinions of Drs. Baker, Harrison, Anderson, Simpao and Dineen on the basis of varying employment histories inasmuch as the physicians noted similar employment histories. *Grace, supra*. The Board also held that the administrative law judge erred in suggesting that Dr. Dineen did not provide an opinion regarding the cause of claimant's respiratory impairment. *Id.* Thus, the Board remanded the case to the administrative law judge to reconsider the relevant evidence under Section 718.204(b). *Id.*

[3] Employer contends that the administrative law judge may not accord less weight to the opinions of Drs. Anderson and Dineen, citing to *Grigg v. Director, OWCP,* 28 F.3d 416, 18 BLR 2-301 (4th Cir. 1994); *Dehue Coal Co. v. Ballard,* 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). However, as this case arises within the jurisdiction of the Sixth Circuit, we decline to apply those cases in the instant case.

[4] In our previous Decision and Order, we affirmed the administrative law judge's finding of pneumoconiosis arising from coal mine employment at 20 C.F.R.

OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).

§718.203(b) and total disability at 20 C.F.R. §718.204(c). *See Grace*, slip. op. at 2 n.1.

Accordingly, the Decision and Order on Remand -- Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge