

BRB No. 06-0513 BLA

CASELYNN BROWN)	
(Widow of WILLIAM R. BROWN))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED: 03/27/2007
)	
and)	
)	
PEABODY INVESTMENTS, INCORPORATED)	
)	
Employer/Carrier- Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, 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 (04-BLA-6790) of Administrative Law Judge Daniel F. Sutton awarding benefits on a survivor's claim filed on September 24, 2003, 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). The administrative law judge credited the miner with over thirty years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). The administrative law judge also found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). Claimant¹ 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.²

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).³ The administrative law judge considered the reports of Drs. Anderson,

¹ Claimant is the widow of the deceased miner, who died on April 19, 1996. Director's Exhibits 2, 14.

² Because the administrative law judge's length of coal mine employment finding and his findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that claimant established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) and (3) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Although we have affirmed the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), we will nonetheless address the contentions raised by employer with regard to the administrative law judge's finding that the medical opinion evidence is

Houser, Pandit, Caffrey and Repsher. In a report dated October 25, 1994, Dr. Anderson diagnosed early category 1 pneumoconiosis. Director's Exhibit 16. Similarly, Dr. Houser, in a report dated August 2, 1994, diagnosed category 1/1 coal workers' pneumoconiosis and mild chronic obstructive pulmonary disease (COPD). *Id.* Dr. Houser also opined that the miner had an occupational lung disease caused by his coal mine employment. *Id.* During a deposition dated January 28, 2005, Dr. Houser reiterated his diagnoses of coal workers' pneumoconiosis and occupational lung disease caused by coal mine employment. Claimant's Exhibit 3. In a supplemental letter dated February 10, 2005, Dr. Houser stated that he "[e]nclosed...information regarding chronic obstructive pulmonary disease in nonsmoking coal miners, and a copy of the statement from the American Thoracic Society which notes that the effect of dust exposure may be greater than that of cigarette smoking alone, and the magnitude of effect of occupational exposure appears consistent with that of cigarette smoking." Claimant's Exhibit 1. Dr. Houser also stated that "[t]his information is in support of comments made regarding [the miner]." *Id.*

In a letter dated March 29, 2004, Dr. Pandit noted that he treated the miner for lung cancer, COPD and black lung. Director's Exhibit 19. Dr. Pandit also noted that Dr. Houser diagnosed black lung. *Id.* During a deposition dated November 16, 2004, Dr. Pandit diagnosed COPD related to cigarette smoking. Employer's Exhibit 1. Dr. Pandit also testified, however, that he never made a diagnosis of coal workers' pneumoconiosis because, even though he is a pulmonary specialist, he was not specialized to diagnose that condition. *Id.* Dr. Pandit testified that he left the diagnosis of coal workers' pneumoconiosis to Dr. Houser and any other doctor who makes diagnoses of that condition. *Id.* Dr. Pandit additionally testified that his diagnosis of coal workers' pneumoconiosis was only based on the diagnosis of Dr. Houser or any other doctor who made that diagnosis. *Id.* In a report dated July 12, 2005, Dr. Repsher opined that the miner did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 3. Dr. Repsher also opined that the miner suffered from a mild to moderate COPD related to his former long history of cigarette smoking and advancing obstructive disease caused by his metastatic bronchogenic carcinoma. *Id.* In a June 10, 2005 report, Dr. Caffrey diagnosed early simple coal workers' pneumoconiosis. Employer's Exhibit 2. However, Dr. Caffrey opined that the miner did not suffer from "legal pneumoconiosis." *Id.*

The administrative law judge found that Dr. Houser's opinion outweighed the contrary opinions of Drs. Repsher and Caffrey because he found that Dr. Houser's

sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) in light of the fact that it may affect the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2).

opinion is based on the most persuasive medical literature of record. Decision and Order at 12, 14-15. In addition, the administrative law judge found that Dr. Houser's opinion is supported by Dr. Pandit's deposition testimony. *Id.* at 13. Further, the administrative law judge discounted Dr. Anderson's diagnosis of coal workers' pneumoconiosis because he found that it was based only on a positive x-ray reading. *Id.* at 11; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Employer argues that the administrative law judge erred in failing to explain why Dr. Houser's reliance on the statement of the American Thoracic Society regarding occupational contribution to obstructive airway diseases made his opinion more persuasive than Dr. Repsher's contrary opinion. Employer further contends, therefore, that the administrative law judge's decision does not comport with 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).

The APA requires an administrative law judge to independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). In this case, the administrative law judge explained that he accorded greater weight to Dr. Houser's opinion than to Dr. Repsher's contrary opinion because he found that Dr. Houser's opinion is supported by the most persuasive medical literature of record. The administrative law judge specifically stated:

While Dr. Hauser [sic] and Dr. Repsher are both well-qualified physicians given their [B]oard-certification in pulmonary disease, and although they both cited impressive medical literature in support of their divergent opinions, I find that there are discernable differences between their opinions in terms of quality and the degree to which they are supported by the medical literature. First, to the extent that there is any conflict between the statement of the American Thoracic Society and the studies cited by Dr. Repsher, I find that it is appropriate to give greater weight to the former based on the fact that it is the most recent (2002), the fact that it took into consideration the largest body of epidemiological and experimental evidence, and the fact that, as the official statement of the prestigious American Thoracic Society, more likely represents the consensus of the relevant medical profession than the view of the individual physicians who wrote the older articles cited by Dr. Repsher. Therefore, I find that the more persuasive medical literature establishes that occupational exposure to coal dust does contribute to the development of COPD and reduction in FEV1 that is comparable to that seen in smokers and, thus, supports both Dr. Hauser's [sic] diagnosis of legal pneumoconiosis which is grounded on his opinion that [the miner's] exposure to coal mine dust, along with his

cigarette smoking, contributed to his COPD, respiratory symptoms and abnormalities in pulmonary function.

Decision and Order at 14-15.

Further, in considering Dr. Repsher's opinion and the six studies Dr. Repsher relied upon in reaching his opinion, the administrative law judge stated:

In contrast, the studies cited by Dr. Repsher generally support his assumption that simple coal workers' pneumoconiosis does not cause a clinically significant pulmonary impairment, but they do not address whether there is any cause and effect relationship between coal mine dust exposure and COPD. More importantly, I find that Dr. Repsher's opinion that it is overwhelmingly probable that cigarette smoking and not coal mine dust exposure was the cause of [the miner's] COPD is flawed because it conflicts with his earlier statement that the majority of coal miners who are exposed to coal mine dust may also develop COPD. Since Dr. Repsher never provided any explanation to reconcile these inconsistent statements, I conclude that his opinion is, on balance, not as well reasoned and supported as the competing opinion from Dr. Hauser [sic] that [the miner] suffered from legal pneumoconiosis.

Id.

Contrary to employer's assertion, based on the foregoing, the administrative law judge reasonably relied on the official statement of the American Thoracic Society regarding occupational contribution to obstructive airway diseases to explain why he found that Dr. Houser's opinion outweighed Dr. Repsher's contrary opinion. *Wojtowicz*, 12 BLR at 1-165. Thus, we reject employer's assertion that the administrative law judge's finding that Dr. Houser's opinion outweighed Dr. Repsher's contrary opinion did not comply with the APA.⁴

⁴ As discussed *supra*, the administrative law judge found that Dr. Houser's opinion is supported by Dr. Pandit's opinion. However, Dr. Pandit attributed the miner's COPD only to cigarette smoking and only diagnosed pneumoconiosis because Dr. Houser diagnosed the disease. Employer's Exhibit 1. Nonetheless, the administrative law judge provided a valid alternate basis for according greater weight to Dr. Houser's opinion than to Dr. Repsher's contrary opinion, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, he reasonably relied on the official statement of the American Thoracic Society regarding occupational contribution to obstructive airway diseases to explain why he found that Dr. Houser's opinion outweighed Dr. Repsher's contrary opinion, *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we

Employer additionally argues that the administrative law judge erred in discounting Dr. Caffrey's opinion. In his report, Dr. Caffrey diagnosed "clinical pneumoconiosis." Employer's Exhibit 2. However, Dr. Caffrey also opined that the miner did not suffer from "legal pneumoconiosis." *Id.* Contrary to employer's assertion, the administrative law judge reasonably discounted Dr. Caffrey's opinion based on his finding that "Dr. Caffrey's parroting of other physicians' findings in combination with his failure to address all of [the miner's] respiratory and pulmonary symptoms and conditions precludes his medical opinion from being treated as sufficiently reasoned and supported to outweigh Dr. Hauser's [sic] diagnosis of legal pneumoconiosis."⁵ Decision and Order at 15; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Caffrey's opinion.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). The administrative law judge considered a death certificate signed by Dr. Mehta, and the reports of Drs. Houser, Pandit, Repsher and Caffrey. On the death certificate, Dr. Mehta listed cardiopulmonary arrest and lung cancer as the causes of the miner's death. Director's Exhibit 14. Regarding the reports, Drs. Houser and Pandit opined that chronic obstructive pulmonary disease related to coal dust exposure and coal workers' pneumoconiosis contributed to the miner's death. Director's Exhibit 19; Claimant's Exhibit 3; Employer's Exhibit 1. In contrast, Drs. Repsher and

hold that any error by the administrative law judge in finding that Dr. Houser's opinion is supported by Dr. Pandit's opinion is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁵ The administrative law judge stated that "[r]ather than independently analyzing the objective medical evidence, Dr. Caffrey relied on the fact that the records from [the miner's] treating physicians contained no diagnosis of 'CWP' which is not the same thing as legal pneumoconiosis and the fact that Dr. Anderson attributed [the miner's] pulmonary disability to cigarette smoking, surgery, and arteriosclerotic heart disease." Decision and Order at 15. The administrative law judge further stated that "Dr. Caffrey also asserted that [the miner's] hypertension, myocardial disease and lung cancer were not causally related to his coal mine employment, but he did not address the cause(s) of [the miner's] COPD or the respiratory symptoms that Dr. Hauser [sic] found to be related to [the miner's] occupational exposure to respirable coal and rock dust." *Id.*

Caffrey opined that coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. Employer's Exhibits 2, 3. The administrative law judge accorded greater weight to the opinions of Drs. Houser and Pandit than to the contrary opinions of Drs. Repsher and Caffrey, because he found that Drs. Houser's and Pandit's opinions are better reasoned and supported by the objective evidence of record. Decision and Order at 19. The administrative law judge also accorded greater weight to Dr. Pandit's opinion than to Dr. Repsher's contrary opinion, based on Dr. Pandit's status as the miner's treating physician and qualifications as a Board-certified pulmonologist. *Id.* at 20. Further, the administrative law judge discounted Dr. Mehta's opinion "in view of Dr. Pandit's detailed and persuasive testimony that [the miner] had very severe COPD which was caused in part by occupational exposure to coal mine dust and which contributed to his fatal cardiopulmonary arrest." *Id.*

Employer argues that the administrative law judge did not comply with the APA because he did not explain why he found Dr. Houser's opinion regarding the cause of the miner's death more persuasive than the contrary opinions of Drs. Repsher and Caffrey. The administrative law judge stated, "[a]fter considering the medical evidence addressing the cause(s) of [the miner's] death in light of the entire record, I am persuaded that the opinions of Drs. Hauser [sic] and Pandit are better reasoned and better supported by the objective evidence than the contrary conclusions voiced by Drs. Repsher and Caffrey." Decision and Order at 19. However, employer is correct in maintaining that the administrative law judge did not set forth the rationale underlying his finding that the opinions of Drs. Houser and Pandit are better reasoned and supported by the objective evidence than the contrary opinions of Drs. Repsher and Caffrey. *Wojtowicz*, 12 BLR at 1-165. Thus, we hold that the administrative law judge erred in failing to provide a valid basis for according greater weight to the opinions of Drs. Houser and Pandit than to the contrary opinions of Drs. Repsher and Caffrey.

Employer additionally argues that the administrative law judge erred in automatically according greater weight to Dr. Pandit's opinion based on his status as the miner's treating physician and as a pulmonary specialist. The administrative law judge noted that Dr. Pandit was a pulmonary specialist who treated the miner during hospital admissions in 1995 and 1996. Decision and Order at 16. In considering the conflicting opinions of Drs. Pandit and Repsher, the administrative law judge stated, "[g]iven Dr. Pandit's qualification as a [B]oard-certified pulmonary specialist and the fact that he treated [the miner] for his lung disease over the last eight months of his life, I find it appropriate to give his opinion on the severity of [the miner's] COPD and obstructive impairment greater weight than the opinion of Dr. Repsher who never examined [the miner]." *Id.* at 20 n.11. Consequently, the administrative law judge concluded that "Dr. Repsher incorrectly characterized [the miner's] obstructive pulmonary impairment as 'mild to moderate' which may have caused him to underestimate the role played by [the

miner's] COPD in hastening his death” because “Dr. Pandit, the treating pulmonary specialist, reported that the impairment was ‘moderate to severe.’ ” *Id.* at 20.

The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician’s opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to “give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.” 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer’s decision to give that physician’s opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, “the opinions of treating physicians get the deference they deserve based on their power to persuade.” *Williams*, 277 F.3d at 513. In the instant case, although he noted that Dr. Pandit was the miner’s treating physician, the administrative law judge did not specifically consider Dr. Pandit’s opinion in light of the criteria provided in 20 C.F.R. §718.104(d) in determining that Dr. Pandit’s opinion is entitled to greater weight than Dr. Repsher’s contrary opinion. Thus, we hold that the administrative law judge erred in failing to explain why he found that Dr. Pandit’s opinion was entitled to greater weight than Dr. Repsher’s contrary opinion, based on Dr. Pandit’s status as the miner’s treating physician.

Furthermore, since Drs. Pandit and Repsher are both Board-certified in pulmonary disease, we hold that the administrative law judge erred in failing to explain why he found that this aspect of Dr. Pandit’s qualifications entitled his opinion to greater weight than Dr. Repsher’s contrary opinion. *Wojtowicz*, 12 BLR at 1-165.

In view of the foregoing, we vacate the administrative law judge’s finding that the evidence is sufficient to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2), and remand the case for further consideration of the evidence in accordance with the decisions of the Sixth Circuit court in *Williams*, *United States Steel*

Mining Co. v. Director, OWCP [Jarrell], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999),
and *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge