BRB No. 99-0195 BLA

MACK BENTLEY Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand and Supplemental Decision and Order on Reconsideration of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Mack Bentley, Summerfield, Ohio, *pro se*.

W. William Prochot (Arter & Hadden LLP), Washington, D.C., for employer.

Edward Waldman (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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN,

Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand and Supplemental Decision and Order on Reconsideration (93-BLA-0772) of Administrative Law Judge Donald W. Mosser awarding benefits 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. Initially, the administrative law judge credited claimant with fourteen years of coal mine employment and found that, although claimant established that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), he failed to establish that he has pneumoconiosis and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b). The Board affirmed the administrative law judge's finding of no pneumoconiosis pursuant to Section 718.202(a) and, accordingly, affirmed the denial of benefits.[1] *Bentley v. Peabody Coal Co.*, BRB No. 95-1049 BLA (Jan. 31, 1996)(unpub.). On appeal of the Board's decision, the United States Court of Appeals for the Sixth Circuit held that the administrative law judge erred when he found that the absence of x-ray evidence of clinical pneumoconiosis confirmed a physician's opinion at Section 718.202(a)(4) that claimant's chronic obstructive pulmonary disease (COPD) is unrelated to coal mine dust exposure. *Bentley v. Peabody Coal Co*., No. 96-3353 (6th Cir., Sep. 5, 1997)(unpub.). Consequently, the court remanded the case for the administrative law judge to reconsider whether the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and, if so, whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b).

On remand, the resolution of these issues required the administrative law judge to reweigh the medical opinions of Drs. Knight and Grodner. Both physicians examined and tested claimant and concluded that he is totally disabled by severe COPD. Director's Exhibits 9, 11; Employer's Exhibit 1. Dr. Grodner attributed the

[1] The Board affirmed as unchallenged on appeal the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c). [1996] *Bentley*, slip op. at 2 n.2.

COPD solely to smoking, while Dr. Knight attributed it equally to smoking and coal dust exposure. After reconsidering their reports, the administrative law judge credited Dr. Knight's opinion that claimant's COPD is due to both smoking and coal dust exposure and therefore found the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). The administrative law judge also credited Dr. Knight's view that claimant's totally disabling respiratory impairment is due to both smoking and pneumoconiosis and therefore found that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b). In so finding, the administrative law judge acknowledged that Dr. Grodner possesses high qualifications, but found that Dr. Grodner did not adequately address the issue of whether claimant has legal pneumoconiosis. Accordingly, the administrative law judge awarded benefits as of June 1, 1992, the beginning of the month in which claimant filed his application for benefits. Employer moved for reconsideration, which the administrative law judge denied.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Sections 718.202(a)(4) and 718.204(b). Claimant has not responded to employer's appeal, but the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Employer has filed a reply brief reiterating its arguments.[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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[2] We affirm as unchallenged on appeal the administrative law judge's finding regarding the benefits commencement date. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Employer contends that the administrative law judge erred in separately evaluating the x-ray evidence at Section 718.202(a)(1) and the medical opinions at Section 718.202(a)(4) in determining whether claimant established the existence of pneumoconiosis.[3] Employer's Brief at 17-18. "The Act and its implementing regulations recognize both 'clinical' and 'legal' pneumoconiosis." *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-106 (1998). "Legal pneumoconiosis, as defined in 20 C.F.R. §718.201, is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis." *Id*. Here, the administrative law judge reasonably found that although the chest x-ray evidence failed to establish clinical pneumoconiosis pursuant to Section 718.202(a)(1), the weight of the medical opinion evidence established legal pneumoconiosis pursuant to Section 718.202(a)(4). Therefore, we find no error in the administrative law judge's method of weighing the medical evidence pursuant to Section 718.202(a).

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge impermissibly departed from his prior credibility determination regarding Dr. Knight. Employer's Brief at 9-10. Specifically, employer argues that the administrative law judge's initial finding that Dr. Knight's opinion was unsupported by objective evidence, [1995] Decision and Order at 9, is now the law of the case.

Employer's reliance on the law of the case principle is misplaced. Neither the

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[3] In support of its argument, employer cites *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104, (3d Cir. 1997), a case arising in a different appellate circuit which consequently is not controlling. As the Board has noted, the *Williams* court, in holding that all types of relevant evidence must be weighed together to determine whether a miner has pneumoconiosis, did not distinguish between legal pneumoconiosis and clinical pneumoconiosis. *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-105-06 n.2 (1998). In this case, that distinction is critical because it is undisputed that claimant's chest x-rays do not reveal clinical pneumoconiosis; the issue is whether he has established legal pneumoconiosis.

Board nor the Sixth Circuit court addressed this particular finding and thus, contrary to employer's assertion, it was not "affirmed." Employer's Brief at 9. Moreover, the Sixth Circuit court remanded this case for the administrative law judge to reweigh the relevant medical opinions; nothing in the court's remand language specifically limited the administrative law judge to crediting the same reports that he credited previously. [1997] *Bentley*, slip op. at 6-7. Additionally, on remand the administrative law judge acknowledged that he had previously discounted Dr. Knight's opinion, but explained why he changed his conclusion: "upon further examination of Dr. Knight's opinion, I discovered my previous conclusion that his opinion was unsupported by objective evidence was incorrect, and in fact the physician did provide adequate documentation to support his conclusions." Supplemental Decision and Order on Reconsideration at 2; *see generally Pavesi v. Director, OWCP*, 785 F.2d 956, 963, 7 BLR 2-184, 2-196 (3d Cir. 1985)(agency may change its position if the change is supported by a reasoned explanation). As the administrative law judge noted in this regard, Dr. Knight based his opinion upon smoking and coal mine employment histories, and the results of a physical examination, chest x-ray, pulmonary function study, blood gas study, and EKG. Director's Exhibit 9. Therefore, we reject employer's contention.

Employer further asserts that the administrative law judge erred in finding Dr. Knight's opinion to be adequately documented and reasoned pursuant to Section 718.202(a)(4). Employer's Brief at 1-13. This contention lacks merit. "[D]eterminations of whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact." *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *see Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Substantial evidence supports the administrative law judge's determination that Dr. Knight set forth the objective factors supporting his diagnosis and adequately explained his opinion. Director's Exhibits 9, 11. In sum, the administrative law judge acted within his discretion in finding Dr. Knight's opinion to be adequately documented and reasoned. *See Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo, supra*. Employer alleges various flaws in Dr. Knight's opinion, but the Board is not empowered to reweigh the evidence.[4] *Anderson*, 12 BLR at 1-

[4] The administrative law judge properly noted that Dr. Knight's slight overstatement of claimant's coal mine employment was "not sufficient to discredit his opinion, which, upon further review, is otherwise documented." Supplemental Decision and Order on Reconsideration at 2; *see McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). Employer's allegations that Dr. Knight's opinion was otherwise based on erroneous premises concerning claimant's smoking history and dust

112; *Fagg v. Amax Coal Co*., 12 BLR 1-77, 1-79 (1988).

Employer next asserts that the administrative law judge incorrectly discounted Dr. Grodner's opinion as based solely upon negative x-rays and ignored Dr. Grodner's qualifications. Employer's Brief at 14. Contrary to employer's contention, the administrative law judge specifically found Dr. Grodner's opinion to be documented and reasoned, and additionally noted that "Dr. Grodner has superior qualifications." Decision and Order on Remand at 3. However, the administrative law judge permissibly gave less weight to Dr. Grodner's opinion that claimant's severe COPD was unrelated to coal dust exposure because the administrative law judge was troubled by Dr. Grodner's statement that:

> There is no evidence that exposure to coal dust without complicated pneumoconiosis causes severe respiratory impairment and certainly does not cause chronic irreversible airway obstruction with severe hypercapnic respiratory failure unless complicated coal workers' pneumoconiosis is present. In this case there is no evidence of any type of pneumoconiosis.

Employer's Exhibit 1 at 3. Since the issue to be determined was whether claimant's COPD was significantly related to or substantially aggravated by dust exposure in coal mine employment, *see* 20 C.F.R. §718.201, the administrative law judge reasonably determined that "while I'm not prepared to conclude that Dr. Grodner's opinion is hostile to the Act . . . his reference to complicated pneumoconiosis leads one to question whether he was even considering the possibility that [claimant] is afflicted with pneumoconiosis as defined in Section 718.201." Decision and Order on Remand at 3; *see Roberts v. Director, OWCP*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir.1995). Therefore, the administrative law judge permissibly accorded less weight to Dr. Grodner's opinion.

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exposure in his steel mill work are not persuasive on this record and provide no basis for the Board to disturb the administrative law judge's credibility determination. Employer's Brief at 13.

Employer next asserts that the administrative law judge erred by failing to consider the opinions of three other physicians that employer alleges prove that claimant does not have pneumoconiosis. Employer's Brief at 15. This contention lacks merit because Drs. Eddy, Tripathi, and Spencer did not address the etiology of claimant's COPD in the sense of legal pneumoconiosis.[5] *See Roberts, supra*; *Barber, supra*. Therefore, their opinions neither prove nor disprove the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Based upon our foregoing discussion, we conclude that substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(4), which we therefore affirm.

Pursuant to Section 718.204(b), employer argues that the administrative law judge failed to apply the proper disability causation standard. Employer's Brief at 19-21. Under the law of the Sixth Circuit, a claimant must establish that his totally disabling respiratory or pulmonary impairment is due at least in part to pneumoconiosis. *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). That is exactly what the administrative law judge found, based upon Dr. Knight's report. Decision and Order on Remand at 4; Supplemental Decision and Order on Reconsideration at 3. Additionally, since Dr. Knight was aware of claimant's smoking history yet opined without equivocation that claimant's total disability is due to both smoking and pneumoconiosis, the administrative law judge correctly found that Dr. Knight did not assign a mere *de minimis* causative role to pneumoconiosis. Supplemental Decision and Order on Reconsideration at 3; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Therefore, we reject employer's contention that the administrative law judge misapplied the law regarding disability causation.

Employer additionally argues that the administrative law judge ignored Dr.

[5] In their hospital treatment records, Drs. Eddy and Tripathi diagnosed COPD without specifying its etiology. Claimant's Exhibit 1. Dr. Spencer, in a one-sentence letter, wrote only that claimant's "chest x-ray fails to demonstrate pneumoconiosis as being the underlying cause" of his severe COPD. Director's Exhibit 10. A chest x-ray negative for clinical pneumoconiosis is not determinative of whether legal pneumoconiosis exists pursuant to Section 718.202(a)(4). *See Barber, supra*.

Grodner's opinion that claimant's total disability is unrelated to pneumoconiosis. Employer's Brief at 21. The administrative law judge did not ignore Dr. Grodner's disability causation opinion. Rather, the administrative law judge permissibly declined to credit it because he found that Dr. Grodner "essentially ruled out the possibility that [claimant's] disability could be due to coal mine employment because there was no evidence of complicated pneumoconiosis or any pneumoconiosis." Decision and Order on Remand at 4. Because the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he permissibly discounted Dr. Grodner's opinion because its underlying premise ran counter to the established fact that claimant has pneumoconiosis. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). Therefore, we reject employer's contention, and we affirm the administrative law judge's finding pursuant to Section 718.204(b). *See Adams, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge