BRB No. 99-0941 BLA

WILLIAM A. ABSHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: _____
	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Laura Metkoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (90-BLA-1693) of Administrative Law Judge Fletcher E. Campbell, Jr. 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).[1] The Board previously remanded the

[1]The administrative law judge previously found that claimant died on May 4, 1993. Decision and Order dated March 10, 1997 at 2.

case to the administrative law judge in *Absher v. Peabody Coal Co.*, BRB No. 97-1278 BLA (May 22, 1998)(unpub.), for reconsideration of the medical opinions of Drs. Tuteur and Renn at 20 C.F.R. §718.204(b). In this regard, the Board held that the administrative law judge acted within his discretion in taking judicial notice of a publication of the National Institute for Occupational Safety and Health (NIOSH), and properly relied on the publication in discrediting Dr. Tuteur's opinion.[2] The Board noted, however, that the administrative law judge had mischaracterized Dr. Tuteur's findings relevant to the cause of claimant's disability. The Board next affirmed the administrative law judge's weighing of Dr. Myers' opinion. The Board further noted its previous affirmance of Judge Amery's findings that claimant established total disability under 20 C.F.R. §718.204(c)(1) and (c)(4), and held that because no exception to the law of the case doctrine had been established, the Board's prior decisions on these issues constituted the law of the case.

In his Decision and Order on Remand, which is the subject of the instant appeal, the administrative law judge reconsidered the opinions of Drs. Tuteur and Renn at Section 718.204(b) pursuant to the decisions in *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991) and *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990). The administrative law judge accorded little weight to the opinions of Drs. Tuteur and Renn and noted that the Board had upheld his according of significant weight to Dr. Myers' opinion. On the basis of the record before him, the administrative law judge found that claimant established that his coal workers' pneumoconiosis was a contributing cause of his respiratory disability. The administrative law judge thus reinstated his previous order granting benefits to claimant.

On appeal, employer contends,

> [by] twisting the record and the law to suit his own purposes, the ALJ avoids the Board's instructions and the inevitable conclusion that claimant did not prove his case. If the evidence in this case proved anything, it was that Absher's 50 pack-year cigarette smoking history was the sole cause of any disability he did have and that the pneumo-

[2]To the extent that employer again argues that the administrative law judge erred in taking judicial notice of the NIOSH publication, we decline to address the assertion as our prior holding constitutes the law of the case. *Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990).

> coniosis found on autopsy but undetectable on x-ray was so minor that it would not have caused any disability that could keep Absher from performing a job that, by his own testimony, required no physical labor. A remand is required.

Employer's Brief at 18. Employer also contends that the administrative law judge erred in taking judicial notice of matters that were not "noticeable" and without providing the parties with notice and an opportunity to respond. *Id.* Specifically, employer alleges error in the fact that the administrative law judge, on remand, took judicial notice of a different and additional publication which is not of record, namely *The Merck Manual of Diagnosis and Therapy.* Employer further alleges error in the administrative law judge's disability causation finding, and argues that the evidence is insufficient to carry claimant's burden. Employer, therefore, seeks remand of the case to the administrative law judge. Claimant responds, and urges the Board to affirm the administrative law judge's award of benefits on remand. Employer has filed a reply brief, restating its position that a remand of the case is required for "fair consideration" of all the evidence.

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).

Employer contends that in taking judicial notice of *The Merck Manual of Diagnosis and Therapy*, which is not part of the record, and using this evidence to discredit employer's evidence, the administrative law judge has deprived employer of a fair hearing and has violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

On remand, the administrative law judge provided three reasons for according less weight to Dr. Tuteur's opinion that claimant's obstructive impairment is due to his smoking induced chronic obstructive pulmonary disease and not to his mild simple coal workers' pneumoconiosis, the existence of which Dr. Tuteur found based on the autopsy evidence. Specifically, the administrative law judge found that (1) Dr. Tuteur provided an inadequate rationale as to why he was able to eliminate coal dust exposure as a cause of claimant's chronic obstructive pulmonary disease; and that (2) Dr. Tuteur only discussed medical or clinical coal workers' pneumoconiosis and not legal coal workers' pneumoconiosis; and (3) the administrative law judge determined that Dr. Tuteur's diagnosis of simple pneumoconiosis was premised on the discredited reports of Drs. Naeye and Kleinerman.

We uphold the administrative law judge's weighing of Dr. Tuteur's report on remand

based on the third reason provided by the administrative law judge. Specifically, the administrative law judge found that Dr. Tuteur relied on the discredited opinions of pathologists Drs. Kleinerman and Naeye in finding medically insignificant clinical pneumoconiosis on autopsy. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In this regard, the administrative law judge noted, "in my original D & O, I found that the opinions of these two physicians were unreasoned. D & O at 5. This finding was not disputed on appeal. On this basis also, I accord Dr. Tuteur's opinion less weight." Decision and Order at 6; *see also* Decision and Order dated March 10, 1997 at 6-7.[3] Inasmuch as the administrative law judge provided a valid reason for according less weight to Dr. Tuteur's report, any error committed by the administrative law judge in taking judicial notice of *The Merck Manual of Diagnosis and Therapy*, and in relying on the publication in offering his second alternate reason, was harmless. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).[4]

Employer next contends that the administrative law judge's finding that claimant met his burden to establish disability causation at Section 718.204(b) does not comport with the requirement of the APA that the administrative law judge provide a reasoned decision. Specifically, employer contends that the administrative law judge provided improper and pretextual reasons for discrediting the opinions of Drs. Tuteur and Renn "so that the ALJ could reach his own preferred conclusion despite the evidence (or lack thereof) in the record supporting entitlement. The ALJ's personal preference for the outcome of a case, however, is not a valid basis on which to credit or discredit proof. It is an impermissible substitution of the ALJ's expertise for the experts." Employer's Brief at 23. Employer argues that nothing in the NIOSH publication or *The Merck Manual* would imply any deficiency in the opinions of Drs. Tuteur and Renn, which excluded claimant's pneumoconiosis as a cause of his obstructive pulmonary impairment. Employer thus argues that the administrative law judge's

[3]The administrative law judge had determined that Drs. Naeye and Kleinerman are not as well qualified to determine the cause of disability in a living miner as are internal medicine and pulmonary medicine specialists, and he discussed the physicians' admissions that they had limited material upon which to base their conclusions. *Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

[4]The proposed regulations and *The Merck Manual* are not contained in the record.

discussion of legal versus medical pneumoconiosis is "merely a pretext" for rejecting this evidence. Employer further asserts that the administrative law judge should have similarly faulted Dr. Myers' opinion on this basis.

Employer's contentions lack merit. As an initial matter, there is no evidence to support employer's allegation of bias on behalf of the administrative law judge and employer cites to none. We thus reject employer's arguments. *Marcus v. Director, OWCP*, 548 F.2d 1044, 1050 (D.C. Cir. 1976); *Zamora v. C.F. & I. Steel Corp.*, 7 BLR 1-568 (1984); *see also* 20 C.F.R. §725.352. Further, the administrative law judge provided valid reasons for according less weight to Dr. Tuteur's opinion. In addition to the administrative law judge's rationale discussed above, the administrative law judge found that Dr. Tuteur did not provide any reasoning for how he was able to eliminate claimant's thirty-six year history of coal dust exposure as a contributing cause of claimant's respiratory problems. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge thus permissibly determined that, inasmuch as Dr. Tuteur did not provide any justification for his conclusion that smoking was the exclusive cause of claimant's respiratory difficulty, his opinion was unreasoned. *Id.*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

The administrative law judge likewise provided valid reasons for according less weight to Dr. Renn's opinion. In remanding the case for reconsideration of Dr. Renn's opinion, the Board initially concluded that the administrative law judge acted within his discretion in questioning Dr. Renn's opinion because he misdiagnosed claimant's pneumoconiosis in his first opinion. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Hutchens v. Director, OWCP* 8 BLR 1-16 (1985); Board's Decision and Order at 4-6. The Board vacated the administrative law judge's weighing of Dr. Renn's opinion because the administrative law judge did not discuss Dr. Renn's statement that pneumoconiosis can cause an obstructive defect when it reaches the complicated stage. Employer's Exhibit 34 at 50; Board's Decision and Order at 4-6. On remand, based on his discussion of case law and the NIOSH article of which the administrative law judge previously took judicial notice and which action the Board upheld, the administrative law judge found persuasive authority that the notion that coal dust exposure causes restrictive rather than obstructive, impairments is "dubious at best." Decision and Order at 7-8. The administrative law judge then found that Dr. Renn explicitly relied on the assumption that coal workers' pneumoconiosis usually causes restrictive and not obstructive impairments in concluding that claimant's coal dust exposure had no effect on the miner's respiratory impairment. Employer's Exhibit 15 at 24-26, 29; Decision and Order at 8. The administrative law judge permissibly accorded less weight to Dr. Renn's opinion as he found that this assumption was unsupported. *Clark, supra; Fields, supra*.

Further, the administrative law judge relied, in part, on *The Merck Manual* in

concluding that, in a manner similar to Dr. Tuteur, Dr. Renn failed to consider that claimant's condition may fall within the legal definition of pneumoconiosis. Decision and Order at 8. Notwithstanding the administrative law judge's error in taking judicial notice of this document, *see* discussion, *supra*, the administrative law judge properly noted that Dr. Renn's testimony that chronic obstructive pulmonary disease and anthracosis are not types of coal workers' pneumoconiosis is contrary to, *inter alia*, the regulatory definition of pneumoconiosis. 20 C.F.R. §718.202(a)(1); Employer's Exhibit 15 at 41, 45. The administrative law judge further found that, as with Dr. Tuteur's opinion, Dr. Renn's opinion was unreasoned because he did not persuasively explain his opinion that claimant's condition was related to his smoking, and not to his coal dust exposure. *Clark, supra; see also Tackett, supra.*

Employer further argues that it was error for the administrative law judge to discredit Dr. Renn's report because the physician did not examine the claimant, when the Board previously determined that this was an improper basis upon which to discredit the opinion. Employer asserts that Dr. Renn's opinion is credible and that the administrative law judge's preference for an examining physician's opinion, namely that of Dr. Myers, was unwarranted. As discussed *supra*, the administrative law judge provided valid reasons for according less weight to Dr. Renn's opinion. Thus, while employer correctly argues that the administrative law judge erred in according less weight to Dr. Renn's opinion because the administrative law judge found, without more, that Dr. Renn never examined the miner, *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992), the administrative law judge's error was harmless. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).

Employer next contends that the administrative law judge improperly suggested that because employer stipulated that claimant had pneumoconiosis, it also stipulated that pneumoconiosis caused an impairment. Employer notes that its stipulation was limited to the existence of pneumoconiosis based on the autopsy evidence, which does not necessarily imply resulting impairment.

Contrary to employer's contention, the record shows that the administrative law judge correctly noted employer's stipulation to the presence of pneumoconiosis. Decision and Order at 9 n.15. Nothing in the record supports employer's blank assertion that the administrative law judge implied that employer's stipulation included a stipulation to the fact that claimant's pneumoconiosis caused an impairment. Rather, the administrative law judge recognized that disability causation was the issue before him. *Id.* at 2. Critically, employer cites to no supporting evidence or language contained in the administrative law judge's Decision and Order.

Employer next contends that the administrative law judge credited Dr. Myers' opinion in finding that claimant met his burden on disability causation, without evaluating the physician's findings, and that Dr. Myers' opinion is insufficient to meet claimant's burden.

Employer asserts that the objective medical evidence supports the contrary opinion of Drs. Tuteur and Renn that claimant's disability is due to smoking, and the administrative law judge ignored this evidence, as well as claimant's smoking history.

The Board previously held that the administrative law judge acted within his discretion in according significant weight to Dr. Myers' opinion and, consequently, affirmed the administrative law judge's weighing of Dr. Myers' opinion. Board's Decision and Order at 5. On remand from the Board, the administrative law judge noted the Board's decision in this regard and found no reason to change his original determination. Decision and Order at 2, 9. The Board's prior decision on this issue constitutes the law of the case inasmuch as employer has established no exception thereto. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). We thus decline to address further employer's arguments.

Employer next argues that the administrative law judge did not impose on claimant the burden to establish disability causation so much as he imposed on employer the burden to disprove disability causation. In support of its argument, employer asserts,

> This is a case of a man who smoked cigarettes since he was a teenager, and who had numerous other medical problems. Before his death, there was so little indication that he had simple pneumoconiosis that few physicians even diagnosed the disease. Absher had no physical symptoms of pneumoconiosis. Only after microscopic analysis of sections of his lung after death was there a determination that Absher had mild simple pneumoconiosis. All this evidence supports the opinions of Drs. Tuteur and Renn, and the ALJ resorted to improper use of publications that are not in the record to reject those opinions.

Employer's Brief at 27-28.

Employer's contention that the administrative law judge placed upon employer the burden of proof on disability causation is refuted by the record. The administrative law judge specifically noted that it is *claimant's* burden to established disability causation under *Compton* and *Shelton* at Section 718.204(b). Decision and Order at 1-2, 9, 10. The record shows that the administrative law judge analyzed the evidence from this point of view, and determined that claimant established that his coal workers' pneumoconiosis was a contributing cause of his disability under Section 718.204(b). Moreover, employer improperly makes several assertions invoking evidentiary matters determinable by the fact finder alone.

Lastly, employer contends that the evidence fails to establish total disability under 20 C.F.R. §718.204(c). Employer notes the Board's affirmance of Judge Amery's finding that

claimant established total disability in the instant case. Employer urges the Board to reconsider the issue of disability and, alternatively, preserves the issue for any further appeal.

The Board previously held that its prior affirmance of Judge Amery's finding that claimant established total disability under Section 718.204(c)(1) and (c)(4) constitutes the law of the case and that no exception to the law of the case doctrine had been established. Board's Decision and Order at 5. We thus decline to address employer's additional arguments in this regard and note employer's preservation of this issue for appeal purposes.

Based on the foregoing, we reject employer's challenge to the administrative law judge's finding of disability causation at Section 718.204(b), and affirm the administrative law judge's award of benefits in the instant case.

Claimant's counsel has applied for an attorney's fee for services rendered to claimant while the case was pending before the Board in BRB No. 97-1278 BLA (May 22, 1998)(unpub.) pursuant to 20 C.F.R. §725.366. Counsel seeks a fee of $2,287.50, constituting 15.25 hours at $150 per hour. No objection to the fee has been received. We grant claimant's counsel a fee in the amount of $2,287.50. Counsel is entitled to fees for services rendered claimant at each level of the adjudicatory process even if he was unsuccessful at a particular level, so long as he is ultimately successful in prosecuting the claim. 33 U.S.C. §932(a); *Clark v. Director, OWCP*, 12 BLR 1-211 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed. Claimant's counsel is granted a fee in the amount of $2,287.50, for work performed before the Board in BRB No. 97-1278 BLA. The fee is payable by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge