BRB No. 93-1744 BLA

JAMES FORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: _____
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for the employer.

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

PER CURIAM:

Employer,[1] appeals the Decision and Order (91-BLA-1463) of Administrative Law Judge Frederick D. Neusner awarding benefits on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).

[1]Claimant, James Ford, filed for benefits under the Act on March 27, 1990. Director's Exhibit 1.

Administrative Law Judge Neusner determined that the permanent criteria set fourth at 20 C.F.R. Part 718 governed the consideration of this claim. He credited claimant with at least twenty five years of coal mine employment, found that claimant had established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4), that this pneumoconiosis arose out of claimant's coal mine employment, and that claimant was totally disabled due to coal worker's pneumoconiosis. 20 C.F.R. §§718.202(a); 718.203(b); 718.204(b), (c).[2] Benefits were

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings of twenty-five years of coal mine employment, the existence of total disability, and his application of the presumption that claimant's pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

awarded on the claim and employer brought this appeal.

On appeal, employer challenges the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1), (4). Employer also asserts that the administrative law judge erred in finding that claimant was totally disabled due to pneumoconiosis. *See* 20 C.F.R. §718.204(b). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to employer's appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).[3]

On appeal, employer contends that the administrative law judge erred in finding that claimant had established the existence of pneumoconiosis based on medical opinion evidence. 20 C.F.R. §718.202(a)(4). Employer maintains that the administrative law judge "never actually weighed the conflicting [medical] reports or addressed the credibility of the various [medical] opinions." Employer's Brief at 10. Employer also argues that the administrative law judge exceeded his expertise in evaluating the medical opinions, that he engaged in an "abstraction" to find that claimant suffered from pneumoconiosis, and that he ignored the medical evidence of record which demonstrated that claimant's condition was

[3]Employer challenges the administrative law judge's reliance on the true doubt rule to find the existence of pneumoconiosis established on the basis of x-ray evidence of the disease. Employer alleges that the administrative law judge erred in finding the x-ray evidence equally probative so as to trigger the rule in the first place. Employer also asserts that the rule is invalid. Employer's latter argument has been accepted by the United States Supreme Court, which, in *Director, OWCP v. Greenwich Collieries,* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g* 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), held that the true doubt rule is invalid for adjudications under the Act. In view of our affirmance of the administrative law judge's findings under Section 718.202(a)(4), we need not reach Employer's Section 718.202(a)(1) arguments.

not caused by coal mine employment. Employer's Brief at 11.

We discern no reversible error in the administrative law judge's evaluation of the medical opinion evidence pursuant to Section 718.202(a)(4), and will affirm his finding that claimant established the existence of pneumoconiosis. The administrative law judge's findings could have been clearer, but it is quite apparent from the context of the Decision and Order, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983); *see also Newport News Shipbuilding and Dry Dock Company v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988), that, contrary to employer's assertions, the administrative law judge addressed Employer's evidence, weighed the medical opinions and permissibly found that Dr. Rasmussen's medical opinion was sufficient to establish the existence of pneumoconiosis. *See Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Dr. Rasmussen examined claimant on July 13, 1990. He diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease, and concluded that the latter condition was due both to coal mine dust exposure and smoking. According to Dr. Rasmussen, coal mine dust exposure constituted a major contributing factor in claimant's total respiratory insufficiency. Director's Exhibit 14; *see also* Claimant's Exhibit 1. In crediting Dr. Rasmussen, the administrative law judge, within his discretion as the trier-of-fact, could also reject the view taken by employer's experts[4] that claimant's obstructive

[4]Dr. Fino reviewed other medical records, and concluded that there was insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis. He opined that claimant does not suffer from an occupationally acquired pulmonary condition, and that claimant's disabling respiratory impairment is due to smoking. Employer's Exhibit 1. Dr. Zaldivar concluded that claimant had not contracted pneumoconiosis. He opined as well that claimant still smokes cigarettes. *See* Zaldivar Deposition at 14, 24. Pulmonary function studies did not show a restriction in Dr. Zaldivar's view. He further assessed claimant as disabled, but concluded that his disability is due to smoking. *Id.* at 49. Dr. Renn opined that claimant did not have pneumoconiosis, although he conceded that claimant had sufficient occupational exposure to develop pneumoconiosis, provided that he was a susceptible individual. Renn Deposition at 8, 19. Employer's Exhibit 3. Dr. Chillag found insufficient evidence to justify a diagnosis of coal worker's pneumoconiosis. To this physician, a significant impairment cannot be attributed to pneumoconiosis. It was more likely due to chronic obstructive pulmonary disease and/or bronchitis associated with smoking and "possibly ischemic heart disease." Employer's Exhibit 4. Dr. Morgan reviewed medical records and concluded that claimant had a moderately severe airways obstruction associated with the usual changes produced by emphysema. He did not feel that claimant suffered from sufficient dust exposure. He further opined that claimant's disability is a result of cigarette smoking. Morgan noted that "many people with large quantities of dust present in their lungs and Category 3 simple pneumoconiosis have virtually normal lung function." Employer's Exhibit 5. Dr. Renn concluded that within a " ... reasonable degree of medical certainty Mr. James Ford's chronic obstructive pulmonary disease and carbooxyhemoglobinemia have resulted from

pulmonary impairment could not be related even in part to coal mine employment. The administrative law judge properly considered and duly accounted for the evidence of record that had been introduced by employer in an effort to prove that claimant's obstructive disease could not be derived from coal mine employment, but was instead due to cigarette abuse. The administrative law judge also addressed such factors as claimant's use of cardiac drugs, which may have affected his performance during pulmonary function and arterial blood gas testing. *See* Decision and Order at 5-7.

Nevertheless, the administrative law judge could properly defer to the conclusion of Dr. Rasmussen, who, acknowledging claimant's lengthy coal mine employment, opined that coal mine employment at least played a role in the development of the disease. *See Southard*; *Anderson*; *see also Mitchell v. OWCP*, 25 F.3d 500, 507 n.12, 18 BLR 2-257, 2-273 n.12 (7th Cir 1994); *Eagle v. Armco Inc.*, 943 F.2d 509, 511 n.2, 15 BLR 2-201, 2-203-04 n.2 (4th Cir. 1991); *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 591 (7th Cir. 1985)(chronic obstructive pulmonary disease meets statutory definition whether or not technical pneumoconiosis).

The administrative law judge is charged with the evaluation and weighing of the medical evidence and may draw appropriate inferences therefrom, *see Summers v. Freeman United Coal Mining Co.,* 14 F.3d 1220, 1223, BLR (7th Cir. 1994); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962)("fact-finders are not bound to decide according to doctors' opinions if rational inferences lead in the other direction"); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *see also Consolidation Coal Co. v. Worrell,* 27 F.3d 227, BLR (6th Cir. 1994)(deference to credibility determinations).

Because the administrative law judge's decision to defer to the medical opinion of Dr. Rasmussen is not patently unreasonable, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), and Dr. Rasmussen's opinion that claimant suffers from pneumoconiosis constitutes substantial evidence in support of the administrative law judge's finding of pneumoconiosis, the administrative law judge's finding of pneumoconiosis is affirmed. 20 C.F.R. §718.202(a)(4).[5]

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his years of tobacco smoking, a habit he is continuing." Employer's Exhibit 6. Dr. Fino submitted additional documentation, noting his strenuous disagreement with Dr. Rasmussen's views as to the etiology of claimant's pulmonary impairment. Employer's Exhibits 9, 10. Dr. Zaldivar examined claimant in 1990, and concluded that claimant's "moderate pulmonary impairment" was due to emphysema due in turn to cigarette smoking. Director's Exhibit 25.

[5]Employer also challenges the administrative law judge's use of the principle that "the Employer is required to take the worker as it finds him -- medical frailties and all," and

contends that the use of this "abstraction" as a rationale for finding the existence of pneumoconiosis is improper. Decision and Order at 8; *See* Employer's Brief at 11. We see no error in this statement, which essentially is consistent with the aggravation rule, under which pneumoconiosis does indeed include "any chronic pulmonary disease ... significantly related to or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. 718.201; *see Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984).

Employer next challenges the administrative law judge's finding of causation pursuant to Section 718.204(b), again asserting that the administrative law judge failed to weigh the medical opinions. Employer implies that, even if the evidence were properly weighed, the administrative law judge could only find that claimant's total disability was in no way derived from coal workers' pneumoconiosis. Employer's Brief at 11.

Employer's arguments on this issue are without merit. Initially, employer effectively asks the Board to reweigh the medical opinion evidence. This task is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988).

As to the adequacy of the administrative law judge's findings, we note that his analysis under Section §718.204(b) is not explicit, and that he refers to the weighing of the evidence pursuant to Section 718.202(a)(4). We nevertheless hold that the administrative law judge made sufficient findings regarding the etiology of claimant's total respiratory disability, and that he articulated an adequate rationale to find causation established.[6] The administrative law judge incorporated into the causation analysis his findings and evaluation of the evidence that had been made with respect to the existence of pneumoconiosis. Specifically, he stated that

> [t]he examination of the evidence as to the existence of pneumoconiosis under 20 C.F.R. 718.292(a)(4) provides the occasion for a thorough analysis of the causal connection between the claimant's totally disabling respiratory impairment and pneumoconiosis. Because of the nature of the evidentiary dispute under [Section] 718.202(a)(4), the inference that claimant suffers

[6]Under the circumstances of this case, the administrative law judge's virtual "incorporation by reference" of the reasons stated in his analysis under Section 718.202(a)(4) provide a sufficient explanation of the grounds for his decision to credit the medical opinion of Dr. Rasmussen over the conflicting views of Employer's experts. *See Markus v. Old Ben Coal Co.,* 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983); *cf. Orange v. Island Creek Coal Co.,* 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986)(administrative law judge did not impermissibly incorporate numerous sections of litigant's brief into decision and order).

> from pneumoconiosis under the regulatory definition... required a finding in which causation was a critical element. Consequently, the same evidence has been weighed in determining this issue, as well. Based on the same reasons that demonstrated that the claimant has pneumoconiosis it is further concluded that pneumoconiosis was a contributing cause of his totally disabling respiratory impairment.

Decision and Order at 9.

Although the administrative law judge should have made separate findings at Section 718.204(b), he properly credited the medical opinion of Dr. Rasmussen, that coal workers' pneumoconiosis was a factor in the development of claimant's total respiratory disability, and accorded less weight to employer's experts. *See generally Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993).

Dr. Rasmussen's conclusion that claimant's total disability was derived in part from coal worker's pneumoconiosis provides substantial evidence for the administrative law judge's finding of causation under Section 718.204(b). *See Adams v. Director, OWCP,* 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Robinson v. Pickands Mather and Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. l990); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990). The administrative law judge cites the correct standard for causation, and his analysis is sufficiently apparent to permit appellate review. *See Markus, supra*; *Tann, supra.*

Accordingly, we affirm the administrative law judge's findings of causation and the existence of pneumoconiosis, and thus affirm the award of benefits.[7]

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[7]In view of our disposition of this case, we consider harmless the administrative law judge's failure to address on the merits claimant's award from the West Virginia Occupational Pneumoconiosis Board. Director's Exhibit 3; *see Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984); *see generally Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946).