

BRB No. 94-0597 BLA

RICHIE E. WREN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
LONE STAR STEEL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Roger T. Jeremiah (Jeremiah & Nielsen), Van Buren, Arkansas, for claimant.

Ronald W. Metcalf, Fort Smith, Arkansas, for employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order After Remand (89-BLA-1286) of Administrative Law Judge Frederick D. Neusner 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. In *Wren v. Lone Star Steel Co.*, BRB No. 91-0868 BLA (Oct. 29, 1992)(unpub.)(McGranery J., dissenting), the Board vacated the administrative law judge's finding of the existence of pneumoconiosis arising out of

coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 and remanded the case for reconsideration of the relevant evidence.

On remand, the administrative law judge<sup>1</sup> found the existence

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<sup>1</sup> Administrative Law Judge Peter McC. Giesey issued the first Decision and Order. Because he is no longer with the Office of Administrative Law Judges, the case was assigned on remand, without objection, to Judge Neusner.

of pneumoconiosis arising out of coal mine employment established at Sections 718.202(a)(4) and 718.203, and total respiratory disability due to pneumoconiosis established at Section 718.204(c) and (b). Accordingly, he awarded benefits.

On appeal, employer challenges the award of benefits. Claimant has not responded, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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).

At Section 718.202(a)(4), employer initially argues that the administrative law judge mischaracterized Dr. Boyer's opinion in finding that Dr. Boyer attributed claimant's obstructive lung disease in part to coal dust exposure.<sup>2</sup> Employer's Brief at 10. Citing *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985), employer contends that Dr. Boyer's opinion "cannot be the basis of an award" because he did not explain his diagnosis sufficiently. Employer's Brief at 12-13. We disagree.

The administrative law judge explained that he based his inference that Dr.

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<sup>2</sup> Doctor Boyer diagnosed obstructive lung disease with an etiology of "environment, cigarettes, [and] family history." Director's Exhibit 19. Dr. Boyer also noted that claimant should be referred to another physician because of a "poor prognosis with present condition at young age and contributing factors of dust and cigarette exposure." *Id.* In its initial Decision and Order in this case, the Board vacated Judge McC. Giesey's treatment of the report of Dr. Boyer as he failed to provide an explanation of his finding that the physician attributed claimant's condition to coal dust exposure. *Wren*, slip op., at 3. Judge Neusner noted the Board's prior holding and provided an explanation on this issue.

Boyer attributed claimant's obstructive lung disease to coal dust exposure on the following factors: 1) Dr. Boyer's use of the word "environment" and his statement that dust exposure was a contributing factor; 2) that "dust" was not used in a generic sense, since the subject of the Form CM-988 report was an appraisal of claimant's lungs for black lung benefits; 3) the presence of the comment "BLACK LUNG, SMOKER X 35 YRS 1 PK/DAY" on the data sheets from the pulmonary function study administered at Dr. Boyer's request and reviewed by him; 4) the fact that Dr. Boyer refers to no other kind of environment; and 5) claimant's testimony that "coal dust was the only airborne environmental hazard in the open pit coal mines where he worked." Decision and Order After Remand at 4-5.

While employer argues that the notations on the pulmonary function study data sheets were not written by Dr. Boyer and that Dr. Boyer deliberately omitted the word "coal" from his reference to dust, Employer's Brief at 12, 14, the administrative law judge acted within his broad discretion as fact-finder in relying on the above factors to infer that Dr. Boyer considered coal dust to be a contributing factor in claimant's obstructive lung disease. See 20 C.F.R. §718.201; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); see also *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Inasmuch as the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable, see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), we affirm the administrative law judge's finding at Section 718.202(a)(4). See *Szafraniec v. Director, OWCP*, 7 BLR 1-397 (1984); see also *Markus v. Old Ben Coal Co.*, 721 F.2d 322, 5 BLR 2-130 (7th Cir. 1983).

Employer next argues at 718.202(a)(4) that the administrative law judge erred in discrediting Dr. Stewart's opinion for failing to distinguish between the effect on claimant of coal dust exposure in non-qualifying coal mine employment as opposed to coal dust exposure in qualifying coal mine employment. Employer's Brief at 16. Dr. Stewart diagnosed "obstructive airways disease related to [claimant's] cigarette smoking history of 46 pack years," and concluded that in light of claimant's less than ten-year coal dust exposure,<sup>3</sup> mainly as a coal truck driver, he "was not suffering from pneumoconiosis or any other pulmonary disease that is due to his exposure to coal dust in his employment as a coal miner." Director's Exhibit 37. In according little weight to Dr. Stewart's opinion, the administrative law judge observed:

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<sup>3</sup> Doctor Stewart noted that claimant worked in the open pit mines for fifteen years, an environment claimant described as extremely dusty. Director's Exhibit 37. Claimant told Dr. Stewart that because the trucks he drove lacked cabs, he became short of breath due to the dust and eventually obtained employment with another company using closed cab trucks to avoid this problem. *Id.* Later in his opinion Dr. Stewart observed that claimant had fewer than ten years of coal mine employment. *Id.*

Since the miner established . . . that he engaged in alternating periods of qualifying and non-qualifying employment as a coal truck operator . . . [Dr. Stewart] would be expected to explain . . . how [he] was able to distinguish the pulmonary aggravation caused by Claimant's qualifying coal mine employment from aggravation he perceived was caused by the non-qualifying employment in the same occupation . . . . Since he found that Claimant did not have pneumoconiosis but did not state whether the exposure to coal dust in qualifying employment aggravated the obstructive lung disease he diagnosed, it follows that Dr. Stewart's conclusion is not supported by a persuasive rationale . . . .

#### Decision and Order After Remand at 6.

We affirm the administrative law judge's finding that Dr. Stewart's opinion was unpersuasive, see *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); *Kuchwara, supra*, as the administrative law judge permissibly found that the physician did not adequately explain how claimant's exposure to coal dust was not significant, see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), when claimant told him that he suffered shortness of breath in the dusty environment of the open pit mines and changed hauling jobs to reduce his dust exposure. Director's Exhibit 37. The administrative law judge permissibly considered Dr. Stewart's failure to explain the rationale for his conclusion, see *Clark, supra*, in determining the weight to be accorded to his report.<sup>4</sup> See *Debusk v. Pittsburg & Midway Coal Co.*, 12 BLR 1-15 (1988); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984); see also *Tackett, supra*. Thus, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

At Section 718.203, employer argues that the administrative law judge erred in finding that claimant's pneumoconiosis arose out of his coal mine employment, citing

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<sup>4</sup> Employer also contends that the administrative law judge erred in failing to consider Dr. Stewart's curriculum vitae, which employer states is attached to Employer's Exhibit 2. Employer's Brief at 14. Contrary to employer's statement, Dr. Stewart's CV does not appear at Employer's Exhibit 2 or anywhere else in the record; Employer's Exhibit 2 consists of the curriculum vitae of another physician and a letter from employer's counsel requesting that the administrative law judge take judicial notice of Dr. Stewart's credentials as listed in the American Medical Directory (30th ed. 1986). Employer's Exhibit 2. We note that an administrative law judge may, but is not required to, take judicial notice of any fact. 5 U.S.C. §556(e); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

the same arguments raised at Section 718.202(a)(4). Employer's Brief at 19. As the administrative law judge permissibly inferred that Dr. Boyer opined that claimant's obstructive lung impairment was due to coal dust exposure and permissibly accorded less weight to Dr. Stewart's contrary opinion, *see* discussion, *supra*, we affirm the finding that claimant's pneumoconiosis arose out of coal mine employment.

At Section 718.204(c) and (b), employer contends generally that the administrative law judge's findings are not supported by substantial evidence. Employer's Brief at 19. As employer has not alleged any specific error with respect to the law or record evidence, thus failing to provide any basis for review, we affirm the administrative law judge's findings at Section 718.204. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-118 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order After Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

\_\_\_\_\_NANCY S.  
DOLDER  
Administrative Appeals Judge

\_\_\_\_\_REGINA C.  
McGRANERY  
Administrative Appeals Judge