BRB No. 08-0518 BLA

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<tr><td>T.A.

Claimant-Petitioner

v.

PEABODY COAL COMPANY

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DATE ISSUED: 04/20/2009

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order – Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, 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:

Claimant appeals the Decision and Order – Denying Benefits (06-BLA-5566) of Administrative Law Judge Donald W. Mosser rendered on a miner's 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). Upon stipulation of the parties, the administrative law judge credited claimant with at least nineteen years of coal mine employment, and adjudicated this claim, filed on January 18, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in denying claimant's request for the admission of post-hearing evidence into the record, and challenges the administrative law judge's finding that the x-ray evidence, computerized tomography (CT) scan evidence, and medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4).[1] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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.[2] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Turning first to the evidentiary issue, claimant contends that the administrative law judge erred in denying claimant's request for the development and admission into the record of post-hearing evidence pursuant to 20 C.F.R. §725.456,[3] thereby depriving

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[1] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment, and his finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), but sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as the miner was last employed in the coal mining industry in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Hearing Transcript at 21-22.

[3] Section 725.456(b)(2) provides, in part, that documentary materials, including medical reports, that were not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). Documentary evidence that is not exchanged with the parties, in

claimant of the opportunity to fully present his case on all issues. Specifically, claimant argues that good cause was shown for the administrative law judge to allow Dr. Cohen to submit a supplemental report after reviewing updated treatment records[4] filed by employer twenty days prior to the hearing. Claimant's Brief at 3-4. We disagree. In an Order issued on August 20, 2007, the administrative law judge permissibly denied claimant's request, finding that claimant had ample opportunity to obtain a complete and accurate medical assessment prior to the hearing, as the records in question related to claimant's own treatment, and thus were available to claimant as well as to employer. *Cf. Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). While an administrative law judge is obligated to insure a full and fair hearing on all the issues, he is afforded broad discretion in dealing with procedural matters. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1985). Since no abuse of discretion has been demonstrated, we affirm the administrative law judge's evidentiary ruling.

Claimant next challenges the administrative law judge's weighing of the x-ray evidence of record at Section 718.202(a)(1), arguing that the administrative law judge improperly performed a simple head count of negative x-ray interpretations. We can discern, however, no error in the administrative law judge's weighing of this evidence. The administrative law judge accurately reviewed the x-ray evidence of record, and permissibly relied on the preponderance of negative interpretations by dually qualified Board-certified radiologists and B readers.[5] Decision and Order at 11-12; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). As the administrative law

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accordance with the provisions at 20 C.F.R. §725.456(b)(3), may be admitted at the hearing with the written consent of the parties, or on the record at the hearing, or upon a showing of good cause as to why such evidence was not exchanged. 20 C.F.R. §718.456(b)(3).

[4] Employer timely submitted claimant's 2006 and 2007 treatment records for admission into the record. Employer's Exhibits 19, 20, 21. Employer had previously submitted claimant's treatment records for the period from 1995 through July 2006. Employer's Exhibits 4-6, 13-15.

[5] The x-ray evidence consists of eight interpretations of two x-rays. The March 21, 2005 x-ray was read as negative for pneumoconiosis by Drs. Whitehead, Wiot, and Spitz, all dually qualified physicians, Director's Exhibits 21, 35; Employer's Exhibit 8; and as positive by Drs. Cappiello and Ahmed, both dually qualified physicians. Director's Exhibits 35, 44. The August 15, 2005 x-ray was read as negative by Dr. Repsher, a B reader, as well as by Dr. Wiot, Director's Exhibit 36; Employer's Exhibit 3; and as positive by Dr. Cappiello, Director's Exhibit 44.

judge properly considered the contemporaneous nature of the x-rays, as well as the qualifications of the physicians, we affirm the administrative law judge's finding that claimant failed to meet his burden of establishing the existence of pneumoconiosis at Section 718.202(a)(1), as supported by substantial evidence. *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983).

Claimant also challenges the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), arguing that the administrative law judge's analysis does not comport with the requirements of 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), 30 U.S.C. §932(a). Specifically, claimant argues that the administrative law judge did not provide a complete and accurate analysis of Dr. Cohen's medical opinion,[6] and that with respect to the CT scan evidence, the administrative law judge failed to consider the physicians' respective qualifications in conjunction with claimant's occupational history, clinical examination and objective test results. Claimant's Brief at 5-9. Claimant's arguments lack merit.

The administrative law judge considered the CT scan evidence when weighing the medical reports, and determined that Dr. Wiot, a Board-certified radiologist and B reader, interpreted the August 15, 2005 CT scan as showing "prominent centrilobular emphysema which is not a manifestation of coal dust exposure," and no evidence of coal workers' pneumoconiosis. Employer's Exhibit 2; Decision and Order at 6. Dr. Cohen, a B reader, read the same film as showing "extensive scarring and fibrosis noted at the bases with an elevated right hemidiaphragm…[t]here are dense calcifications in the right hilar and sub-carinal lymph nodes…[t]here are also scattered round opacities in the upper lobes between 1.5 and 3 mm in diameter." Claimant's Exhibit 2; Decision and Order at 6, 9. Citing *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002), the administrative law judge permissibly found that "the two reports produced varying interpretations," and at best, represented inconclusive evidence.

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[6] Dr. Cohen provided a fifteen-page consultative opinion based on his review of the medical opinions of record, as well as claimant's occupational, smoking and medical histories, x-ray readings, CT scan, pulmonary function studies, arterial blood gas studies, electrocardiograms, echocardiograms, and claimant's treatment records from 1995 through 2006. Dr. Cohen diagnosed coal workers' pneumoconiosis and moderately severe obstructive lung disease significantly contributed to by claimant's twenty years of coal mine dust exposure and his thirty-eight pack years of smoking. He opined that claimant's respiratory impairment has disabled him for his last coal mine job. Claimant's Exhibit 2.

Decision and Order at 14; *see Director, OWCP v. Greenwich Collieries* [*Onderko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

In evaluating the conflicting medical opinions of record at Section 718.202(a)(4), the administrative law judge determined that Dr. Cohen was the only physician to diagnose clinical and legal pneumoconiosis, while Drs. Dumas, Repsher and Tuteur found no pneumoconiosis.[7] Decision and Order at 13. The administrative law judge reviewed Dr. Cohen's opinion and underlying documentation, and acted within his discretion in finding that the opinion was entitled to little weight, as the doctor's diagnosis of clinical pneumoconiosis was premised largely on positive x-ray and CT scan interpretations, contrary to the administrative law judge's finding that this evidence did not establish the existence of pneumoconiosis. Decision and Order at 14. Further, the administrative law judge determined that the diagnosis was unsupported by claimant's medical records, as they did not mention any lung disease caused by coal dust exposure. *Id.* Regarding Dr. Cohen's diagnosis of legal pneumoconiosis, the administrative law judge also permissibly found the doctor's rationale to be inadequate, as Dr. Cohen summarily opined that emphysema present on claimant's chest imaging was caused by both coal dust exposure and smoking, but failed to explain and provide support for his conclusion that a causal link existed between claimant's coal dust exposure and his emphysema/obstructive impairment. Decision and Order at 14; *see Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge, therefore, rationally found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

The administrative law judge addressed all relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for his credibility determinations. Thus, his Decision and Order comports with the requirements of the

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[7] The administrative law judge accorded little weight to the opinion of Dr. Dumas, who diagnosed chronic obstructive pulmonary disease (COPD) due entirely to smoking, as it was primarily a clinical diagnosis, and because the doctor failed to explain how he ruled out legal pneumoconiosis given the miner's extensive mining history. Decision and Order at 13; Director's Exhibit 17. Similarly, the administrative law judge discounted as insufficiently reasoned the opinions of Drs. Respsher and Tuteur, who did not diagnose either clinical or legal pneumoconiosis, because while both physicians diagnosed COPD, they failed to "illustrate how they rationally eliminated twenty years of coal mine employment as a contributor to the disease." Decision and Order at 14; Director's Exhibit 36; Employer's Exhibits 9, 17. Accordingly, the administrative law judge found their opinions to be little more than observations that coal mine dust usually does not cause COPD, followed by a conclusion that claimant's COPD was, therefore, probably not caused by coal dust exposure. *Id*.

APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR 1-111.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge