BRB No. 02-0879 BLA

DONALD THACKSTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENNELIS ENERGIES, INCORPORATED	)	DATE ISSUED: 08/28/2003
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0760) of Administrative Law Judge Jeffrey Tureck 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 administrative law judge found that the record supported a finding of a coal mine employment history of forty years, and a smoking history of Aat least a pack of cigarettes a day for 40-50 years.@ Decision and Order at 2-3. Turning to the merits of entitlement, the administrative law judge concluded that the x-ray evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)(2000). Decision and Order at 3-4. The administrative law judge further found that claimant was unable to establish the presence of the disease pursuant to 20 C.F.R. '718.202(a)(2), (3)(2000). Decision and Order at 4. Lastly, the administrative law judge found that other relevant medical evidence of record, *i.e.*, CT scan evidence and medical opinion evidence, insufficient to support a finding of pneumoconiosis at 20 C.F.R. '718.202(a)(4)(2000). Decision and Order at 4-10. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his smoking history determination. Claimant further argues that the administrative law judge erred in concluding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Employer, in response urges that the administrative law judge=s denial of benefits be affirmed. The Director, Office of Workers= Compensation Programs (the Director), has not filed a brief in this appeal.[2]

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,

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm, as unchallenged on appeal, the administrative law judge=s length of coal mine employment determination and his determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant contends that the administrative law judge erred in his analysis of the x-ray opinion evidence as the administrative law judge improperly relied on a mere Ahead count@ in concluding that the weight of the x-ray evidence failed to support a finding of the existence of the disease. After review of the administrative law judge=s Decision and Order and claimant=s assertions regarding the administrative law judge=s analysis of the evidence at Section 718.202(a)(1), we hold that substantial evidence supports the administrative law judge=s conclusion that the x-ray evidence of record failed to establish the existence of pneumoconiosis at that subsection.

In concluding that the x-ray evidence of record failed to support a finding of the existence of pneumoconiosis, the administrative law judge found that the record consisted of fifty x-ray interpretations. The administrative law judge concluded that, of these fifty interpretations, seventeen were positive for the existence of pneumoconiosis, while the remaining interpretations did not support the presence of the disease. He further found that the weight of the readings by physician=s with B-reader qualifications was negative for the existence of pneumoconiosis, Decision and Order at 4. The administrative law judge further found that the most probative x-ray interpretations were those rendered by Dr. Wiot based on the physicians Apre-eminent[]@ qualifications in the field of radiology. He found that all five interpretations rendered by Dr. Wiot, Director=s Exhibits 28, 30, 36; Employer=s Exhibit 1, were negative for the existence of pneumoconiosis.

Contrary to claimant=s assertion, the administrative law judge did not rely on a Amere head count@ to conclude that the x-ray evidence did not support a finding of the existence of pneumoconiosis. Rather, the administrative law judge considered the entirety of x-ray evidence of record plus the qualifications of those physicians rendering interpretations. The administrative law judge=s determination was rationally based on the qualifications of those physicians rendering x-ray readings. *See Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). Further, in a permissible exercise of his discretion, the administrative law judge accorded greatest weight to the negative interpretations rendered by Dr. Wiot based on the physician=s superior qualifications established in the record. *See* Employer=s Exhibit 16; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*). Further, contrary to claimant=s assertion, we hold that the administrative law judge=s finding that the x-ray readings of Drs. Marmo, Ailanani and Gulati, Employer=s Exhibits 3, 5, 6, constitute negative readings for pneumoconiosis constitutes harmless error. *See Larioni v.*

Director, OWCP, 6 BLR 1-1276 (1984). While claimant correctly asserts that the physicians, who concluded that claimant=s chest x-ray was normal, did not render their x-ray interpretations in a manner consistent with ILO U/C classification system, *see* 20 C.F.R. ''718.102, 718.103, 718.202, the basis of the administrative law judge=s conclusion was that the weight of interpretations by physicians with superior qualifications was negative for the existence of pneumoconiosis. Thus, the x-ray interpretations lacking appropriate classification played no role in the administrative law judge=s conclusion. *See Larioni* 6 BLR at 1-1276. Accordingly, we hold that substantial evidence supports the administrative law judge=s determination that claimant was unable to establish the existence of pneumoconiosis pursuant to the x-ray evidence of record. 20 C.F.R. '718.202(a)(1)(2000).

Claimant further argues that the administrative law judge erred in concluding that the other evidence of record, specifically the CT scan evidence of record and the medical opinion evidence, failed to establish the existence of pneumoconiosis. Initially, claimant argues that the administrative law judge misinterpreted the CT scan evidence as he concluded that Drs. Selby and Tuteur had reviewed the scans when, in fact, the physicians had not. In reviewing the CT scan evidence of record, the administrative law judge concluded that the evidence, Director=s Exhibits 30, 33, 36-38, Employer=s Exhibits 2, 6, was Auniformly negative@ for the existence of pneumoconiosis. Decision and Order at 4. The administrative law judge concluded this evidence Aconfirm[ed] the correctness@ of the negative x-ray interpretations. Decision and Order at 4. A review of the CT scan evidence shows, as claimant asserts, that it is not clear that Dr. Tuteur reviewed the April 15, 1997 CT scan, Director=s Exhibit 30. Rather, the reading of the scan may have been performed by a colleague of the physician. Similarly, the record is not clear that Dr. Selby read the April 8, 1999, as the record indicates the scan was actually read by Dr. O=Hearn. Contrary to claimant=s assertion, however, the administrative law judge=s findings regarding these interpretations constitutes harmless error, *see Larioni*, 6 BLR at 1-1276, as the administrative law judge found, the CT scan evidence of record is completely negative for the existence of pneumoconiosis. Accordingly, claimant is unable to use CT scan evidence to support a finding of the existence of pneumoconiosis. Moreover, contrary to claimant=s assertion, the administrative law judge did not assert that Athe CT scan evidence automatically trumps x-ray evidence.@ Claimant=s Brief at 15. Rather, the administrative law judge merely observed that the CT scan reinforced the negative x-ray evidence of record. Decision and Order at 4. To the extent that substantial evidence supports the administrative law judge=s statement, we affirm the determination that the CT scan evidence fails to support a finding of pneumoconiosis.

Claimant further argues that the administrative law judge erred in his analysis of the medical opinion evidence in concluding that such evidence failed to support a finding of pneumoconiosis; claimant raises numerous arguments in support of this contention. Initially, claimant asserts that the administrative law judge=s failed to consider the conflicting evidence regarding claimant=s smoking history and that this calls into question the validity

of his analysis. Specifically, claimant argues that the records support a finding of a smoking history of 30-41 pack years. Claimant asserts that the administrative law judge failed to comment on the credibility of his testimony of a 30-pack year history and that the administrative law judge failed to explain the basis for his determination of a 40-50 pack year history.

Contrary to claimant=s assertions, the administrative law judge=s determination of a smoking history of Aat least a pack of cigarettes a day for 40-50 years,@ Decision and Order at 4, is supported by substantial evidence. The administrative law judge considered the entirety of the record evidence addressing claimant=s smoking history. Decision and Order at 2-3. In considering the evidence, the administrative law judge noted claimant=s hearing testimony of thirty years, Hearing Transcript at 37-38, but also addressed claimant=s inconsistent recitations of smoking history to various physicians of record, which ranged from 30-49 years, Director=s Exhibits 12, 14, 15, 30; Claimant=s Exhibit 16. The administrative law judge also considered the results of the carboxyhemoglobin test suggesting a smoking history of up to 49 years. Director=s Exhibit 16; Employer=s Exhibits 2, 16. We hold that the administrative law judge has rationally concluded that claimant=s smoking history is 40-50 years as he has addressed all relevant evidence and has drawn a reasonable conclusion. Thus the administrative law judge=s findings comply with the Administrative Procedure Act (the 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) and 30 U.S.C. '932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *Id*. We are thus unable to say that the administrative law judge=s length of smoking determination constitutes an abuse of his discretion as trier-of-fact. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant further argues that the administrative law judge improperly rejected the opinions of Drs. Cohen, Houser, Sanjabi, and Kane, all of whom diagnosed the existence of pneumoconiosis, Director=s Exhibits 12-15, 44; Claimant=s Exhibits 16, 17, in favor of the contrary opinions of Drs. Tuteur, Renn, Fino, and Repsher, all of whom rule out the presence of pneumoconiosis and/or any coal mine dust related disease arising out of coal mine employment, Director=s Exhibits 30, 47; Employer=s Exhibits 1, 2, 5, 11, 13, 16, 17, 20, 22. Substantial evidence supports the administrative law judge=s determination that the medical opinion evidence fails to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). In reaching this determination we hold that claimant=s assertions are tantamount to a request to reweigh the evidence of record, a role outside 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); *see also Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1277-78, 18 BLR 2-42, 2-48 (7th Cir. 1991)(AIt is the sole province of the administrative law judge to weigh the evidence and resolve conflicts therein@). In considering the medical

opinions of record, the administrative law judge recognized that Drs. Cohen, Sanjabi, Kane and Houser all diagnosed the existence of pneumoconiosis. Decision and Order at 5. Contrary to claimant=s assertion, the administrative law judge rationally found Dr. Cohen=s opinion to be entitled to little weight because the physician failed to fully explain his conclusions. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985). While the administrative law judge recognized that Dr. Cohen=s opinion was the strongest on behalf of claimant, the administrative law judge permissibly called into question the credibility of Dr. Cohen=s opinions as the physician failed to fully explain the effect of this claimant=s smoking on his disease process. While the administrative law judge accepted Dr. Cohen=s statement that coal mine dust exposure can cause obstructive ventilatory impairments, *i.e.*, Alegal pneumoconiosis,@ *see* 20 C.F.R. ' 718.201(a)(2), the administrative law judge permissibly found the opinion of Dr. Cohen to be entitled to little weight because the physician=s opinion failed to establish that A*this claimant=s* obstructive ventilatory impairment arises at least in part from his coal mine employment,@ Decision and Order at 8. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985).

Further, the administrative law judge permissibly accorded little weight to Dr. Houser=s diagnosis of pneumoconiosis as the physician=s opinion failed to fully to explain the basis of his medical conclusions. *See Oggero*, 7 BLR at 1-860 (1985); *Cooper*, 7 BLR at1-842 (1985); *York* at 7 BLR 1-766 (1985). Moreover, the administrative law judge permissibly concluded that Dr. Sanjabi=s opinion was similarly unexplained as the physician diagnosed coal workers= pneumoconiosis and an ongoing 48 pack year smoking history but failed to elaborate on his findings. *See Oggero*, 7 BLR at 1-860 (1985); *Cooper*, 7 BLR at1-842 (1985); *York* at 7 BLR 1-766 (1985). Lastly, with regard to the opinion of the remaining physician diagnosing the existence of pneumoconiosis, the administrative law judge concluded that Dr. Kane=s medical conclusion is similarly without reasoning or explanation and thus entitled to little weight.[3] *See Clark*, 12 BLR at 1-149 (1989); *Oggero*, 7 BLR at 1-860 (1985); *Cooper*, 7 BLR at1-842 (1985); *York* at 7 BLR 1-766 (1985).

Further, we hold that the administrative law judge has permissibly accorded greatest weight to the opinions of Dr. Tuteur concluding that claimant did not suffer from

[3] The administrative law judge noted the entire statement of Dr. Kane: A[Claimant] has a history of COPD and working in underground coal mines. It is very possible that pneumoconiosis and underlying Chronic Lung Disease will be contributing factors to his demise.@ Director=s Exhibit 14. The administrative law judge rationally concluded that it Ais unclear whether Dr. Kane is diagnosing pneumoconiosis or is merely indicating that clamant may get pneumoconiosis and perhaps die from it sometime in the future,@ Decision and Order at 6. *See generally Kuchwara* at 7 BLR 1-167 (1984).

pneumoconiosis. Director=s Exhibit 30; Employer=s Exhibits 1, 13, 22. Contrary to claimant=s assertion, the administrative law judge need not have made a specific determination that Dr. Tuteur=s opinions were reasoned and documented. Implicit in an administrative law judge=s reliance upon a particular physician's opinion is a finding that the opinion is reasoned. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *see also Freeman United Coal Mining Co. v. Cooper,* 965 F.2d 443, 448, 16 BLR 2-74, 2-79 (7th Cir. 1992). The administrative law judge thoroughly reviewed Dr. Tuteur=s opinions and concluded that the physician=s opinion was most credible because the physician examined claimant, provided Areasonably accurate employment and cigarette smoking histories@ and also addressed the remainder of the evidence of record. Decision and Order at 9. The administrative law judge thus reasonably concluded that Dr. Tuteur=s opinion was the most persuasive of record. *See Livermore v. Amax Coal Co*., 297 F.3d 668, 672, 22 BLR 2-399, 2-407 (7th Cir. 2002). We therefore affirm, as supported by substantial evidence, the administrative law judge=s determination that the medical opinion evidence, along with the CT scan evidence does not support a finding of pneumoconiosis at Section 718.202(a)(4). Because the evidence fails to support a finding of the existence of pneumoconiosis, an essential element of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the denial of benefits.

Accordingly, the administrative law judge=s Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

ROY P SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge