BRB No. 05-0995 BLA

CYRIL L. SMOTHERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 08/31/2006
Employer-Respondent	)	
	)	
	)	
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.

Gary B. Nelson and Cheryl L. Erdman (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5245) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, based on claimant's August 10, 2001 filing date, the administrative law judge credited claimant with thirty-two years of coal mine employment and found Consolidation Coal Company (employer) to be the properly designated responsible operator. The administrative law judge further found that the miner had a smoking history of one and one-half packs of cigarettes per day from 1958 through 1996.

Addressing the merits of entitlement, the administrative law judge found that the medical evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in denying benefits, arguing that the administrative law judge erred in weighing the x-ray evidence of record as well as the CT scan and medical opinion evidence when finding the medical evidence failed to establish the existence of pneumoconiosis. In addition, claimant contends that the administrative law judge erred in admitting the medical opinion of Dr. Sanjabi, in violation of 20 C.F.R. §§725.414 and 725.456(b)(1). Claimant also argues that the administrative law judge erred in his determination that claimant's smoking history was one and one-half packs of cigarettes per day. In response, employer urges affirmance of the administrative law judge's denial of benefits as within a proper exercise of his discretion. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond in this appeal.[1]

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. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, claimant contends that the administrative law judge erred in admitting the medical opinion of Dr. Sanjabi, Director's Exhibit 28 pp. 209-212, as it is medical opinion evidence submitted in excess of the regulatory limitations set forth at Section 725.414. Specifically, claimant contends that the administrative law judge erred in finding that "good cause" was established for the admission of the report because

[1] We affirm the administrative law judge's decision to credit claimant with thirty-two years of coal mine employment, his determination that employer was the properly designated responsible operator, and his finding that the medical evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), as unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

employer did not provide a specific reason for the admission of this report. This contention lacks merit.

At the formal hearing, the administrative law judge acknowledged that employer's submission of the report of Dr. Sanjabi, contained within a compilation of treatment records, constituted excessive medical opinion evidence pursuant to Section 725.414 because it did not meet the definition of a treatment record. Hearing Transcript at 10-11. Employer, in seeking admission of the report, stated that it was relevant and pertained to the issue of claimant's smoking history. Hearing Transcript 13. Based on the facts of this case and the arguments raised, error, if any, in the administrative law judge's admittance of Dr. Sanjabi's report into the record based on employer's allegation of relevancy is harmless because the administrative law judge did not rely on this report in his determination of the length of claimant's smoking history or his evaluation of the evidence at Section 718.202(a)(4).[2] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In addition, we reject claimant's contention that the administrative law judge failed to adequately explain his finding regarding claimant's smoking history. Contrary to claimant's contention, the administrative law judge considered claimant's hearing testimony of one pack of cigarettes a day from 1958 through 1996, Hearing Transcript at 40-41, as well as the varied histories provided in the medical opinions of record which reported a heavier smoking history than testified to by claimant. Decision and Order at 2. Specifically, the administrative law judge found that Dr. Clark reported a smoking history of up to one and one-half packs of cigarettes per day and that Dr. Kelley, in a 1983 medical report, stated that claimant had a fifty pack year smoking history and reported a similar history in a 2002 medical report. Decision and Order at 2; Director's Exhibit 28 at 102, 111, 191. In addition, the administrative law judge found that in his 2000 medical report, Dr. Dave indicated that claimant had a greater than fifty pack year history of smoking and, Dr. Repsher, in his 1996 medical opinion, reported that the carboxyhemoglobin test associated with his examination of claimant indicated that claimant was smoking at least two packs of cigarettes per day. Decision and Order at 2; Director's Exhibit 28 at 15, 213; Employer's Exhibit 4. Weighing this conflicting

[2] Dr. Sanjabi diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD). Director's Exhibit 28 at 209-212. However, the administrative law judge found this opinion not credible because the physician based his diagnosis of pneumoconiosis on a positive x-ray interpretation which the administrative law judge found to be against his findings at 20 C.F.R. §718.202(a)(1). Decision and Order at 8. Additionally, the administrative law judge found that Dr. Sanjabi's diagnosis of COPD was insufficient to establish legal pneumoconiosis because the physician did not relate claimant's COPD to his coal mine employment. *Id*.

evidence, the administrative law judge reasonably exercised his discretion in accepting claimant's testimony of smoking from 1958 through 1996, but determined that claimant smoked "at least 1½ packs of cigarettes" during this time. Decision and Order at 2-3; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *see also Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Consequently, we affirm the administrative law judge's finding.

Pursuant to Section 718.202(a)(1), the administrative law judge found that the x-ray evidence of record failed to establish the existence of pneumoconiosis. In particular, the administrative law judge found that the negative x-ray evidence of record, including the negative interpretations by Dr. Wiot, as well as the interpretations from claimant's treatment notes, outweighed the positive interpretations by Drs. Ahmed, Cappiello, and Whitehead. Decision and Order at 4.

Claimant contends that that the administrative law judge erred in how he weighed the x-ray evidence of record, particularly, that the administrative law judge did not consider the x-rays individually and then as a whole. Claimant's Brief at 9. Claimant also contends that the administrative law judge erred in crediting the readings of Dr. Wiot over the positive readings of record, based on Dr. Wiot's "teaching status and administrative position in a professional association" and in finding Dr. Whitehead's interpretation of the November 30, 2001 x-ray to be ambiguous. Claimant's Brief at 7-8. Claimant also contends that the administrative law judge erred in giving considerable weight to the hospital radiology records contained in the treatment notes and hospital records because they do not conform to the quality standards as they are not on ILO classification forms. Claimant's Brief at 10. These contentions lack merit.

Contrary to claimant's contention, the administrative law judge considered all of the relevant x-ray evidence of record and discussed each of the x-ray films individually as well as weighing the entirety of the x-ray evidence as a whole. Decision and Order at 3-4; *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990). The administrative law judge considered individually each of the x-ray films admitted as affirmative evidence by the parties and found that the November 30, 2001 film was read as positive by Drs. Ahmed, Whitehead and Cappiello, each of whom is a B reader and Board-certified radiologist, but reread as negative by Dr. Wiot, who is also a dually-qualified radiologist. Decision and Order at 3; Director's Exhibits 18, 19; Claimant's Exhibits 1, 2; Employer's Exhibit 3. The administrative law judge then found that Dr. Ahmed read the November 2003 x-ray as positive, whereas Dr. Wiot found it negative for the existence of pneumoconiosis. Decision and Order at 4; Claimant's Exhibit 4; Employer's Exhibit 1. Likewise, the administrative law judge found that the March 9, 2004 x-ray was read as positive by Dr. Cappiello, but reread as negative by Dr. Wiot. Decision and Order at 4; Claimant's Exhibit 6; Employer's Exhibit 2. The administrative law judge then found that Dr. Wiot's negative interpretations outweighed the positive interpretations based on his

superior professional credentials and, therefore, that the x-ray evidence failed to establish the existence of pneumoconiosis. Decision and Order at 4.

Initially, we hold that contrary to claimant's contention, the administrative law judge reasonably exercised his discretion as trier-of-fact in finding that Dr. Whitehead's interpretation of the November 30, 2001 x-ray is ambiguous because the physician did not explain the difference between his narrative interpretation that the x-ray film "may reflect changes of pneumoconiosis" and his ILO form classification of 1/0 opacities and, thus, rationally accorded it no weight. Decision and Order at 4; Director's Exhibits 18, 19; *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999). Moreover, we note that even if the administrative law judge credited Dr. Whitehead's positive x-ray reading, he, nonetheless, reasonably accorded greater weight to Dr. Wiot's negative reading based on Dr. Wiot's superior professional credentials, *see* discussion, *infra*, and, therefore, found that the November 30, 2001 x-ray failed to establish the existence of pneumoconiosis.

Furthermore, we reject claimant's contention that the administrative law judge erred in according determinative weight to Dr. Wiot's x-ray interpretations based on his additional teaching and administrative credentials. The administrative law judge found that while all of the relevant x-ray interpretations were provided by dually-qualified physicians, neither Dr. Ahmed or Cappiello, who interpreted the films as positive, matched Dr. Wiot's additional qualifications as a Professor of Radiology and member of the American College of Radiology Task Force on Pneumoconiosis. Decision and Order at 4; Employer's Exhibit 1. Because the administrative law judge initially weighed the x-ray evidence taking into consideration the superior qualifications of each of the physicians, it was therefore not irrational for him to accord determinative weight to Dr. Wiot based on consideration of his additional radiological credentials. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *see generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

Claimant argues that the administrative law judge erred by giving "considerable weight" to hospital x-rays that were not in substantial compliance with the applicable quality standards. Claimant's Brief at 9. This argument lacks merit because the administrative law judge merely reviewed the hospital x-rays and noted that they did not contain a diagnosis of pneumoconiosis; he did not rely on them at Section 718.202(a)(1). He instead relied on the ILO-classified x-rays that were developed in connection with this claim. Decision and Order at 3-4. Therefore, we affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), based on his reasonable crediting of Dr. Wiot's negative interpretations over the positive interpretations of record.

Furthermore, we reject claimant's contention that the administrative law judge erred in failing to consider the qualifications of the physicians providing the CT scan

interpretations as well as failing to consider the time frame and purpose for which the CT scans were taken. Claimant's Brief at 12-13. The administrative law judge, in considering the CT scan evidence, found that this evidence failed to establish the existence of pneumoconiosis because all of the CT scans were either interpreted explicitly as negative for pneumoconiosis or the physicians interpreting the scans stated that they showed chronic obstructive pulmonary disease (COPD) but did not further relate the diagnosis to pneumoconiosis. Decision and Order at 5. The administrative law judge thus found that the unanimity of the CT scan interpretations was persuasive and therefore determined that the CT scan evidence is negative for pneumoconiosis. *Id*. Contrary to claimant's contention, the administrative law judge considered the professional credentials of the physicians providing the CT scan interpretations and rationally credited the negative interpretations by Drs. Wiot and Chen, based on their radiological qualifications. Decision and Order at 5; Director's Exhibit 13; Employer's Exhibits 2, 6. *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 893-4, 22 BLR 2-409, 2-423-4 (7th Cir. 2002). Because the administrative law judge found that all of the CT scan interpretations were negative for establishing the existence of pneumoconiosis, error, if any, in the administrative law judge's crediting of the remainder of the CT scan interpretations based on the physicians' status as pulmonary specialists, and not radiological specialists, without adequately explaining his basis for this conclusion is harmless as these interpretations are merely supportive of the administrative law judge's ultimate findings. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

However, as claimant correctly contends, the Board held recently in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J. concurring), that, pursuant to 20 C.F.R. §§718.107(a) and 725.414(a)(2)(ii), (a)(3)(ii), each party may proffer only one reading of each CT scan in support of its affirmative case and one reading in rebuttal of each reading submitted by the opposing party in support of its affirmative case. *Webber*, 23 BLR at 1-135. Nevertheless, as the administrative law judge found that none of the CT scan evidence is supportive of a finding of the existence of pneumoconiosis, we need not remand the case for the administrative law judge to determine which evidence is properly admissible as consideration of any of the additional evidence herein is harmless. *See Larioni*, 6 BLR 1-1276. Consequently, we affirm the administrative law judge's finding that the CT scan evidence failed to support a finding of the existence of pneumoconiosis.

Pursuant to Section 718.202(a)(4), the administrative law judge found that the medical opinion evidence failed to establish the existence of pneumoconiosis. Initially, he noted that the medical treatment notes dated between 1983 and 2004 and provided by Drs. Clark, Kelley, and Dave includes diagnoses of COPD, as well as other non-pulmonary conditions, but do not contain diagnoses of pneumoconiosis or opinions relating claimant's COPD to his coal mine employment. Decision and Order at 6. Thus,

the administrative law judge found that these treating physicians did not diagnose either clinical or legal pneumoconiosis. *Id*. In addition, the administrative law judge found that the opinions of Drs. Houser, Sanjabi, and Cohen, each of whom diagnosed pneumoconiosis, are not credible and, therefore, insufficient to establish the existence of pneumoconiosis. He further found that although the contrary opinions of Drs. Tuteur and Repsher credibly stated that claimant does not suffer from clinical pneumoconiosis, they did not adequately address why claimant's COPD is not related to his coal mine employment and, thus, the administrative law judge did not credit these opinions. Decision and Order at 10. Consequently, the administrative law judge found that the medical opinion evidence fails to establish that claimant suffers from either clinical pneumoconiosis or legal pneumoconiosis as it does not establish that claimant's obstructive impairment is related to his coal mine employment.

Claimant contends that the administrative law judge erred in weighing the medical treatment records of Drs. Clark, Kelley, and Dave as medical opinion evidence. Claimant's Brief at 14-15. Specifically, claimant contends that the administrative law judge erred in according significant weight to the lack of a diagnosis of pneumoconiosis in the treatment records. Claimant also contends that the administrative law judge erred in considering the medical opinion of Dr. Sanjabi as this report should not have been admitted into the record under Section 725.414. Claimant's Brief at 14. Claimant further contends that the administrative law judge erred in discrediting Dr. Houser's diagnosis of clinical pneumoconiosis solely because it was based on a positive x-ray interpretation and that he provided impermissible bases for discrediting Dr. Houser's diagnosis of legal pneumoconiosis. Claimant's Brief at 15-17. In addition, claimant contends that the administrative law judge erred in discrediting the medical opinion of Dr. Cohen based on his determination that Dr. Cohen relied on "slanted" x-ray evidence and that the administrative law judge misinterpreted Dr. Cohen's opinion concerning legal pneumoconiosis. Claimant's Brief at 17-21. These contentions do not have merit.

Contrary to claimant's contention, the administrative law judge properly considered all of the medical opinion evidence, including the diagnoses included in the treatment notes provided by Drs. Clark, Kelley, and Dave, as they were properly admitted evidence pursuant to Section 725.414(a)(4). The administrative law judge rationally found that these opinions were relevant to the issue of whether claimant suffers from pneumoconiosis as they were claimant's treatment records concerning his pulmonary condition. Director's Exhibits 13, 28; Employer's Exhibits 8, 9. Specifically, the administrative law judge reasonably found that Dr. Clark and Dr. Dave treated claimant for his pulmonary condition and while consistently diagnosing COPD, did not relate this diagnosis to claimant's coal mine employment or diagnose pneumoconiosis, even though they were fully aware of claimant's employment history. Thus, it was not irrational for the administrative law judge to find it "of great significance" that claimant's treating pulmonary physicians did not diagnose pneumoconiosis. Decision and Order at 6.

In addition, we reject claimant's contention that the administrative law judge erred in weighing the medical opinion of Dr. Houser. Contrary to claimant's contention, the administrative law judge reasonably found that Dr. Houser's diagnosis of clinical pneumoconiosis was based on his positive x-ray interpretation and the length of claimant's coal mine employment. Director's Exhibit 14; Claimant's Exhibit 3 at 21-22. Because the administrative law judge found the weight of the x-ray evidence, including the rereadings of Dr. Houser's film, to be negative for the existence of pneumoconiosis, it was reasonable for the administrative law judge to find Dr. Houser's diagnosis of clinical pneumoconiosis not credible as the physician did not provide any further explanation of his diagnosis. Decision and Order at 7; Director's Exhibit 14; Claimant's Exhibit 3; *Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002); *Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Furthermore, we affirm the administrative law judge's finding that Dr. Houser's diagnosis of legal pneumoconiosis is speculative, not credible and entitled to no weight as the physician did not adequately explain how the evidence, in this case, supports his determination that claimant's COPD is related to his coal mine employment. Specifically, the administrative law judge found that while Dr. Houser cited to the medical literature which explains how coal mine employment can cause COPD, the administrative law judge reasonably exercised his discretion in finding that Dr. Houser did not provide a rational explanation of how coal mine employment caused claimant's COPD in this case. Decision and Order at 7-8; Director's Exhibit 14; Claimant's Exhibit 3; *Livermore*, 297 F.3d 668, 22 BLR 2-399; *Peabody Coal Co. v. Benefits Review Board* [*Wells*], 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977); *Clark*, 12 BLR 1-149; *Tackett*, 12 BLR 1-11.

Similarly, with regard to Dr. Cohen's opinion, the administrative law judge found that Dr. Cohen, while acknowledging that coal mine employment may cause COPD, failed to adequately explain how the evidence, in this case, supports such a determination. Decision and Order at 9; Claimant's Exhibits 5, 7, 8; *Livermore*, 297 F.3d 668, 22 BLR 2-399; *Wells*, 560 F.2d 797, 1 BLR 2-133; *Clark*, 12 BLR 1-149; *Tackett*, 12 BLR 1-11. Moreover, contrary to claimant's contention, the administrative law judge did not discredit Dr. Cohen's opinion because it was based on "slanted" x-ray evidence. Claimant's Brief at 17-18. Rather, the administrative law judge found that Dr. Cohen's opinion was based on an incomplete record of claimant's medical history, in particular, that Dr. Cohen was missing much of the radiographic evidence, comprised of x-rays and CT scans, that had been developed in conjunction with claimant's treatment for his pulmonary condition. Decision and Order at 8. In addition, the administrative law judge found that Dr. Cohen relied too much on the two positive x-rays readings he reviewed to the exclusion of the multiple negative x-ray readings he also reviewed and, thus, gives the impression that the x-ray evidence was positive for the existence of pneumoconiosis,

which is contrary to the administrative law judge's findings at Section 718.202(a)(1). Decision and Order at 9. Moreover, the administrative law judge found that Dr. Cohen's diagnosis that claimant's COPD is due to his coal mine employment is not credible because is it not supported by the underlying documentation, particularly, that Dr. Cohen, while citing to the medical literature that coal mine employment can cause COPD, did not provide a rational explanation of how coal mine employment caused claimant's COPD in this case. Decision and Order at 9-10; Claimant's Exhibit 5, 7; *Livermore*, 297 F.3d 668, 22 BLR 2-399; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As the administrative law judge considered fully the underlying bases of Dr. Cohen's opinion, we affirm his decision to accord this opinion little weight.

Moreover, claimant, in challenging the administrative law judge's weighing of the opinions of Drs. Houser and Cohen, is in effect merely seeking a reweighing of the medical evidence of record, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as we have affirmed the administrative law judge's finding that the opinions of Drs. Houser, Sanjabi, and Cohen, the only opinions supportive of claimant's burden of establishing the existence of pneumoconiosis, are not credible and entitled to little weight, we need not address claimant's arguments concerning the contrary medical opinion evidence. Therefore, we affirm the administrative law judge's finding that the medical opinions are insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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