BRB No. 00-0300 BLA

DERALD W. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING COMPANY	)	DATE ISSUED: _____
	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Vernon L. Plummer, II (Plummer Law Offices, P.C.), Shelbyville, Illinois, for claimant.

John A. Washburn (Gould & Ratner), Chicago, Illinois, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-0230) of Administrative Law Judge Donald W. Mosser 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). The administrative law judge credited claimant with twenty years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the

[1]The administrative law judge found that claimant worked for employer from 1963 to 1965 and from 1976 until his retirement in 1994. The administrative law judge found that

administrative law judge found that the evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). The administrative law judge further found that even if the evidence establishes the existence of pneumoconiosis, it fails to establish that claimant's total disability is due to pneumoconiosis under 20 C.F.R. §718.204(b). In this regard, the administrative law judge noted the parties' agreement that claimant is totally disabled from a respiratory standpoint and found that the evidence of record establishes a totally disabling respiratory impairment under 20 C.F.R. §718.204(c). The administrative law judge further found that claimant failed to establish disability causation at Section 718.204(b) under *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991) and *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings that the medical opinions fail to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at Section 718.204(b). Claimant further asserts that he is entitled to the presumption that his pneumoconiosis arose from his coal mine employment under 20 C.F.R. §§718.203(b) and 718.302. Employer responds, and urges the Board to affirm the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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 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 Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). In the instant case, which arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), claimant must establish that his pneumoconiosis is a contributing cause of his total disability, such that mining must be a necessary, but need not be a sufficient, condition of disability. *See Shelton, supra*, 899 F.2d at 693, 13 BLR at 2-448; *see also Compton, supra*.

Claimant challenges the administrative law judge's finding that the medical opinions

---

claimant worked as an underground repairman in 1976 and 1977, then moved to the surface of the mine as an electrician. The administrative law judge further considered the specific duties of claimant's work as an electrician. Decision and Order at 4.

fail to establish the existence of pneumoconiosis at Section 718.202(a)(4). The record contains relevant opinions by Drs. Drake, Cohen, Main and Fino.

Dr. Drake examined claimant and performed objective tests. He diagnosed history of heavy cigarette smoking, 68 pack years; right upper lobectomy for epidermoid carcinoma of the lung in 1981; emphysema, chronic bronchitis, and pulmonary fibrosis by x-ray, noting "[p]neumoconiosis cannot be excluded" based on the positive x-ray reading; and secondary polycythemia, hemoglobin 17.2. Director's Exhibit 13. Dr. Drake opined that claimant's pneumoconiosis contributes to his pulmonary problem. He stated, "Certainly the main problem is his long cigarette-smoking history but there is shunting during exercise, x-ray evidence that is compatible with pneumoconiosis, and he gives a fairly long coal-working history. Therefore, it would appear to me that there is a presumption that pneumoconiosis is a contributing factor." Director's Exhibit 15.

Dr. Cohen examined the miner, performed objective tests, and reviewed additional medical evidence. He found that claimant has coal workers' pneumoconiosis and opined that claimant's degree of impairment would preclude him from the exertion required by his last coal mining job. Dr. Cohen indicated that this impairment was caused by claimant's 20 years of coal dust exposure and 45 to 60 pack-years of smoking. Claimant's Exhibit 2.

Dr. Main examined the miner and performed objective tests. He found that claimant does not have coal workers' pneumoconiosis and indicated that his chronic obstructive pulmonary disease that is primarily emphysema with some bronchitis "was no doubt due to past cigarette smoking." Director's Exhibit 24. Dr. Main concluded that claimant is totally disabled from work due to his chronic obstructive pulmonary disease with elements of emphysema and bronchitis, and opined that claimant's past history of lobectomy from lung cancer would explain a minimal restrictive defect which would also contribute to his impairment. Dr. Main also indicated that, "[t]he disability is not due to pneumoconiosis simply because he does not have pneumoconiosis. He does not have pneumoconiosis because the chest x-ray reveals absolutely no evidence of pneumoconiosis." *Id.*

Dr. Fino reviewed the medical evidence. He found insufficient objective evidence to justify a diagnosis of simple coal workers' pneumoconiosis. Dr. Fino also opined that claimant does not have an occupationally acquired pulmonary condition. Dr. Fino found an obstructive ventilatory abnormality and an impairment in oxygen transfer due to smoking and claimant's previous lung resection, which would prevent claimant from returning to his last mining job or job requiring similar effort. He further concluded, "... (4) This man would be

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings of twenty years of coal mine employment, that the evidence fails to establish pneumoconiosis at 20 C.F.R. §718.202(a)(1) through (a)(3), and that claimant established total respiratory disability under 20 C.F.R. §718.204(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

as disabled as I find him now had he never stepped foot in the coal mines. (5) Even if he had coal workers' pneumoconiosis, it neither caused nor contributed to his pulmonary disability." Employer's Exhibit 2.

Weighing these medical opinions, the administrative law judge found that Dr. Drake's report is not well-reasoned "as it appears he primarily based his diagnosis of pneumoconiosis on a positive x-ray, then merely presumed the existence of the disease based on the x-ray and claimant's history of coal mine employment." Decision and Order at 15. The administrative law judge further determined that although Dr. Cohen explained the rationale for his diagnosis, two pulmonologists, Drs. Fino and Main, came to contrary conclusions. In this regard, the administrative law judge found that Dr. Fino's opinion was well documented and reasoned, that Dr. Main examined claimant, and that both physicians were highly qualified in pulmonary disorders and their opinions were entitled to deference. *Id.*

Claimant argues that the administrative law judge erred in discrediting Dr. Drake's opinion because it was based on a positive x-ray, while crediting Dr. Main's opinion which was based on a negative x-ray. Claimant asserts that unlike Dr. Drake, Dr. Main did not consider whether pneumoconiosis was a cause of claimant's obstructive pulmonary disorder, but opined that claimant did not have pneumoconiosis solely because the x-ray evidence did not show the presence of the disease. Claimant thus argues that Dr. Main did not consider whether claimant has legal pneumoconiosis, and thus his opinion is not credible and the administrative law judge erred in relying upon it. Claimant further contends that Dr. Fino's findings that claimant does not have pneumoconiosis and that his impairment is due to smoking and his previous lung resection, are not credible. Claimant offers several reasons in support of his contention. Specifically, claimant argues that the fact that Dr. Fino finds no objective evidence of pneumoconiosis is an insufficient rationale for determining that claimant's chronic obstructive pulmonary disease is not caused by pneumoconiosis. In this regard, claimant cites to Dr. Fino's testimony that he could not rule out some degree of obstruction due to claimant's coal mine dust inhalation. Employer's Exhibit 53 at 13. Claimant also argues that Dr. Fino's conclusion that claimant's smoking-related obstructive abnormality worsened after claimant left the mines is unsupported and is actually contrary to the record which, claimant asserts, shows that the greatest loss in function occurred while claimant was working as a miner and before he resumed smoking. Claimant further asserts that the administrative law judge placed great weight on Dr. Fino's opinion based on his credentials without critically evaluating his opinion. Claimant further relies on the opinions of Drs. Drake and Cohen, which he argues are credible and entitled to some weight.

As an initial matter, it is within the discretion of the administrative law judge to determine the credibility of the medical opinion evidence. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Claimant's arguments regarding the opinions of Drs. Fino and Main amount to a request that the Board reweigh the evidence, which the Board will not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We note, however, that contrary to claimant's arguments, both Drs. Fino and Main provided explanations as to why

they attributed claimant's condition to causes unrelated to his coal mine employment. Director's Exhibit 24; Employer's Exhibits 1, 2, 53. Moreover, Dr. Fino testified that he "would never rule out pneumoconiosis as a diagnosis on the x-ray evidence alone." Employer's Exhibit 53 at 98.

The administrative law judge's consideration of the evidence at Section 718.202(a)(4), however, is not without error. We hold that the administrative law judge erred in according less weight to Dr. Drake's opinion that claimant has pneumoconiosis. Contrary to the administrative law judge's indication that Dr. Drake *presumed* the existence of the disease, the record reveals that Dr. Drake properly based his diagnosis of pneumoconiosis on a physical examination, coal mine employment, medical and smoking histories, and objective testing including an x-ray read as compatible with pneumoconiosis, as well as physical findings including "shunting during exercise." 20 C.F.R. §718.202(a)(4); Director's Exhibits 13, 15. Further, the administrative law judge's discrediting of Dr. Cohen's opinion because he found it outweighed by the contrary opinions of two pulmonologists, namely Drs. Fino and Main, cannot be affirmed. The record reveals that Dr. Cohen is also a pulmonologist. Claimant's Exhibit 1. Moreover, the administrative law judge erred by "counting heads." *See Sahara Coal Company v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The Seventh Circuit indicated in *Fitts* that the adjudicating tribunal shall not base its decision on a mechanical nose count of witnesses; that the principle of the numerical superiority of witnesses is invalid. 39 F.2d 782, 783; 18 BLR 2-386, 388. Based on the administrative law judge's errors in weighing the evidence at Section 718.202(a)(4), we vacate the administrative law judge's finding and remand the case for reconsideration of all the relevant evidence thereunder.

Claimant also challenges the administrative law judge's finding that the evidence does not establish that claimant's total respiratory disability is due to pneumoconiosis under Section 718.204(b). The administrative law judge initially determined that, although employer submitted evidence showing that employees working as electricians at the coal mine generally were exposed to less coal dust than employees working in other mining positions, he found this evidence too speculative to prove that claimant did not have enough exposure to coal dust to cause a respiratory impairment. The administrative law judge added,

---

[3]The record, as it now stands, contains the relevant opinions of four physicians: Drs. Cohen, Fino and Main, each a pulmonologist, as well as the opinion of Dr. Drake, a pathologist. Claimant's Exhibit 1; Employer's Exhibits 23-25. Two of these physicians, namely, Drs. Cohen and Drake rendered opinions supportive of claimant's case while the other two physicians, Drs. Fino and Main, did not. These witnesses are thus equally divided as to the cause of claimant's disability. The administrative law judge, on remand, must redetermine the credibility of these opinions and cannot rely on the principle of the numerical superiority of witnesses even if this principle were valid, which the Seventh Circuit, in *Sahara Coal Company v. Fitts*, 39 F.3d 781, 783, 18 BLR 2-384, 388 (7th Cir.1994), held that it is not.

"Additionally, the miner testified that he was exposed to coal dust in the various areas he worked in and as the evidence indicates, some miners develop pneumoconiosis even with minimal exposure." Decision and Order at 16-17.

The administrative law judge next considered the relevant medical opinion evidence under the controlling standard, as set forth by the Seventh Circuit in *Shelton*. He found that while the physicians agreed that claimant is totally disabled from a respiratory standpoint, they disagree as to the cause of disability. The administrative law judge indicated that Drs. Drake and Cohen both attributed claimant's total disability to his coal mine employment, while Drs. Main and Fino concluded that claimant's disability is due, not to pneumoconiosis, but to claimant's "considerable smoking history." Decision and Order at 17. The administrative law judge then found,

> Dr. Cohen described the medical studies which support the view that coal mine employment can cause obstructive impairments and stated that there is no way of separating the two exposures. Dr. Fino described the specific medical information which he relied on in making his determination and described how the miner's disability is more consistent with a smoking etiology. Both Drs. Main and Fino found the weight of the evidence they considered did not support a finding of coal workers' pneumoconiosis. Dr. Fino concluded that Mr. Wilson's impairment would be the same degree if he had never worked in the mines. I find the reports of Drs. Fino and Main are well-documented and well-reasoned. I therefore conclude that claimant has not met his burden of proof on this element.

Decision and Order at 17.

Claimant contends that the opinions of Drs. Fino and Main are not credible because they did not consider whether claimant's pneumoconiosis contributed to his disability because they found that pneumoconiosis was not present on x-ray. Claimant also refers to Dr. Fino's testimony that he could not rule out some degree of obstruction due to claimant's coal mine dust inhalation. Employer's Exhibit 53 at 13. Claimant further asserts, "As the pulmonary function studies contained in the record demonstrate, neither Mr. Wilson's surgery nor his smoking history considered separately or together provide a satisfactory account for the onset of Mr. Wilson's total respiratory disability. At best they can only be said to be "contributing causes" to Mr. Wilson's total disability. This is especially true, because the pulmonary function studies clearly show that Mr. Wilson was experiencing substantial losses in FEV-1 function subsequent to his surgery and prior to the resumption of his smoking while he continued his coal mine employment and exposure to coal dust." Claimant's Brief at 21. Claimant thus argues that the pulmonary function study evidence refutes Dr. Fino's opinion that claimant's loss in function was due to his lung resection surgery and smoking. Lastly, claimant relies on the opinions of Drs. Drake and Cohen in

asserting that his disability is due to his exposure to coal dust and smoking.

Contrary to claimant's contention, while Dr. Main did not find x-ray evidence of pneumoconiosis, he properly considered whether claimant's coal mine employment caused or contributed to his chronic obstructive pulmonary disease and resulting impairment, and found that it did not. 20 C.F.R. §718.204(b); Employer's Exhibit 1. Moreover, to the extent that claimant relies on Dr. Fino's medical opinion to support his case, his reliance is misplaced. As claimant notes, Dr. Fino testified that claimant's impairment was due to his previous lung resection and smoking, but he could not rule out some degree of obstruction due to claimant's inhalation of coal mine dust. Employer's Exhibit 53 at 8-9. Dr. Fino added, however, that "it's insignificant, and by insignificant I mean that the amount that he would have lost as a result of coal mine dust inhalation, assuming that he did, is small enough that he would have gotten to the same state of disability in the same manner, in the same time had he never stepped foot in the mines." Employer's Exhibit 53. The Seventh Circuit held in *Shelton* that "A miner is not entitled to benefits if by reason of his heavy smoking or some other activity or condition of his that is not itself mining, he would have become totally disabled (and no later than he did) even if he had never gone near a coal mine." 899 F.2d 693, 13 BLR at 2-448. Thus, Dr. Fino's opinion is not supportive of claimant's burden at Section 718.204(b). Moreover, claimant's reliance on the pulmonary function studies is likewise misplaced as this evidence is not probative of the cause of claimant's impairment. *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984).

Further, a review of the administrative law judge's findings at Section 718.204(b), however, reveals that the administrative law judge did not indicate what weight, if any, he accords to Dr. Drake's opinion that claimant's pneumoconiosis contributes to his disability. Decision and Order at 16-17; Director's Exhibit 15. This omission on the administrative law judge's part constitutes reversible error. Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Accordingly, we vacate the administrative law judge's finding at Section 718.204(b) and remand the case.

If, on remand, the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a)(4), he must then consider whether claimant has established the requisite etiology at Section 718.203(b). If so, the administrative law judge must then reconsider whether claimant has met his burden to establish that his total respiratory disability is due to pneumoconiosis under Section 718.204(b) pursuant to *Shelton.*

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge