

BRB No. 08-0256 BLA

J.P.)
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 Claimant-Respondent)
)
 v.)
)
 PEABODY COAL COMPANY)
)
 Employer-Petitioner) DATE ISSUED: 12/23/2008
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Stephen L. Purcell,
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.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank
James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for
Administrative Litigation and Legal Advice), Washington, D.C., for the
Director, Office of Workers' Compensation Programs, United States
Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-6268) of
Administrative Law Judge Stephen L. Purcell 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 involves a subsequent claim filed

on February 12, 2002¹ and is before the Board for the second time. In the initial decision, the administrative law judge credited claimant with nineteen years of coal mine employment² and found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). [*J.J.P.*] v. *Peabody Coal Co.*, BRB No. 05-1024 BLA (Sept. 21, 2006)(unpub.). The Board specifically held that the administrative law judge erred in failing to discuss and weigh the CT scan evidence, as well as the x-ray interpretations found in claimant's treatment records. The Board also vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Board specifically held that the administrative law judge erred in not considering whether claimant's "specific chronic obstructive pulmonary disease was due to coal mine employment." [*J.J.P.*], slip op. at 3. The Board also held that the administrative law judge erred in finding that claimant was entitled to the rebuttable presumption of disability causation at 20 C.F.R. §718.305. The Board, therefore, remanded the case for the administrative law judge to consider whether the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Board, however, rejected employer's contention that a finding of disability causation was precluded as a matter of law because claimant suffered from disabling knee problems. The Board also rejected employer's contention that the revised regulation found at 20 C.F.R. §718.204(a) was impermissibly retroactive.

¹ Claimant filed a previous claim on January 30, 1991. Director's Exhibit 1. The district director denied the claim by reason of abandonment on May 22, 1991. *Id.* The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

² The record reflects that claimant's coal mine employment was in Illinois. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

On remand, the administrative law judge again found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer contends, *inter alia*, that the administrative law judge erred in his consideration of the CT scan evidence and the x-ray interpretations found in claimant's treatment records. Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Lastly, employer contends that claimant's disabling knee injury precludes a finding of disability causation. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, noting that the Board, in its 2006 decision, rejected employer's contention that claimant's disabling knee injury necessitated a denial of benefits. The Director contends that the Board's 2006 holding constitutes the law of the case. In a reply brief, employer reiterates its previous contentions of error.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(2).

In its 2006 decision, the Board held that:

[B]ecause the administrative law judge did not consider whether the medical opinion evidence established that claimant's specific chronic obstructive pulmonary disease was due to coal mine employment, as

³ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

opposed to finding generally that chronic obstructive pulmonary disease was due to coal mine employment, the administrative law judge's finding of legal pneumoconiosis must be vacated and the case remanded for reconsideration of the medical opinion evidence under 20 C.F.R. §718.202(a)(4).

[*J.J.P.*], slip op. at 3-4.

On remand, the administrative law judge reconsidered whether the medical opinion evidence established the existence of legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Majmudar, Houser, Cohen, Repsher, and Tuteur. While all of the physicians diagnosed chronic obstructive pulmonary disease, they differed as to whether the disease was caused by coal dust exposure and smoking or by smoking alone. Drs. Majmudar, Houser, and Cohen opined that claimant's chronic obstructive pulmonary disease was due to coal dust exposure and smoking,⁴ Director's Exhibits 15, 41; Claimant's Exhibits 1, 2, and Drs. Repsher and Tuteur opined that claimant's chronic obstructive pulmonary disease was due to smoking and was not caused by his coal dust exposure. Director's Exhibit 36; Employer's Exhibits 19, 20. The administrative law judge accorded the greatest weight to Dr. Cohen's opinion and found that the opinions of the other physicians, on a relative basis, were poorly reasoned. Decision and Order on Remand at 5-8. The administrative law judge, therefore, determined that the medical opinion evidence established the existence of legal pneumoconiosis, *i.e.*, chronic obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Cohen, Repsher, and Tuteur.⁵ We disagree. The administrative law

⁴ The administrative law judge credited claimant with nineteen year of coal mine employment. *See* Decision and Order at 5. The administrative law judge found that claimant's last coal mining job was as a supervisor, a position that required claimant to spend eight hours a day underground, walking 1,000 feet and lifting up to 100 pounds. *Id.* The administrative law judge also noted that claimant had to crawl around and under machines as a part of his duties. *Id.*

The administrative law judge found that claimant smoked one-half to one pack of cigarettes a day for approximately twenty-seven years. Decision and Order at 4. Thus, claimant has a smoking history of between thirteen and one-half pack years and twenty-seven pack years.

⁵ The administrative law judge found that the opinions of Drs. Majmudar and House supported a finding of legal pneumoconiosis, but determined that these physicians

judge found Dr. Cohen’s opinion most persuasive because it was supported by “medical and scientific studies confirming a link between occupational exposure to coal dust and obstructive lung disease and emphysema.” Decision and Order on Remand at 5. Moreover, as instructed by the Board, the administrative law judge explained how Dr. Cohen integrated the medical and scientific studies with claimant’s medical record to conclude that coal dust exposure contributed to his obstructive lung disease. The administrative law judge noted that Dr. Cohen’s opinion, that claimant’s chronic obstructive pulmonary disease was caused, in significant part, by his coal dust exposure, was supported by claimant’s obstructive test results. *Id.* at 5-6. Dr. Cohen noted that claimant’s pulmonary function testing showed severe obstructive lung disease with diffusion impairment and that claimant had abnormal gas exchange. Claimant’s Exhibit 1. Dr. Cohen explained that these findings were consistent with exposure to coal dust as well as tobacco smoke. *Id.* Dr. Cohen also based his opinion, that coal dust exposure contributed to claimant’s chronic obstructive pulmonary disease, on the fact that claimant’s lung function continued to decline significantly after he stopped smoking. Claimant’s Exhibit 2. Consequently, the administrative law judge, properly found that Dr. Cohen’s opinion was well reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Employer’s contention that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Tuteur also lacks merit. The administrative law judge noted that, in the comments to the revised regulations, the Department of Labor (DOL) stated that:

Even in the absence of smoking, coal dust exposure is clearly associated with *clinically significant* airways obstruction and chronic bronchitis. The risk is addictive with cigarette smoking. 65 Federal Register 245, December 20, 2000, 79940 (italics added).

Decision and Order on Remand at 7.

Conversely, the administrative law judge noted that Dr. Repsher merely acknowledged that the inhalation of coal dust can cause “very mild” obstructive lung disease. Decision and Order on Remand at 7; Employer’s Exhibit 20 at 11. In his previous decision, the administrative law judge observed that Dr. Repsher acknowledged that he could not rule out coal dust exposure as a causative factor in claimant’s chronic

provided “little or no explanation as to how their diagnoses were reached.” Decision and Order on Remand at 6. The administrative law judge, therefore, held that their opinions were “not well-reasoned and entitled to lesser weight.” *Id.* Because no party challenges these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

obstructive pulmonary disease if he accepted the fact that the inhalation of coal mine dust can result in chronic obstructive pulmonary disease. Decision and Order at 21; Employer's Exhibit 20 at 80. On remand, the administrative law judge permissibly accorded Dr. Repsher's opinion less weight because the doctor concluded, contrary to prevailing medical opinion, that coal dust exposure does not cause clinically significant obstructive lung disease. We affirm the administrative law judge's finding as it is rational, supported by substantial evidence, and consistent with the position of the DOL. See *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

In his consideration of Dr. Tuteur's opinion, the administrative law judge noted that Dr. Tuteur based his opinion that claimant's chronic obstructive pulmonary disease was due solely to smoking on questionable statistical data. Decision and Order on Remand at 7-8. Dr. Tuteur opined that:

Quantitatively, it's rather well established that in a person who smokes as much as [claimant] did, that he has about a 20 percent risk for development of cigarette smoke-induced chronic obstructive pulmonary disease of the severity displayed in this medical record. Coal mine dust in a lifelong nonsmoker would result in this clinical condition no higher than one percent of the time and probably closer to a small fraction of one percent of the time.

Employer's Exhibit 19 at 18-19.

The administrative law judge accurately noted that Dr. Cohen explained that the statistical data relied upon by Dr. Tuteur have no basis in the medical literature.⁶

⁶ Dr. Cohen stated:

[Dr. Tuteur] states that 20% of smokers develop chronic obstructive pulmonary disease while only 1% of nonsmoking miners develop obstruction (pages 19, 43). The source of that information is not provided, but I know of no authority that would confirm either statement. The research discussed in my last report that was published by Love and Miller, Attfield and Attfield and Hodous, do not support his opinion. They show that decline in lung function (obstruction) is similar as between the two exposures.

Claimant's Exhibit 2.

Claimant's Exhibit 2. Dr. Cohen noted that Dr. Tuteur's use of "artificial statistics created out of thin air" would "always require a false conclusion that the cause [of obstructive lung disease] is only smoking." *Id.* The administrative law judge, therefore, properly found that Dr. Tuteur's opinion, like that of Dr. Repsher, was based on views about the relationship between chronic obstructive pulmonary disease and coal dust exposure which "are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature."⁷ Decision and Order on Remand at 9 (*citing Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7).

The function of the administrative law judge, as fact-finder, is to weigh the conflicting medical evidence. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990). In this case, the administrative law judge reviewed the opinions of Drs. Repsher and Tuteur and found that they were not well-reasoned and were entitled to less weight than the better reasoned opinion of Dr. Cohen. Because this finding is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis (chronic obstructive pulmonary disease arising out of coal mine employment.) pursuant to 20 C.F.R. §718.202(a)(4).⁸ *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Employer finally argues that claimant's disabling knee injury precludes a finding of disability causation pursuant to 20 C.F.R. §718.204(c). In its 2006 Decision and Order, the Board rejected employer's contention that a finding of disability causation was precluded as a matter of law because claimant suffered from disabling knee problems.

⁷ The Department of Labor has indicated that medical opinions which exclude obstructive lung disorders from occupationally related pathologies are inconsistent with the revised regulations and the prevailing view of the medical community. *See* 65 Fed. Reg. 79938-79942 (Dec. 20, 2000).

⁸ Since the physicians agree that claimant's chronic obstructive pulmonary disease is totally disabling, our decision to affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) obviates the need for the Board to address the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, we decline to address employer's contentions of error regarding the administrative law judge's consideration of the x-ray and CT scan evidence.

[J.J.P.], slip op. at 4 n.3. The Board also rejected employer's contention that the revised regulation found at 20 C.F.R. §718.204(a) was impermissibly retroactive. *Id.* The Board's previous holdings on these issues constitute the law of the case and govern the Board's determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address employer's contentions of error in regard to the effect of claimant's disabling knee injuries. Because employer does not raise any other contentions of error in regard to the administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge