BRB No. 03-0435 BLA

JAMES R. HOFFMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KINDILL MINING, INCORPORATED	)	
	)	DATE ISSUED: 02/24/2004
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

William S. Mattingly (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Jennifer U. Toth (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2001-BLA-1145) of Administrative Law Judge Rudolf L. Jansen 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). Based upon claimant's April 4, 2000 filing date, the administrative law judge considered the claim pursuant to 20 C.F.R. Part 718 and credited claimant with "at least twenty years" of coal mine employment based on a stipulation entered into by the parties at the formal hearing. Decision and Order at 4; Hearing Transcript at 12-13. The administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 11-12. In addition, the administrative law judge found that the evidence established a totally disabling respiratory or pulmonary impairment and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Decision and Order at 12-13. Accordingly, the administrative law judge awarded benefits, commencing as of April 1, 2000. Decision and Order at 14.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c). In response, claimant urges affirmance of the administrative law judge's award of benefits, arguing that the administrative law judge reasonably found the evidence sufficient to establish entitlement to benefits.[1] The Director, Office of Workers' Compensation Programs (the Director) responds, urging the Board to reject employer's contention that the regulation set forth at 20 C.F.R. §718.104(d) is impermissibly retroactive. The Director further states that he will not otherwise address the merits of the administrative law judge's findings.[2]

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).

The record indicates that Drs. Henry, Houser, Cohen and Diaz opined that claimant suffers from pneumoconiosis, Director's Exhibits 9, 21, 25; Claimant's Exhibits

[1] Employer submitted a brief in reply to claimant's response brief, reiterating its prior arguments.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with at least twenty years of coal mine employment, or his findings pursuant to Sections 718.202(a)(1)-(3) and 718.204(b). We, therefore, affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

1-3, and Drs. Renn, Tuteur, Selby and Castle opined that claimant is not suffering from pneumoconiosis, Director's Exhibit 35; Employer's Exhibits 1, 3, 5, 7, 8. In weighing these opinions, the administrative law judge accorded greater weight to the opinions of Drs. Houser, Diaz and Cohen as these physicians are Board-certified in pulmonary diseases and their opinions are well-documented and reasoned. Decision and Order at 11. In addition, the administrative law judge accorded greater weight to Dr. Houser, based on his status as claimant's treating physician, noting that he has been treating claimant's pulmonary condition for almost four years. *Id*. Lastly, the administrative law judge accorded more weight to the opinions of Drs. Cohen and Houser as they provided the most recent physical examinations of claimant, thereby affording their opinions significant weight in assessing claimant's current condition. *Id*.

Employer asserts that the administrative law judge erred in failing to adequately explain his rationale for crediting the opinions of Drs. Houser, Diaz and Cohen, that claimant is suffering from pneumoconiosis, over the contrary opinions of Drs. Renn, Tuteur, Selby and Castle. As employer correctly contends, the administrative law judge did not adequately discuss the bases for his finding that the opinions of Drs. Houser, Cohen and Diaz are entitled to greater weight. Specifically, the administrative law judge did not provide the rationale for his finding that the professional qualifications of Drs. Houser, Diaz and Cohen are superior to those of Drs. Tuteur, Renn, Selby and Castle, as he found all these physicians to be pulmonary specialists. Decision and Order at 11; *see generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). We therefore vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) and remand the case for further consideration of the evidence. On remand, the administrative law judge must fully explain the bases for his conclusions. *See* Administrative Procedure Act, 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988)(*en banc*); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); *see also Melnick*, 16 BLR 1-31.

Likewise, on remand the administrative law judge must provide a more detailed explanation for his decision to accord greater weight to the opinions of Drs. Cohen, Diaz and Houser based on his finding that these opinions are well-documented and reasoned, and further provide the same evaluation to the contrary medical opinions and the rationale relied on in according weight. *Wojtowicz*, 12 BLR 1-162; *Tenney*, 7 BLR 1-589*; see generally Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992). The administrative law judge must also provide a more detailed explanation of his determination that the opinions of Drs. Houser and Cohen are entitled to greater weight as they provided the most recent physical examination of claimant, in light of the fact that Drs. Renn, Castle and Tuteur provided supplemental medical reports which included their

review of the findings and medical reports by Drs. Houser and Cohen. *See Wojtowicz*, 12 BLR 1-162; *Tenney*, 7 BLR 1-589.

Contrary to employer's argument, since Dr. Houser's medical opinion is dated August 2, 2002, after the implementation date of the new regulations, Section 718.104(d) is applicable. *See National Mining Ass'n v. DOL*, 292 F.3d 849, 861, BLR (D.C. Cir. 2002). Therefore, on remand, the administrative law judge may accord more weight to claimant's treating physician, if he determines that the opinion is entitled to greater weight based on the criteria set forth at Section 718.104(d). 20 C.F.R. §718.104(d); *see also Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Beasley*, 957 F.2d 324, 16 BLR 2-45.

Lastly, we reject employer's contention that the administrative law judge erred in failing to consider all of the relevant medical evidence under Section 718.202(a), as he did not weigh all of the evidence, like and unlike, in finding that claimant has established the existence of pneumoconiosis in light of *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Contrary to employer's contention, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has not adopted the reasoning of the United States Court of Appeals for the Third Circuit in *Williams*, or that of the United States Court of Appeals for the Fourth Circuit in *Compton*. Therefore, since we have consistently applied the long-standing precedent that Section 718.202(a) provides four alternative methods by which claimant can establish the existence of pneumoconiosis, we decline to apply *Williams* and *Compton* in this case. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *cf. Compton*, 211 F.3d 203, 22 BLR 2-162; *Williams*, 114 F.3d 22, 21 BLR 2-104.

Employer further contends that the administrative law judge erred in finding the medical evidence sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). Specifically, employer contends that the administrative law judge's findings at Section 718.204(c) are based upon his Section 718.202(a)(4) findings and, since those findings were flawed and must be vacated, the Section 718.204(c) findings must likewise be vacated. Employer's Brief at 29. We agree.

In finding the medical opinions of record sufficient to establish disability causation pursuant to Section 718.204(c), the administrative law judge found that Drs. Houser, Diaz, Cohen and Henry stated that claimant's coal dust exposure was a significant cause of his disabling lung condition, whereas Drs. Renn, Tuteur, Selby and Castle opined that pneumoconiosis did not play any role in claimant's total disability. Decision and Order at 13. In particular, the administrative law judge stated:

> For the same reasons I assigned greater probative weight to the opinions of Drs. Houser, Diaz and Cohen in considering the issue of whether the miner suffered from pneumoconiosis, I assign significant weight to these opinions in finding that they weigh in favor of finding that the pneumoconiosis was a substantially contributing cause of Mr. Hoffman's disability. I assign less weight to the opinions of Drs. Renn, Tuteur, Selby and Castle on this issue, because they did not find the existence of pneumoconiosis, contrary to the weight of the evidence and contrary to what I have previously concluded.

Decision and Order at 13.

In light of our decision to vacate the administrative law judge's findings at Section 718.202(a)(4), we also vacate the administrative law judge's finding that the medical evidence was sufficient to establish disability causation pursuant to Section 718.204(c). If, on remand, the administrative law judge again reaches this issue, he must reconsider all of the relevant medical evidence to determine whether it satisfies the requirements of Section 718.204(c) and the applicable case law. 20 C.F.R. §718.204(c); *see Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995)*; Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990).

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

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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PETER A. GABAUER, JR.
Administrative Appeals Judge