BRB No. 13-0263 BLA

DONALD EDWARD OYLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 02/26/2014
	)	
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 on Remand Awarding Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits of Administrative Law Judge Stephen R. Henley (2008-BLA-05698) rendered on a subsequent claim filed on June 18, 2002, pursuant to the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012)(the Act).[1] This case is on appeal to the Board for the second time.

Initially, Administrative Law Judge Jeffrey Tureck credited claimant with twenty-nine years of coal mine employment, but found that the 2010 amendments to the Act were not applicable to this claim, based on the filing date. Judge Tureck therefore adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Tureck found that the newly submitted evidence was insufficient to establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Further, Judge Tureck declined to address the issue of whether claimant otherwise demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d),[2] as the evidentiary record as a whole was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4). Accordingly, Judge Tureck denied benefits.

Pursuant to claimant's appeal, the Board affirmed, as unchallenged by the parties, Judge Tureck's length of coal mine employment determination, his finding that the evidence was insufficient to establish the existence of clinical pneumoconiosis and his finding that the 2010 amendments to the Act were not applicable.[3] *Oyler v. Peabody Coal Co.*, BRB No. 10-0643 BLA (Aug. 18, 2011)(unpub.). However, the Board held

[1] Claimant's prior claim, filed on June 27, 1973, was denied by the Social Security Administration and the Department of Labor (DOL), as claimant did not establish any of the requisite elements of entitlement. Claimant took no further action until he filed the current claim. Director's Exhibits 1, 5.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because claimant's prior claim was denied for failure to establish any of the requisite elements of entitlement, he is required to establish, based on the newly submitted evidence, at least one of the requisite elements of entitlement in order to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

[3] The Board also affirmed, as unchallenged by the parties, the finding by Administrative Law Judge Jeffrey Tureck that the opinions of Drs. Harris and Weiss were insufficient to establish the existence of pneumoconiosis. *Oyler v. Peabody Coal Co.*, BRB No. 10-1643 BLA (Aug. 18, 2011)(unpub.) slip op. at 3 n.5; *see* Claimant's Exhibit 2; Director's Exhibit 12.

that Judge Tureck erred in discounting the newly submitted opinions of Drs. Cohen[4] and Istanbouly,[5] who diagnosed the existence of legal pneumoconiosis.[6] The Board therefore vacated Judge Tureck's denial of benefits and remanded the case for Judge Tureck to reconsider the medical opinion evidence on the issue of legal pneumoconiosis pursuant to Section 718.202(a)(4). The Board instructed Judge Tureck to set forth his findings in detail, including the underlying rationale, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Further, the Board held that, should Judge Tureck conclude, on remand, that the newly submitted medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4), claimant will have established a change in an applicable condition of entitlement pursuant to Section 725.309. The Board therefore directed Judge Tureck to consider, if reached, whether the evidence of record, as a whole, established claimant's entitlement to benefits pursuant to 20 C.F.R. §§718.202, 718.203, 718.204(b), (c).

[4] Dr. Cohen, who examined claimant on August 16, 2005, diagnosed, in addition to coal workers' pneumoconiosis, chronic bronchitis, an obstructive and restrictive impairment with a severely impaired FEV_1, moderate diffusion impairment and mild hypoxemia. He attributed these impairments to a combination of smoking and coal dust exposure, and opined that claimant was disabled from performing his usual coal mine employment because of them. Director's Exhibit 38; Claimant's Exhibit 43 at 8, 18.

[5] Dr. Istanbouly, who examined claimant on March 19, 2008, considered an x-ray, pulmonary function study, blood gas study, and a thirty-year history of underground mining, and diagnosed coal workers' pneumoconiosis, a moderate obstructive defect, a mild restrictive defect and mild hypoxemia. He identified coal dust exposure as a contributing cause of claimant's impairments. Dr. Istanbouly agreed with Dr. Cohen that claimant cannot go back to do the same job that he did in his last year of employment in the coal mines as a laborer and roof bolter. Dr. Istanbouly also stated that, even if the x-ray evidence were negative for pneumoconiosis, a restrictive defect could be caused by coal dust inhalation, as there is no correlation between the degree of pneumoconiosis seen on x-ray and a defect revealed on a pulmonary function test. Claimant's Exhibits 2, 3 at 60-61, 108-09, 113, 142.

[6] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

On remand, Judge Henley[7] (the administrative law judge) found that the medical opinion of Dr. Cohen,[8] supported by that of Dr. Istanbouly, was more credible than the contrary opinions of Drs. Tuteur[9] and Repsher,[10] and therefore established the existence of legal pneumoconiosis and a change in an applicable condition of entitlement pursuant to Section 725.309. Next, the administrative law judge credited Dr. Cohen's opinion that claimant is totally disabled, namely that claimant is unable, from a respiratory standpoint,

[7] In light Judge Tureck's retirement, this case was reassigned to Administrative Law Judge Stephen R. Henley (the administrative law judge). Decision and Order on Remand Awarding Benefits at 3; *see* May 21, 2012 Order, Office of Administrative Law Judges.

[8] The administrative law judge concluded that Dr. Cohen's opinion is consistent with the preamble to the 2001 revised regulations and the view of the DOL that coal dust exposure and smoking are additive and that coal dust exposure causes clinically significant airways obstruction and chronic bronchitis, which constitutes a diagnosis of legal pneumoconiosis. Decision and Order on Remand Awarding Benefits at 8; *see* Employer's Brief at 19-20.

[9] Dr. Tuteur conducted a medical evidence review and issued a report on February 16, 2004, diagnosing chronic obstructive pulmonary disease (COPD) due to tobacco smoke, and opined that claimant does not suffer from either simple coal workers' pneumoconiosis or any other coal mine dust-induced disease process. He was uncertain whether claimant is totally disabled, but opined that his disability is not due to coal workers' pneumoconiosis. Decision and Order on Remand Awarding Benefits at 9-11; Employer's Exhibits 12, 22.

[10] Dr. Repsher examined claimant and issued a report on November 4, 2003, finding no evidence of coal workers' pneumoconiosis or any other pulmonary or respiratory disease or condition either caused by, or aggravated by, his coal mine employment. He diagnosed mild, but not limiting, arterial hypoxemia, that was "overwhelmingly most likely" due to "long and continued" smoking. In his deposition of September 14, 2004, Dr. Repsher testified that claimant has "only minimal if any COPD," "probably doesn't have" significant COPD or asthma, but suffers from chronic bronchitis from smoking, nocturnal dyspnea, coronary artery disease, diabetes, and arthritis. Dr. Repsher also stated that claimant has sufficient pulmonary function to perform heavy sustained labor, so that even if the pulmonary function study results were valid, he could still do his usual coal mine employment. Decision and Order on Remand at 11-12; Employer's Exhibit 23 at 10-14, 17, 20-21, 41, 101-114, 116-118, 120-122, 156-158.

to perform his usual coal mine work.[11] The administrative law judge also credited Dr. Cohen's opinion that claimant's totally disabling respiratory impairment is due to both cigarette smoking and coal dust exposure. In conclusion, the administrative law judge found that the evidence demonstrated that claimant has legal pneumoconiosis, that claimant's pneumoconiosis arose out of his coal mine employment,[12] that claimant is totally disabled and that claimant's pneumoconiosis is a substantially contributing cause of his total disability. 20 C.F.R. §§718.202, 718.203, 718.204. The administrative law judge therefore awarded benefits.

On appeal, employer argues that the administrative law judge violated the APA in relying on the preamble to the 2001 revised regulations to resolve evidentiary conflicts, misapplied the preamble to create an erroneous presumption of legal pneumoconiosis, and failed to evaluate all of the evidence regarding the issue of total respiratory disability. Employer's Brief at 21, 25. Further, employer contends that the opinions of Drs. Cohen and Istanbouly were improperly credited over the contrary opinions of Drs. Repsher and Tuteur on the issues of legal pneumoconiosis and total respiratory disability. *Id*. Claimant responds, urging affirmance of the administrative law judge's Decision and Order on Remand Awarding Benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal. The Director urges the Board to reject employer's arguments regarding the administrative law judge's use of the preamble to the 2001 revised regulations and his assignment of the burden of proof. In reply, employer reiterates its arguments.

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.[13] 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).

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[11] The administrative law judge found that claimant's usual coal mine employment required heavy manual labor. As this finding is uncontested on appeal, it is affirmed. *See* Decision and Order on Remand Awarding Benefits at 16-17; *see* Director's Exhibit 38 at 7-10, 22, 42-44; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[12] A finding that claimant's pneumoconiosis arose out of coal mine employment is subsumed in a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-333 (10th Cir. 2006).

[13] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 6; Decision and Order on Remand Awarding Benefits at 11 n.8.

Initially, we reject employer's assertion that the administrative law judge erred in relying on the preamble to the 2001 revised regulations in evaluating the credibility of the medical opinion evidence pursuant to Section 718.202(a)(4).[14] Employer's Brief at 1, 22-25. Contrary to employer's assertions, the administrative law judge did not utilize the preamble to the 2001 revised regulations as a legal rule, or misapply the burden of proof by creating an erroneous presumption of legal pneumoconiosis. Rather, he consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See* 65 Fed. Reg. 79,938-39 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-382-83 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Thus, we agree with the Director that the administrative law judge permissibly evaluated the medical opinions of record for consistency with the prevailing view of the medical community, and with the scientific literature relied upon by the DOL in promulgating the 2001 revised regulations. Director's Response Brief at 1-3; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318. Additionally, contrary to employer's argument, the preamble does not constitute evidence outside the record. *A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). The administrative law judge was not therefore precluded from considering it in his weighing of the evidence.

Employer contends that the administrative law judge erred in crediting the opinion of Dr. Cohen, as supported by Dr. Istanbouly, to find legal pneumoconiosis established. Contrary to employer's contention, however, the administrative law judge acted within his discretion as fact-finder in crediting Dr. Cohen's opinion of legal pneumoconiosis because it was reasoned and documented. The administrative law judge specifically noted that Dr. Cohen found that claimant's thirty year coal mine employment history and his twenty-two year smoking history both contributed to his respiratory impairment. The administrative law judge noted that, in addition to considering claimant's history, Dr.

[14] The administrative law judge noted that, in light of the preamble to the 2001 revised regulations, a medical opinion that coal dust-induced COPD is rare is contrary to the DOL's position that coal dust-induced COPD is clinically significant, that non-smoking miners develop moderate and severe obstruction at the same rate as smoking miners, and that coal dust exposure can produce a disabling chronic obstructive lung disease, even in the absence of findings of clinical pneumoconiosis. Decision and Order on Remand Awarding Benefits at 10-11, *citing* 65 Fed. Reg. 79,938-43 (Dec. 20, 2000).

Cohen conducted an examination of claimant, reviewed the results of claimant's pulmonary function studies, considered claimant's symptoms and cited to a number of scientific articles which supported his finding. Likewise, contrary to employer's contention, the administrative law judge properly credited Dr. Istanbouly's opinion as supportive of a finding of legal pneumoconiosis. Contrary to employer's contention, the administrative law judge found that Dr. Istanbouly's opinion, attributing claimant's respiratory impairment to both coal mine employment and smoking, was based on his examination of claimant, his review of claimant's symptoms and history and his review of claimant's pulmonary function studies. Consequently, we reject employer's argument that the administrative law judge erred in finding that the opinions of Drs. Cohen and Istanbouly could not support a finding of legal pneumoconiosis. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Likewise, the administrative law judge properly rejected Dr. Tuteur's opinion, that claimant did not have legal pneumoconiosis, because Dr. Tuteur did not explain the basis for his opinion that coal-induced COPD is rare, and why, even if causality was rare, claimant's case could not be one of those cases where coal mine dust exposure was the cause of claimant's COPD. Consequently, we reject employer's argument that the administrative law judge erred in rejecting Dr. Tuteur's opinion. *See* 65 Fed. Reg. 79,938 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-35, 2-37 (7th Cir. 2007); *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318; *see Obush*, 24 BLR at 125-26.

However, regarding Dr. Repsher's opinion, that claimant did not have legal pneumoconiosis, we agree with employer that the administrative law judge failed to consider Dr. Repsher's opinion in its totality because he failed to discuss Dr. Repsher's deposition testimony,[15] which provided an explanation for his assessment of claimant's hypoxemia, and because he cited to, and provided copies of, specific articles in medical literature, which supported his conclusion that it is "very uncommon" for coal dust exposure to cause hypoxemia, and that claimant's hypoxemia is unrelated to claimant's coal dust exposure. Moreover, Dr. Repsher stated that "if you have normal spirometry, normal lung volumes, and normal diffusing capacity, you cannot explain hypoxemia on the basis of a lung ailment."[16] Employer's Exhibit 23 at 136, *see also* at 25-32, 37-42,

[15] The record reflects that Dr. Repsher's September 14, 2004 deposition transcript was admitted into the record. *See* Judge Tureck's 2010 Decision and Order at 6; Employer's Exhibit 23.

[16] Dr. Repsher's testimony also reflects that he reviewed medical data relevant to claimant. *See* Employer's Exhibits 12, 23 at 9, 10, 17, 20, 79, 81, 97-98, 107-108, 148-152.

55-56, 61-64, 66-68, 70-75, 77-79, 81-86, 88-92, 93-97, 101-108, 108-114, 116-118, 120-122, 127-137, 148-152, 156-158; Decision and Order on Remand Awarding Benefits at 12-13. Consequently, the administrative law judge erred in rejecting Dr. Repsher's opinion because he failed to offer "any explanation" as to why claimant's hypoxemia was unrelated to his coal mine employment.[17] *Id*. at 13.

Based on the foregoing, we vacate the administrative law judge's rejection of Dr. Repsher's opinion concerning the cause of claimant's COPD and we remand the case for the administrative law judge to consider Dr. Repsher's 2004 deposition testimony, along with his 2003 medical report. Whether Dr. Repsher's deposition testimony provides adequate explanation for his conclusions and renders his medical opinion sufficiently documented and reasoned is a credibility determination reserved for the fact-finder. *See Livermore v. Amax Coal Co.*, 297 F.2d 668, 672, 22 BLR 2-399, 2-408 (7th Cir. 2002); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992).

The administrative law judge's assignment of diminished probative weight to Drs. Repsher's opinion was part of his overall evaluation of the medical opinion evidence. Decision and Order on Remand Awarding Benefits at 13, 16-18. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), his finding that an applicable condition of entitlement had changed pursuant to Section 725.309(d), and his finding of total respiratory disability pursuant to Section 718.204(b). *Id*. We therefore vacate the administrative law judge's Decision and Order on Remand Awarding Benefits and we remand this case to the administrative law judge to reconsider all the relevant medical evidence and to set forth his findings in detail, including the underlying rationale for his findings, in accordance with the APA. *Wojtowicz v. Director, OWCP*, 12 BLR 1-162, 1-165 (1989). If the administrative law judge should conclude, on remand, that the newly submitted medical evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4), claimant will have established a change in an applicable condition of entitlement pursuant to Section 725.309. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The administrative law judge must then consider whether the evidence of record, as a whole, establishes

[17] We reject, however, employer's contention that the administrative law judge may not consider prior Board precedent in rejecting the opinions of physicians whose views are inconsistent with that precedent. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *see Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-35, 2-37, (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-257, 24 BLR 2-311, 2-318 (7th Cir. 2001); *see also Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-382-83 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

claimant's entitlement to benefits pursuant to 20 C.F.R. §§718.202, 718.203, 718.204(b), (c). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc).

Accordingly, the administrative law judge's Decision and Order on Remand 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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BETTY JEAN HALL
Administrative Appeals Judge