BRB No. 03-0304 BLA

DONALD D. STALCUP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 01/30/2004
	)	
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 on Remand – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (99-BLA-0445) 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).[1] This case is before the Board for the second time. In an initial Decision and Order, dated February 9, 2001, the administrative law judge credited claimant with thirty years of coal mine employment, and considered this claim, which was filed on March 18, 1998, pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge determined that while claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000), he established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge further found claimant entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was not rebutted. The administrative law judge then found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), but sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). Finally, the administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, he awarded benefits.

Employer appealed. The Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), total disability pursuant to Section 718.204(c)(4) (2000) and total disability due pneumoconiosis pursuant to Section 718.204(b) (2000).[2] *Stalcup v. Peabody Coal Co.*, BRB No. 01-0506 BLA (Mar. 8,

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The Board affirmed, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and findings under 20 C.F.R. §§718.202(a)(1) (2000), 718.203(b)(2000) and 718.204(c)(1)-(3) (2000). *Stalcup v. Peabody Coal Co.*, BRB No. 01-0506 BLA (Mar. 8, 2002)(unpublished). It is noted that, in summarizing the administrative law judge's findings, the Board incorrectly stated that the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Stalcup v. Peabody Coal Co.*, BRB No. 01-0506 BLA (Mar. 8, 2002)(unpublished), slip op. at 2. In fact, the administrative law judge found the x-ray evidence insufficient to establish the presence of pneumoconiosis under Section 718.202(a)(1) (2000). 2001 Decision and Order at 11. The Board's

2002)(unpublished). In his Decision and Order on Remand, the administrative law judge again found the evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), total disability under Section 718.204(b)(2)(iv), and total disability due to pneumoconiosis under Section 718.204(c).[3] On appeal, employer challenges the administrative law judge's findings on remand under Sections 718.202(a)(4) and 718.204(b)(2)(iv), (c). Claimant responds in support of the administrative law judge's decision awarding benefits. Employer filed a reply brief, reiterating contentions made in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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 challenging the administrative law judge's finding on remand pursuant to Section 718.202(a)(4), employer first argues that the administrative law judge again erroneously assigned great weight to Dr. Cohen's opinion, that claimant suffers from pneumoconiosis, based on Dr. Cohen's subspecialty in critical care medicine and training and experience in pulmonary medicine. We agree. In his prior Decision and Order, the administrative law judge credited Dr. Cohen's opinion over contrary medical opinions submitted by Drs. Cook and Dahhan upon finding that Dr. Cohen is Board-certified in two subspecialties, namely, pulmonary medicine and critical care medicine, while Drs. Cook and Dahhan are Board-certified in only one subspecialty of internal medicine – pulmonary medicine.[4]

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misstatement is inconsequential inasmuch as it did not affect the disposition of the case in the prior appeal.

[3] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[4]In his February 9, 2001 Decision and Order, the administrative law judge stated that only the opinions of Drs. Cook and Dahhan support a finding that claimant does not have pneumoconiosis. 2001 Decision and Order at 13. Subsequently, the Board held that the administrative law judge should have characterized Dr. Castle's opinion as supportive of a finding that claimant does not

2001 Decision and Order at 13; Claimant's Exhibit 1; Employer's Exhibits 1, 8. The Board vacated the administrative law judge's decision to credit Dr. Cohen's opinion on that basis, holding that he did not explain why Dr. Cohen's credentials in the subspecialty of critical care medicine are relevant to the doctor's ability to formulate an opinion on the existence of pneumoconiosis or total disability. *Stalcup v. Peabody Coal Co.*, BRB No. 01-0506 BLA (Mar. 8, 2002)(unpublished), slip op. at 4. The Board thus instructed the administrative law judge to provide a valid basis on remand for finding the qualifications of Dr. Cohen superior to those of the other physicians of record. *Id*.

On remand, the administrative law judge found that the additional certification in critical care medicine is relevant to formulating an opinion on pneumoconiosis because "it shows that [a physician has] further training in pulmonary systems in addition to other bodily systems affected when a person is in need of critical care." Decision and Order on Remand at 5. Employer correctly contends that the administrative law judge's conclusion in this regard is unsupported in the record. In addition, we agree with employer that it was improper for the administrative law judge to credit the opinions of Dr. Cohen and Koenig on the basis of their training in pulmonary medicine without considering the credentials of Drs. Repsher, Castle, Tuteur and Dahhan, credentials which employer argues are at least equal to those of Dr. Cohen. Consequently, we hold that the administrative law judge again failed to provide a valid basis for finding the qualifications of Drs. Cohen and Koenig superior to the qualifications of the other doctors of record in finding the evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Employer next argues under Section 718.202(a)(4) that the administrative law judge improperly discounted Dr. Repsher's opinion, submitted in his November 5, 1999 report, that claimant does not have pneumoconiosis. Employer's Exhibit 34. The administrative law judge, as he did in his prior Decision and Order, discounted Dr. Repsher's opinion as equivocal because Dr. Repsher stated, in a March 30, 1999 report, that claimant may have early mild coal workers' pneumoconiosis – *i.e.*, subradiographic evidence of mild, early pneumoconiosis. Decision and Order on Remand at 6; 2001 Decision and Order at 12; Employer's Exhibit 8. The Board rejected employer's identical argument in the prior appeal, namely that the administrative law judge erred in discounting Dr. Repsher's opinion as equivocal. *Stalcup v. Peabody Coal Co.*, BRB No. 01-0506

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have pneumoconiosis. *Stalcup v. Peabody Coal Co.*, BRB No. 01-0506 BLA (Mar. 8, 2002)(unpublished), slip op. at 5; Employer's Exhibits 10, 33, 52. Additionally, Dr. Tuteur's opinion supports a finding that claimant does not have pneumoconiosis, as will be discussed herein. Employer's Exhibits 9, 31, 50.

BLA (Mar. 8, 2002)(unpublished), slip op. at 5. We reject employer's renewed argument in this appeal, as the Board's prior holding with respect to the administrative law judge's treatment of Dr. Repsher's opinion at Section 718.202(a)(4) is the law of the case. *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983).

Employer further argues under Section 718.202(a)(4) that the administrative law judge erroneously found Dr. Tuteur's opinion, that claimant does not have clinically, radiographically, or physiologically significant coal workers' pneumoconiosis, to be a finding of pneumoconiosis, albeit insignificant. The Board addressed employer's argument in the previous Decision and Order, holding that it was reasonable for the administrative law judge to infer that Dr. Tuteur's finding of "no significant pneumoconiosis" constitutes a finding of insignificant pneumoconiosis, which is nonetheless pneumoconiosis. *Stalcup v. Peabody Coal Co.*, BRB No. 01-0506 BLA (Mar. 8, 2002)(unpublished), slip op. at 4; Employer's Exhibits 9, 31. Upon further reflection, we find merit with employer's contention that the administrative law judge drew an unreasonable inference from Dr. Tuteur's report, and hold that the only logical reading of the report is that the claimant does not have pneumoconiosis. *Id.*

In light of the foregoing, we vacate the administrative law judge's finding that the medical opinion is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), and remand the case for the administrative law judge to reconsider the issue. In resolving the conflict presented by the opinions of record, the administrative law judge must consider Dr. Tuteur's opinion as supportive of a finding that claimant does not have pneumoconiosis. Moreover, the administrative law judge must consider all of the evidence bearing on the credibility of the opinions of Drs. Cohen and Koenig, and the contrary opinions of Drs. Castle, Tuteur and Dahhan,[5] and must provide an adequate rationale for his credibility determinations which comports with the requirements of the Administrative Procedure Act (APA), 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). *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). The administrative law judge's conclusions with respect to the relevance of Dr. Cohen's and Dr. Koenig's Board-certification in critical care medicine must have evidentiary support in the record.

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[5]Because the administrative law judge properly discounted as equivocal Dr. Repsher's opinion on the issue of pneumoconiosis, as discussed above, the administrative law judge need not reconsider Dr. Repsher's opinion pursuant to 20 C.F.R. §718.202(a)(4).

Employer also challenges the administrative law judge's decision to accord determinative weight to the opinions of Drs. Cohen and Koenig to find the evidence sufficient to establish total disability under Section 718.204(b)(2)(iv). The administrative law judge assigned substantial weight to the opinions of Drs. Cohen and Koenig regarding total disability because these doctors took the exertional requirements of claimant's coal mine employment into account, describing claimant's ladder and stair climbing while carrying heavy equipment and shoveling coal for hours. Decision and Order on Remand at 10; Claimant's Exhibits 1, 2, 8. The administrative law judge also credited the opinions of the two physicians in light of their qualifications, which include Board-certification in critical care medicine. *Id*. The administrative law judge discounted, as not well documented or reasoned, the contrary opinions of Drs. Castle, Cook, Dahhan, Repsher and Tuteur on the basis that these doctors lacked knowledge of the exertional requirements of claimant's usual coal mine employment as a mechanic working on the surface. Decision and Order on Remand at 8-9; Employer's Exhibits 1, 7-10, 31-34, 50, 52.

We agree with employer that the administrative law judge improperly gave the opinions of Drs. Cohen and Koenig substantial weight under Section 718.204(b)(2)(iv) based on their certification in critical care medicine, for the reasons discussed above. In addition, the administrative law judge's rejection of Dr. Castle's opinion on the basis that Dr. Castle did not indicate an awareness of the exertional requirements of claimant's coal mine employment, Decision and Order on Remand at 8, contravenes the Board's prior holding that the administrative law judge erred previously in rejecting Dr. Castle's disability opinion on the basis that Dr. Castle was not familiar with claimant's coal mine employment. *Stalcup v. Peabody Coal Co.,* BRB No. 01-0506 BLA (Mar. 8, 2002)(unpublished), slip op. at 6. Accordingly, we vacate the administrative law judge's credibility determinations in support of his finding that total disability was established pursuant to Section 718.204(b)(2)(iv). On remand, the administrative law judge must reconsider all of the relevant evidence thereunder. If the administrative law judge finds on remand that the medical opinion evidence is sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), he must consider and weigh all of the relevant evidence of record, including the contrary probative evidence, like and unlike, to determine whether it is sufficient to establish total disability under Section 718.204(b)(2)(i)-(iv). 20 C.F.R. §718.204(b)(2)(i)-(iv); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (*en banc*).

Finally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis

pursuant to Section 718.204(c).[6] Because we have vacated the administrative law judge's findings that claimant established the existence of pneumoconiosis under Section 718.202(a)(4) and total disability under Section 718.204(b), we vacate the administrative law judge's finding with regard to disability causation under Section 718.204(c). If he reaches the issue on remand, the administrative law judge must reconsider the relevant evidence pursuant to Section 718.204(c) in accordance with the APA.[7] *Shaneyfelt*, 4 BLR at 1-146.

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[6]Revised Section 718.204(c) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

[7]In reconsidering Dr. Cohen's opinion, the administrative law judge may accord weight to Dr. Cohen's opinion on the ground that Dr. Cohen examined claimant only if crediting the opinion on that basis comports with the decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). In *McCandless*, the court held that in order to credit an opinion on the ground that it was submitted by an examining physician, there must be a medical reason for preferring the views of the doctor who examined claimant over the views of a doctor who did not. *McCandless*, 255 F.3d at 468, 22 BLR at 2-315-316.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge