BRB No. 07-0358 BLA

R.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING COMPANY	)	DATE ISSUED: 01/24/2008
	)	
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 on Remand Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Theodore F. Kommers (Gould & Ratner), Chicago, Illinois, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand Denying Benefits (03-BLA-5980) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent 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 is before the Board for the second time. In the administrative law judge's original Decision and Order, he credited claimant with twenty-four years of coal mine employment and adjudicated this subsequent claim, filed on May 6, 2002,[1] pursuant to the regulatory provisions at 20

[1] Claimant's prior claim was filed February 9, 1990 and was administratively denied on May 8, 1990. Director's Exhibit 1.

C.F.R. §725.309.[2] The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board vacated the administrative law judge's findings regarding the evaluation of the x-ray evidence at Section 718.202(a)(1), and remanded the case for the administrative law judge to admit Dr. Ahmed's June 18, 2002 x-ray re-reading and re-weigh the x-ray evidence accordingly. *R.S. v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA, slip op. at 6 (Aug. 31, 2006)(unpub.). As employer had submitted four interpretations of a single computerized tomography (CT) scan, the Board also vacated the administrative law judge's findings at 20 C.F.R. §718.107, instructing him to reconsider the CT scan evidence in accordance with *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), while re-evaluating the relevant qualifications of the CT scan readers. *R.S.*, slip op. at 7. The Board additionally vacated the administrative law judge's findings at Section 718.202(a)(4) to allow for his re-evaluation of the medical opinion evidence in light of his reconsideration of the x-ray and CT scan evidence. *Id*.

On remand, the administrative law judge again found the evidence of record insufficient to support a finding that claimant has pneumoconiosis. Pursuant to Section 718.202(a)(1), the administrative law judge admitted Dr. Ahmed's positive interpretation of the June 18, 2002 x-ray into evidence, but found that it had no impact on his finding that the x-ray evidence failed to prove the existence of pneumoconiosis, giving greater weight to the negative readings of Drs. Wheeler and Scott based on their superior qualifications. Decision and Order on Remand at 2-3. Pursuant to Section 718.107, the administrative law judge declined to delay the disposition of the case by reopening the record for employer to designate the CT scan interpretation it chose to rely upon. The administrative law judge found that Dr. Fishman's negative interpretation of the CT scan outweighed Dr. Cohen's positive interpretation, based on Dr. Fishman's superior credentials, and thereby found the evidence insufficient to support a finding of pneumoconiosis. Decision and Order on Remand at 2-4. Pursuant to Section 718.202(a)(4), the administrative law judge again found Dr. Cohen's diagnosis of pneumoconiosis to be insufficient to support a finding of either clinical or legal

[2] Claimant's prior claim was denied because he failed to show that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c)(2000). Director's Exhibit 1. Because employer no longer contested the issue of total disability, the administrative law judge determined that a change in an applicable condition of entitlement had been established pursuant to 20 C.F.R. §725.309(d). Decision and Order dated August 30, 2005 at 2; Hearing Transcript at 8.

pneumoconiosis. Decision and Order on Remand at 4-5. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge failed to properly weigh the conflicting x-ray evidence and improperly credited Drs. Wheeler and Scott with superior qualifications over Dr. Ahmed. Claimant further asserts that the administrative law judge abused his discretion in choosing Dr. Fishman's CT scan interpretation and improperly assessed the readers' qualifications. Additionally, claimant contends that the administrative law judge's consideration of the medical opinion evidence is not supported by substantial evidence or rational, and that his inappropriate comments demonstrate a bias against claimant, necessitating a remand for reassignment to a different administrative law judge. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[3] 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, 363 (1965).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Specifically, claimant argues that the administrative law judge improperly relied on the qualifications of Drs. Wheeler and Scott, and erred in failing to reweigh and resolve the conflicting x-ray evidence. The administrative law judge, in making his determination, relied on twelve interpretations of the three most recent x-rays, dated April 30, 1999, June 18, 2002, and July 8, 2003. Of the twelve x-ray interpretations of record, six readings are positive for pneumoconiosis, Claimant's Exhibits 1, 2, 3, 6, 7; Director's Exhibit 25; and six readings are negative for pneumoconiosis, Employer's Exhibits 1, 2, 3, 9, 15; Director's Exhibit 24. The administrative law judge noted that the positive interpretations were all by B readers, including Dr. Cohen, and that Drs. Ahmed and Cappiello were also Board-certified radiologists. Decision and Order at 3. The administrative law judge further noted that Drs. Wheeler, Scott, and Repsher, who all obtained negative readings, were B readers, with Drs. Wheeler and Scott being Board-certified radiologists. Dr. Hackett also obtained a negative reading, but his qualifications were not of record. Decision and Order at 4. The administrative law judge considered

[3] The law of the United States Court of Appeals for the Seventh Circuit is applicable, as the miner was employed in the coal mining industry in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1.

each x-ray reading and noted the qualifications of each physician, finding the opinions of the B readers to be equally probative. Decision and Order at 3-4. He further found that Drs. Wheeler and Scott, both of whom are professors of radiology at Johns Hopkins University, had superior qualifications to those of Drs. Ahmed and Cappiello, and credited Dr. Cohen's qualifications as a director of a black lung clinic as being superior to Dr. Repsher's qualifications. Decision and Order at 4. The administrative law judge properly considered the quantitative and the qualitative nature of the conflicting x-ray readings and sought to resolve the numerical conflict by permissibly considering the readers' qualifications and other factors relevant to the level of radiological competence, such as a prestigious position teaching radiology. *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir). Thus, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant next alleges that the administrative law judge abused his discretion in relying on Dr. Fishman's negative CT scan interpretation as being superior to Dr. Cohen's positive interpretation, and additionally argues that the administrative law judge improperly evaluated the physicians' qualifications. We disagree. Five readings of a July 8, 2003 CT scan were originally admitted into evidence. Four readings, by Drs. Repsher, Becker, Tuteur, and Fishman, were negative for pneumoconiosis, and one reading by Dr. Cohen was positive. Employer's Exhibits 1, 4, 5, 12; Claimant's Exhibit 4. Because claimant underwent only one CT scan, the parties were limited to one reading in support of their affirmative case. *See Webber*, 23 BLR at 1-135. On remand, the administrative law judge evaluated the relevant qualifications of the physicians and permissibly determined that Dr. Fishman's interpretation outweighed that of Dr. Cohen based on Dr. Fishman's superior expertise as the Director of Diagnostic Imaging and Body CT in the Department of Radiology at Johns Hopkins University. Additionally, the administrative law judge determined that because Dr. Cohen's qualifications did not exceed those of Drs. Repsher, Becker, or Tuteur, claimant was unable to meet his burden pursuant to 20 C.F.R. §718.107. Decision and Order on Remand at 4; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Furthermore, the administrative law judge was not required to admit the first proffered evidence by employer that was within the evidentiary limits. Each party may choose which set of results to submit, for each test or procedure, in order to best support its position. *Webber*, 23 BLR at 1-135. As Dr. Fishman's qualifications exceeded those of any remaining physician, the administrative law judge properly declined to delay disposition of this case by reopening the record for employer to designate its CT scan interpretation. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.107.

Regarding Section 718.202(a)(4), claimant contends that the administrative law judge's findings are not supported by substantial evidence, and additionally, that Dr. Cohen's opinion was mischaracterized. Claimant specifically challenges the administrative law judge's finding that Dr. Cohen's opinion was not probative. Claimant's arguments are without merit. On remand, the administrative law judge again considered Dr. Cohen's four medical reports and determined that Dr. Cohen downplayed the negative x-ray and CT scan evidence. Further, Dr. Cohen based his opinion, in part, on a smoking history of from one half pack per day to one pack per day for fifty-six years which, at the low end, was only half the amount the administrative law judge found that claimant actually smoked. The administrative law judge thus concluded that Dr. Cohen may have applied a smoking history that was understated by half, and that the physician also erroneously stated in one report that claimant had a history of twenty-five years of underground coal mine employment, when the last fourteen years of claimant's employment were spent above ground. Decision and Order on Remand at 4-5. Consequently, the administrative law judge permissibly found Dr. Cohen's opinion insufficient to support a diagnosis of either clinical or legal pneumoconiosis, as it was based, in part, on erroneous information regarding the claimant. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).

As claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's denial of benefits. Furthermore, in light of the administrative law judge's obvious bias against claimant, I would instruct that this case be assigned to a new administrative law judge. Tellingly, the administrative law judge, *inter alia*, unnecessarily notes on two separate occasions that claimant traveled 300 miles to be examined by Dr. Cohen, but ignores the fact that employer had its doctor (Dr. Repsher) travel 2000 miles to examine claimant. (Claimant's Brief at 8).

Regarding the x-ray evidence, I would hold that the administrative law judge erred in failing to follow the Board's remand instructions to reweigh the x-ray evidence in light of the newly admitted reading by Dr. Ahmed. The administrative law judge ignores that two of the three most recent x-rays are positive based on radiological qualifications. Additionally, in crediting Drs. Scott and Wheeler with superior qualifications, the administrative law judge credits the publications of these doctors, yet ignores publications of Dr. Ahmed, and fails to explain how the publications of Drs. Scott and Wheeler relate in any way to x-ray expertise. Accordingly, I would vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) and remand the case for further consideration of all of the relevant x-ray evidence of record.

With regard to Section 718.202(a)(4), I believe the administrative law judge erred in his handling of the medical opinion evidence. The administrative law judge was cautioned on remand not to substitute his own opinion for those of the medical experts, yet that is precisely what he did when stating that it seems much more likely that

claimant's obstructive impairment is due to smoking rather than coal mining because claimant had greater exposure to tobacco smoke. Decision and Order at 6-7; Decision and Order on Remand at 3. The administrative law judge went on to apply an incorrect legal standard in addressing claimant's smoking history by assuming that claimant's obstructive impairment was due only to a single cause, rather than determining whether claimant's impairment was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2). Furthermore, the administrative law judge clearly mischaracterized Dr. Cohen's medical opinion as to claimant's work history, type of coal mine employment, and smoking history. The administrative law judge improperly discounted Dr. Cohen's opinion for failing to consider claimant's use of a respirator and work from an enclosed cab, yet Dr. Cohen noted this information in his evaluation of claimant, and the administrative law judge gives no reason why he believes this information was not considered by Dr. Cohen. Director's Exhibit 20. Furthermore, Dr. Cohen provided four opinions, all of which correctly stated claimant's length and type of coal mine employment except for a reference on page eleven of a supplemental report stating 25 years of *underground* coal mine employment. Claimant's Exhibits 4, 5, 8; Director's Exhibit 20. The administrative law judge would have us believe Dr. Cohen was confused as to claimant's employment rather than consider that a typographical error occurred on one page. Lastly, the administrative law judge does not explain how the smoking history of a half pack to a pack a day for 56 years, as stated by Dr. Cohen, differs from that reported by claimant (a pack per day since age 18 but…now down to a half pack a day) and found by the administrative law judge himself (…a pack a day cigarette smoker since he was 17 or 18 years old … claimant continues to smoke…although he states he has cut down to a half a pack a day). Claimant's Exhibit 4; Director's Exhibit 1; Transcript at 38-39; Decision and Order at 2. While it is certainly within the administrative law judge's purview to accord less weight to Dr. Cohen's extensive training and superior knowledge of cutting-edge research, *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), he may not mischaracterize or selectively analyze a medical opinion.

With regard to the CT scan evidence at Section 718.107, the administrative law judge's analysis was inconsistent with his findings with respect to Drs. Repsher and Tuteur because neither physician possessed the expertise relied upon by the administrative law judge. I would, however, affirm his reliance on Dr. Fishman's interpretation, as any error in the administrative law judge's assumption regarding his expertise would be harmless in this case. The administrative law judge was disingenuous, at best, however, for berating claimant's counsel for not objecting to the admission of CT scan evidence at the hearing in accordance with *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc)*(Boggs, J., concurring), given that the Board's Decision and Order in *Webber* was issued approximately one year after the hearing in this case.

Accordingly, I would affirm the administrative law judge's findings at 20 C.F.R. §718.107, vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and (a)(4), and remand this case to the Office of Administrative Law Judges for reassignment to a new administrative law judge and for further consideration.

_____

BETTY JEAN HALL
Administrative Appeals Judge