BRB No. 09-0326 BLA

CAROL M. OWEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY	)	DATE ISSUED: 01/28/2010
	)	
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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Barry H. Joyner (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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 Awarding Benefits on Remand (2002-BLA-5365) of Administrative Law Judge Alice M. Craft rendered on a miner's 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 original Decision and Order, Administrative Law Judge Rudolf L. Jansen credited the miner with eighteen years of coal mine employment, and adjudicated this claim, filed on May 7, 2001, pursuant to the regulations at 20 C.F.R. Part 718. Judge Jansen determined that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). Accordingly, benefits were awarded.

In response to employer's appeal, the Board affirmed the administrative law judge's procedural ruling, that the Board's holding in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 23 BLR 1-261 (2007)(*en banc*)(Boggs, J., concurring), was applicable to limit the number of CT scans employer could enter into the record. The Board further held, however, that since employer proffered three CT scan readings and alleged good cause for their admission, the administrative law judge erred in failing either to allow employer to designate the CT scan reading it wished to have admitted into the record, or to consider whether good cause was demonstrated pursuant to 20 C.F.R. §725.456(b)(1) for admitting additional CT scan interpretations.[1] Consequently, the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b),[2] and remanded the case for the administrative law judge to provide further analysis of the medical opinion evidence, sufficient to comply with 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), 30 U.S.C. §932(a), taking into consideration any CT scan interpretations of record, claimant's smoking history, and other relevant evidence. The Board also vacated the administrative law judge's finding that claimant established total respiratory disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c), and remanded the case for reconsideration of this issue, if reached, weighing together all relevant evidence. *C.M.O.* [*Owen*] *v. Midwest Coal Company*, BRB No. 06-0958 BLA (Sept. 25, 2007)(unpub.).

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[1] Dr. Cook interpreted the original CT scan on behalf of employer on January 18, 2002. This CT scan was subsequently interpreted by Drs. Wiot, Repsher, and Renn. Director's Exhibit 22; Employer's Exhibits 4, 5. While employer submitted the CT scan interpretations by Drs. Wiot, Repsher, and Renn for admission into the record, Administrative Law Judge Rudolf L. Jansen only allowed the admission of one interpretation, and chose to consider Dr. Wiot's interpretation, based on his superior qualifications. Director's Exhibit 22.

[2] The Board affirmed the administrative law judge's finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On remand, the case was assigned to Administrative Law Judge Alice M. Craft (the administrative law judge), who determined that employer failed to show "good cause" for the admission into the record of CT scan evidence that exceeded the limitations of 20 C.F.R. §725.414 and *Webber*. *See* 20 C.F.R. §725.456(b)(1); 65 Fed. Reg. 79,989 (Dec. 20, 2000). The administrative law judge found that the weight of the evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), and total disability due to pneumoconiosis at Section 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's decision on both procedural and substantive grounds. On procedural grounds, employer asserts that the administrative law judge abused her discretion and deprived employer of due process in failing to find "good cause" for the admission into the record of more than one CT scan reading. On the merits, employer challenges the administrative law judge's analysis in finding the evidence sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), and total disability due to pneumoconiosis at Section 718.204(b), (c). Claimant responds, urging affirmance of the award of benefits, to which employer replies in support of its position, further requesting that, if remand is appropriate, this case be reassigned to a different administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's evidentiary ruling, to which employer replies in support of its position.

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.[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 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Employer first contends that the administrative law judge abused her discretion and deprived employer of due process in finding that it failed to

[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 Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

show "good cause"[4] for the admission into the record of additional interpretations of the January 18, 2002 CT scan, over and above the interpretation of Dr. Renn, which employer designated as its affirmative evidence. In this regard, employer argues that it demonstrated good cause because the additional CT scan interpretations of Drs. Wiot and Repsher were obtained and submitted prior to the Board's holding in *Webber*, and that employer was prejudiced by their exclusion. Alternatively, employer requests that the Board find that "good cause" has been established.[5] Employer's Brief at 7-15. Employer's arguments are without merit. The Director notes that any additional CT scan interpretations could not change the result in this case, as they pertain to the existence of clinical pneumoconiosis, which was not established herein, and the administrative law judge's award was based on a finding of legal pneumoconiosis. We agree with the Director's position, that employer must make a particularized showing that the evidence submitted in compliance with the evidence-limiting rules was insufficient for determining entitlement to benefits. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297, n. 18, 23 BLR 2-430, 2-460-461 (4th Cir. 2007). As the administrative law judge has broad discretion in procedural matters, and employer has failed to show that the administrative law judge abused her discretion in disallowing the excess evidence, we find no error in the administrative law judge's ruling in this regard. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Additionally, employer's request that the Board find "good cause" established must be denied, as such a determination is not

[4] A showing of "good cause" is necessary in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony. *See* 65 Fed. Reg. 79,993 (Dec 20, 2000); 20 C.F.R. §725.456(b)(1).

[5] Employer also renews its arguments from the prior appeal, that the holding in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006), is unconstitutional and that *Webber* should not have been applied retroactively. Employer's Brief at 13-15; Employer's Reply Brief at 4-7. As the Board has addressed and rejected these arguments, and as employer has not set forth any valid exception to the law of the case doctrine, we adhere to our previous holdings regarding these issues. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). We find no merit in employer's contention that the administrative law judge erred in failing to address its argument that claimant was granted "ample opportunity" to obtain and submit CT scan evidence, as 20 C.F.R. §725.456(b)(1) contains no provision that would allow parties to waive the regulatory limitations on medical evidence set forth at 20 C.F.R. §725.414. Employer's Brief at 12; *see Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004).

within the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Employer next challenges the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4), contending that the administrative law judge failed to comply with the Board's directives on remand. Employer asserts that the administrative law judge's crediting of the opinions of Drs. Cohen and Houser over the contrary opinions of Drs. Repsher and Renn, was irrational, not supported by substantial evidence, and contrary to law. Employer's arguments are without merit. The administrative law judge determined that claimant had a smoking history of, at most, fifty-one pack years, Decision and Order on Remand at 5, and summarized the conflicting medical opinions of record, noting their underlying documentation, the employment and smoking histories relied upon, the relative qualifications of the physicians, and the physicians' explanations for their respective conclusions. Decision and Order on Remand at 12-16. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988). In this case, the administrative law judge determined that Dr. Cohen was "superbly qualified in the field of pulmonary disease," and acted within her discretion in finding that his opinion, that claimant had a moderately severe chronic obstructive lung disease significantly related to both smoking and coal dust exposure, was well-reasoned and entitled to great weight, as it was supported by claimant's treatment records, physical findings and the objective testing.[6] Decision and Order on Remand at 18-22; Claimant's Exhibit 5; *see Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Despite the fact that Dr. Houser diagnosed the presence of clinical pneumoconiosis on x-ray, contrary to the administrative law judge's finding that clinical pneumoconiosis was not established, the administrative law judge permissibly found that Dr. Houser's diagnosis of chronic

[6] The administrative law judge acknowledged that, while Drs. Houser, Renn, and Repsher were all Board-certified pulmonologists, Dr. Cohen possessed superior qualifications, as "[Dr. Cohen] is a highly qualified pulmonologist, who currently practices as a senior attending physician in the Division of Pulmonary Medicine/Critical Care at Cook County Hospital in Chicago; he is the medical director of the Pulmonary Physiology and Rehabilitation Divisions of Pulmonary and Occupational Medicine and the Black Lung Clinics Program; he is an assistant professor of environmental and occupational health and safety at the University of Illinois; and he has published thirty articles or abstracts, the latest in 2003, nearly all of which involved the treatment of coal workers' pneumoconiosis, silicosis, sarcoidosis or tuberculosis." Decision and Order on Remand at 18-19; Claimant's Exhibit 5; Employer's Exhibits 5, 4.

obstructive pulmonary disease (COPD) due to smoking and coal dust exposure, based on physical examination findings and objective testing revealing hypoxemia and moderately severe obstructive airway disease, was documented and well-reasoned, and entitled to probative weight. Director's Exhibit 11; Decision and Order on Remand at 20; s*ee Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge rationally accorded little weight to Dr. Renn's opinion, that claimant's COPD was due to smoking with an asthmatic component, as Dr. Renn's rationale, that pneumoconiosis does not cause a bronchoreversible obstructive ventilatory defect, was based primarily upon the results of an invalid pulmonary function study. Decision and Order on Remand at 19; *see Webber*, 23 BLR at 1-138. The administrative law judge also permissibly gave little weight to Dr. Renn's opinion, that claimant's emphysema was due to smoking and that the upper lobe fibro-infiltrative process was consistent with burned out sarcoidosis or tuberculosis but not pneumoconiosis, because it was based on the physician's own CT scan interpretation, and the administrative law judge determined that the record failed to show that Dr. Renn possessed a specialized knowledge and expertise in reading CT scans. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002). Further, the administrative law judge found that Dr. Renn failed to adequately address the effect of coal dust exposure on this claimant's pulmonary condition. Decision and Order on Remand at 19; *see generally Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999); *Clark*, 12 BLR at 1-149. Similarly, the administrative law judge permissibly discounted Dr. Repsher's opinion, that claimant's obstructive disease was due solely to smoking, based on deficiencies in his rationale, including his analysis regarding the validity of the pulmonary function testing, and his position that pneumoconiosis rarely causes a purely obstructive airway disease, which the administrative law judge determined was unsupported by the current majority view in the medical literature, as approved by the Department of Labor. Decision and Order on Remand at 20-22; *see* 65 Fed. Reg. 79,938-43 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Burns*, 855 F.2d at 501; *Clark*, 12 BLR at 1-155. Because the administrative law judge found that Dr. Cohen was better qualified to render an opinion as to whether claimant's condition constituted legal pneumoconiosis, and provided a more persuasive rationale for his conclusions, the administrative law judge permissibly accorded dispositive weight to Dr. Cohen's opinion, as supported by the opinion of Dr. Houser. *See generally Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the weight of the medical opinion evidence of record was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4).

Employer next challenges the administrative law judge's finding that the weight of the evidence was sufficient to establish total respiratory disability pursuant to Section 718.204(b), arguing that the administrative law judge failed to provide valid reasons for crediting the opinions of Drs. Cohen and Houser, that claimant is totally disabled from performing her usual coal mine employment, over the contrary opinions of Dr. Renn and Repsher. Employer also maintains that the administrative law judge failed to properly weigh the credibility of the medical opinion evidence against the non-qualifying results of the objective tests of record in accordance with *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987). Employer's Brief at 29-37. Employer's arguments lack merit. After determining that the pulmonary function study evidence of record was inconclusive, and that the objective evidence in the record as a whole did not support a finding of total respiratory disability at Section 718.204(b)(2),[7] the administrative law judge summarized the conflicting medical opinions, including the underlying bases for their conclusions, and permissibly credited the opinion of Dr. Cohen, as supported by the opinion of Dr. Houser, that claimant's moderately severe obstructive impairment prevented her from performing her usual coal mine employment duties as a truck driver and drill helper, involving periodic heavy physical labor. In so doing, the administrative law judge determined that Dr. Cohen had the most detailed understanding of the exertional requirements of claimant's coal mine employment duties. Further, she found that Dr. Cohen's persuasive opinion was bolstered by the qualifying pre-bronchodilator values and near-qualifying post-bronchodilator values of the only valid pulmonary function study of record, as well as by the physician's "superior credentials and recent research and publication in this area of medicine." Decision and Order on Remand at 23-24; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Weighing like and unlike evidence together at Section 718.204(b), the administrative law judge concluded that claimant established total respiratory disability based on the weight of the medical opinion evidence at subsection (b)(2)(iv). Decision and Order on Remand at 24; *see Fields*, 10 BLR at 1-22. As substantial evidence supports the administrative law judge's findings thereunder, they are affirmed.

Lastly, employer maintains that the administrative law judge erred in finding the opinions of Drs. Cohen and Houser sufficient to establish disability causation at Section 718.204(c). Employer contends that the administrative law judge's weighing of the medical opinion evidence of record is not supported by substantial evidence, is irrational

[7] The Board affirmed Judge Jansen's finding that the non-qualifying blood gas study evidence could not demonstrate total disability at 20 C.F.R. §718.204(b)(2)(ii), and affirmed his finding that there was no evidence of cor pulmonale with right-sided congestive heart failure to demonstrate total disability at subsection (b)(2)(iii). *C.M.O.* [*Owen*] *v. Midwest Coal Company*, BRB No. 06-0958 BLA (Sept. 25, 2007)(unpub.); *see Skrack*, 6 BLR at 1-710.

and is contrary to law. We disagree. Based on her weighing of the conflicting medical opinions on the issue of legal pneumoconiosis, the administrative law judge permissibly determined that the doctors' reasoned and documented opinions were entitled to determinative weight on the issue of disability causation. Decision and Order on Remand at 24-26; *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Additionally, the administrative law judge properly determined that the opinions of Drs. Renn and Repsher were entitled to less weight, as they did not diagnose clinical or legal pneumoconiosis, and did not find claimant to be totally disabled, contrary to the administrative law judge's findings. *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). We affirm the administrative law judge's finding of disability causation at Section 718.204(c), as supported by substantial evidence, and affirm her award of benefits.

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

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