BRB No. 02-0743 BLA

PHYLLIS LITTLEPAGE, on behalf of CHARLES LITTLEPAGE (deceased)	)	
Claimant-Petitioner	)	
v.	)	
FREEMAN UNITED COAL MINING COMPANY	)	DATE ISSUED:_____
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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

Shannon L. Clark (Gould & Ratner), Chicago, Illinois, for employer.

Timothy S. Williams (Howard M. Radzely, Acting 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:

Claimant appeals the Decision and Order Denying Benefits (00-BLA-646) of Administrative Law Judge Jeffrey Tureck, rendered on her claim 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] The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, he denied benefits.

Charles Littlepage worked for employer as a miner for over twenty years.[2] He retired in 1987 when the mine he was working in closed. The miner filed his claim for benefits in 1998, which was denied by the Office of Workers' Compensation Programs. Following a subsequent hearing on his claim, the administrative law judge found that the miner had failed to establish the existence of pneumoconiosis by x-ray or medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(1) and (a)(4). On appeal, claimant argues that the administrative law judge made several errors in analyzing the facts, which require a remand. Employer argues that the decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, submitted a letter arguing that the administrative law judge erred in his treatment of the opinion evidence of one medical expert, and therefore that the case should be remanded.

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).

Several of claimant's arguments are without merit. First, claimant asserts that the administrative law judge erred in finding that the miner's smoking history exceeded 75 pack years. However, claimant concedes that the miner smoked one to one and one half packs of cigarettes a day for fifty years. *See* Claimant's Brief at 7. It is the role of the administrative law judge, as the trier-of-fact, to determine both the credibility of the evidence and the inferences to be drawn from it. *Director, OWCP v. Rowe*, 719 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Such determinations must be upheld unless they are unreasonable or unsupported by the record. *See Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). We find that the administrative law judge's findings regarding the miner's smoking history are supported by substantial evidence. Claimant also argues that the administrative law judge erred in stating

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[1] The Department of Labor has amended the regulations implementing the Act. 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 miner initially brought the claim. He died after the administrative law judge issued his decision; the miner's surviving widow then pursued the claim.

that the record contained over 40 x-ray readings, whereas the record contained only 35 "properly classified" x-ray readings. The administrative law judge included in his total several x-ray reports that were not classified according to the ILO system for categorizing pneumoconiosis. However, he did not assert that those x-ray readings were "properly classified," and elsewhere in his opinion the administrative law judge discussed all of the x-rays and gave the unclassified x-rays limited weight. We find no reversible error in the administrative law judge's characterization of the x-ray evidence. Claimant additionally argues that the administrative law judge erroneously stated that there were nine positive x-ray readings by six doctors, when in fact there were eight positive readings by five doctors. To the extent that the administrative law judge erred, it was in claimant's favor, and therefore is harmless.

Claimant also argues that the administrative law judge erroneously went outside the record to determine that x-ray interpretations by a physician identified only as "JAW" were from Dr. John A. Worrell, a B-reader. In addition, claimant argues the administrative law judge impermissibly credited employer's other readers, Drs. Castle, Hippensteel, and Wheeler, as B-readers when the record does not reflect their qualifications to interpret chest x-rays for pneumoconiosis. Employer responds that these physicians' x-ray reports were in substantial compliance with the Section 718.102 standards for interpretation of x-rays. Moreover, employer asserts that the administrative law judge correctly found those physicians to be B-readers in light of employer's uncontroverted representation of their credentials, Dr. Kelly's uncontradicted report identifying them as B-readers,[3] and the miner's failure to object to such representations either at the hearing or in his post-hearing brief.[4]

Claimant correctly asserts that there is no record evidence regarding the qualifications of Drs. Castle, Hippensteel, Wheeler, and "JAW." Moreover, contrary to employer's assertion, the miner argued in his post hearing brief that because critical information about the qualifications of the readers was not in the record, the readings of Drs. Castle, Hippensteel, Wheeler, and "JAW" should be given little if any weight. Claimant's argument has merit. The party who attempts to rely upon an

[3] Dr. Kelly's report was not submitted to the administrative law judge and the miner until sometime after the close of the hearing. Therefore, the miner had no opportunity at the hearing to object to his characterization of Drs. Castle, Hippensteel, Wheeler, and "JAW" as B-readers.

[4] Employer cites *Peabody Coal Co. v. Helms*, 901 F.2d 571, 573 (7th Cir. 1991), as holding that the administrative law judge in that case "permissibly relied on opinion of expert whose curriculum vitae was not placed in record but whose qualifications were described by employer without contradiction." Employer's Response to Claimant's Petition for Review at 8. *Peabody* does not stand for that principle.

x-ray interpretation has the burden of establishing for the record the qualifications of the x-ray reader in question. *Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54 (1985). In the face of the miner's objection to employer's characterization of the physicians' qualifications, the administrative law judge was required to address that issue. Consequently, we vacate the administrative law judge's consideration of these x-rays. On remand the administrative law judge shall determine the basis for finding that Drs. Castle, Hippensteel, Wheeler, and "JAW" were B-readers.

Claimant additionally argues that even assuming that Drs. Wheeler, Castle, and "JAW" are B-readers, the administrative law judge erroneously failed to explain the method he used to assign weight to the x-ray interpretations. The administrative law judge found that the multiple readings by Drs. Ahmed, Cappiello, Miller, and Kattan (all dually qualified) were offset by the multiple negative readings by Drs. Wheeler, Castle, and Worrell ("JAW"). Decision and Order at 3. Claimant's argument has merit. While an administrative law judge is not obligated to give more weight to dually qualified physicians than to B-readers, where the x-ray evidence is in conflict, consideration must be given to readers' qualifications in accord with Section 718.202(a)(1). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Here the administrative law judge did not acknowledge that Drs. Ahmed, Cappiello, Miller, and Kattan, are dually qualified and did not address how that impacted his weighing of the x-ray evidence. Therefore, on remand the administrative law judge shall make findings of fact regarding the qualifications of the x-ray readers and explain his method of assigning weight to the conflicting readings.

Claimant also challenges the administrative law judge's reliance upon hospital chest x-rays which were taken during the miner's hospitalizations at Herrin Hospital, and which did not conform to the Section 718.102 and 718.202 standards, and did not diagnose pneumoconiosis. The administrative law judge found:

> It appears that all of these x-rays were taken in connection with claimant's treatment for lung disease. Although there is no indication that any of these doctors were B-readers, since the x-rays were taken for the purpose of diagnosing and treating claimant's lung problems, and were relied upon by claimant's treating doctors, they are entitled to great weight. These readings are consistent in diagnosing chronic obstructive pulmonary disease (COPD) and a calcified mass in claimant's right upper lobe which is identified as a granuloma or hamartoma. They also are consistent in not diagnosing pneumoconiosis. Since these x-ray readings were taken for the purpose of diagnosing claimant's lung disease, that they do not mention pneumoconiosis would indicate that they did not find pneumoconiosis to be present.

Decision and Order at 3. The administrative law judge concluded that the eight Herrin Hospital x-ray readings, which did not diagnose pneumoconiosis, offset the positive reading of Dr. Mitchell (category 1/0), who was not a B-reader. We find no error in the administrative law judge's treatment of those x-ray readings.

Claimant also raises several challenges to the administrative law judge's finding that the miner failed to establish the existence of pneumoconiosis by medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Several of claimant's arguments are without merit. We conclude that the administrative law judge did not err in considering Dr. Ming's records. We also find the administrative law judge's treatment of the reports of Drs. Sanjabi and Parks to be rational and supported by substantial evidence. It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984); and to assess the evidence of record and draw his own conclusions and inferences from it, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

The remainder of claimants arguments relate to the administrative law judge's treatment of the medical opinions of Drs. Houser and Cohen, both of whom diagnosed legal pneumoconiosis, and Dr. Selby, who did not. Dr. Cohen - who did not examine the miner, but reviewed the medical evidence - based his diagnosis on the miner's history of exposure to coal mine dust; treatment records showing signs of chronic lung disease; pulmonary function tests showing increasingly severe obstructive defect with significant diffusion impairment; severe hypoxemia at rest and exercise; and x-ray evidence of pneumoconiosis, "although there are conflicting reports. " Claimant's Exhibit 10. Dr. Cohen found the obstructive defect was "consistent with the miner's 22 years of exposure to coal mine dust and with his 45-74 pack years of exposure to tobacco smoke." He also tied the miner's severe hypoxemia to coal dust exposure and smoking. Dr. Cohen found no other history of exposure beyond the miner's coal mine employment and cigarette smoke. *Id*. at 10.

In addition, Dr. Cohen criticized Dr. Selby's report. Noting that Dr. Selby identified cigarette smoking as the primary cause of the miner's obstructive impairment, Dr. Cohen stated that "it is well known that coal dust like tobacco smoke causes or contributes to obstructive impairment like that in Mr. Littlepage." *Id*. Dr. Cohen questioned Dr. Selby's report because "[h]is opinion does not indicate to me why he did not consider significant coal dust exposure as a contributing cause of the severe pulmonary impairment . . . ," and because Dr. Selby apparently took a limited view of what constitutes coal workers' pneumoconiosis. *Id*. at 13. Dr. Cohen also rejected Dr. Selby's opinion that the miner had severe asthma. *Id*. at 14-15. The administrative law judge discussed Dr. Cohen's report at length, and concluded

that it should not be credited. Decision and Order at 4-5, 8.

Claimant argues that the administrative law judge erred to the extent that he discounted Dr. Cohen's opinion because he did not examine the miner; and that the administrative law judge mischaracterized the miner's smoking history, and substituted his opinion for that of the medical experts. In addition, claimant argues that the administrative law judge, in finding Dr. Cohen's analysis would require that every miner with a lung impairment and a history of exposure to coal mine dust be found to suffer from pneumoconiosis, misinterpreted and grossly overstated Dr. Cohen's opinion.

Nothing in the administrative law judge's discussion of Dr. Cohen's opinion indicates that the judge gave diminished weight to Dr. Cohen's opinion because he did not examine the miner. Additionally, as discussed above, the administrative law judge's findings regarding the miner's smoking history are supported by substantial evidence. However, claimant's assertion that the administrative law judge substituted his medical opinion for that of Dr. Cohen has merit. The administrative law judge criticized Dr. Cohen's opinion because Dr. Cohen found that both exposure to coal mine dust and cigarette smoking contributed to the miner's pulmonary disease:

> [C]laimant's cigarette smoking history of 75 pack years is far more significant than his coal mining history of 22 years. As Dr. Cohen states: "Modern studies consistently show a relationship between coal mine dust exposure and declines in lung function: dust caused impairment is at a level comparable to that of cigarette smoke . . . ." On that basis, claimant's smoking history is 3-4 times more significant than his coal mining history. Interestingly, Dr. Cohen takes Dr. Selby to task for failing to consider the effects of coal dust exposure on claimant's obstructive impairment; but he is guilty of just the reverse, ignoring or minimizing the effects of claimant's extensive smoking history on his obstructive impairment.

Decision and Order at 5.

In finding that the miner's "cigarette smoking history of 75 pack years is far more significant than his coal mining history of 22 years," the administrative law judge improperly substituted his medical opinion for Dr. Cohen's. *See Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984) (adjudicator may not reject medical report because it does not accord with his own medical conclusion); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986) (adjudicator improperly rejected physician's report because she disagreed with physician's opinion that miner's 7.5 years of exposure to coal mine dust was "short," and administrative law judge did

not believe that 7.5 years was "short"); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987) (interpretation of objective data is a medical determination and an administrative law judge may not substitute his opinion for that of a physician).

Moreover, both claimant and the Director, Office of Workers' Compensation Programs challenge the administrative law judge's finding that Dr. Cohen's opinion should not be credited because he did not discuss that the miner's condition seriously deteriorated after he left the mines but while he continued to smoke heavily. The administrative law judge noted that the miner retired in 1987 because the mine closed, not because of disability. "Seven years later he had a severe obstructive impairment." Decision and Order at 5. The administrative law judge acknowledged that the revised regulations state that pneumoconiosis is recognized as a latent and progressive disease, which may first become detectable only after the cessation of coal mine dust exposure. However, he emphasized that in *National Mining Association v. Department of Labor*, 292 F. 3d 849, 862 (2002) (NMA), the United States Court of Appeals for the District of Columbia Circuit noted that during oral argument in that case the Secretary conceded that the most common forms of pneumoconiosis are not latent, and that latent and progressive pneumoconiosis is rare, "occurring in a small percentage of cases by all accounts." The administrative law judge found "[b]ased on the Secretary's admissions before the DC Circuit, it is clearly more likely that claimant's decreased respiratory capacity between 1987 and 1994 is due to his continued very heavy cigarette smoking during that period, and not to the coal mine employment which had ceased." Decision and Order at 5.

Claimant argues that the discussion of latency and progressivity in NMA only relates to clinical pneumoconiosis and not to legal pneumoconiosis. The Director joins claimant, arguing that *NMA*, *supra*, "does not authorize a fact-finder to deny a claim based on the statistical probability that a particular miner's pneumoconiosis is not latent or progressive . . . ." Director's letter at 2.

The Director's argument has merit. The administrative law judge found that it is statistically improbable that the miner suffered from legal pneumoconiosis, and therefore that Dr. Cohen's opinion that the miner did suffer from legal pneumoconiosis is not worthy of weight. In so doing, the administrative law judge improperly substituted his judgment regarding the etiology of the miner's disease for the medical judgment of the experts. *See Hall*, *supra*; *Hucker*, *supra*; *Marcum*, *supra*.

Claimant also challenges the administrative law judge's treatment of the opinions of Drs. Selby and Houser. Dr. Selby examined the miner on behalf of employer. He found the chest x-ray taken in conjunction with that examination to be negative for pneumoconiosis. He found the pulmonary function tests showed a very severe obstructive lung defect with a good response to bronchodilators. He also

reported the results of an arterial blood gas study. He concluded that the miner suffered from very severe advanced emphysema due to cigarette smoking and "his genetic influence," and -

> fairly severe bronchial asthma with a considerable response to postbronchodilator despite all the asthma medicines he is even on at this time, including the Prednisone. This would indicate that he has a very severe component of bronchial asthma superimposed on a very severe component of emphysema, and thus it is not at all surprising that he should be short of breath with even the slightest exertion.

Director's Exhibit 28. Dr. Selby concluded that the miner did not suffer from pneumoconiosis, and that his emphysema and asthma were not caused by exposure to coal mine dust. *Id*.

The administrative law judge found that Dr. Selby "conducted a thorough pulmonary examination, including a lengthy history, physical examination, ventilatory and blood gas tests, and a chest x-ray, and found Dr. Selby's opinion, "along with the treatment notes and examination reports of Drs. Parks, Sanjabi and Mings to be the most probative evidence. . . ." Id. at 7-8. Dr. Houser, who also examined the miner, diagnosed category 1/2 coal workers' pneumoconiosis and emphysema. Claimant's Exhibit 1. He found the miner's emphysema to be related to smoking as well as exposure to coal and rock dust. Claimant's Exhibit 3. The administrative law judge found, "Dr. Houser conducted a limited examination in that he did not conduct an arterial blood gas test nor [sic] an EKG. He also did not have an x-ray taken at [the time he did his examination], relying instead on an x-ray taken [five months earlier]." Decision and Order at 4. The administrative law judge concluded, "[i]n regard to the reports of Dr. Houser and Dr. Selby, I give Dr. Houser's report less weight because he does not consider the fact that claimant's respiratory condition seriously deteriorated after claimant left the mines but while he still was smoking heavily." *Id*. at 8.

Claimant argues that Dr. Selby failed to explain his conclusion that claimant's chronic obstructive pulmonary disease was caused by smoking and not coal mine employment; therefore his opinion is not reasoned, and the administrative law judge erred in crediting it. Claimant also challenges the administrative law judge's reasons for giving diminished weight to Dr. Houser's opinion. Because Dr. Selby discussed all of the relevant medical evidence in conjunction with his conclusion that the miner did not suffer from pneumoconiosis we find no error in the administrative law judge's crediting of that report. On the other hand, claimant's arguments regarding Dr. Houser's opinion have merit.

Regarding Dr. Houser's opinion, claimant first argues that the administrative

law judge erroneously gave diminished weight to Dr. Houser's opinion because he failed to conduct an arterial blood gas study and an EKG, and evaluated an x-ray that was five months old instead of taking a new one. The administrative law judge offered no explanation as to why those perceived shortcomings in Dr. Houser's examination warranted giving his opinion diminished weight. Thus, without further explanation we cannot affirm the administrative law judge's decision to give Dr. Houser's report diminished weight. *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Claimant also challenges the administrative law judge's determination to discount Dr. Houser's opinion because the physician did not "consider the fact that claimant's respiratory condition seriously deteriorated after claimant left the mines but while he still was smoking heavily." Decision and Order at 8. We have found that the administrative law judge erroneously discredited Dr. Cohen's opinion on the same ground. The administrative law judge's treatment of Dr. Houser's opinion is also inappropriate substitution of the administrative law judge's medical judgment for that of the expert opinion.

The administrative law judge erred in his treatment of certain aspects of the x-ray and medical opinion evidence. Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and remanded for further proceedings consistent with our 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