BRB No. 01-0506 BLA

DONALD D. STALCUP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

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

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (99-BLA-0445) of Administrative Law Judge Rudolf L. Jansen awarding benefits 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] The administrative law judge credited claimant with thirty years of coal mine

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims

employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000)[2] and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)

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pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments regarding the impact of the challenged regulations made by employer in its response brief and the Director, Office of Workers' Compensation Programs, in his letter to the Board.

[2]Although the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), the administrative law judge

(2000).[3] Accordingly, the administrative law judge awarded benefits.

found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000).

[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).

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c)(4) (2000) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Claimant responds, urging affirmance of the administrative law judge's Decision and Order.[4] The Director, Office of Workers' Compensation Programs, has declined to respond to employer's appeal.[5]

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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Whereas Drs. Carandang, Cohen and Koenig opined that claimant suffers from pneumoconiosis, Director's Exhibit 10; Claimant's Exhibits 1, 2, 8, Drs. Castle, Cook, Dahhan and Repsher opined that claimant does not suffer from pneumoconiosis, Employer's Exhibits 1, 7, 8, 10, 32-34, 48, 52. Dr. Tuteur opined that claimant does not suffer from "significant" coal workers' pneumoconiosis. Employer's Exhibits 31, 52. The administrative law judge stated that "[b]ased upon the superior credentials of Dr. Cohen and the bolstering opinions of Drs. Tuteur and Castle, together with the less significant opinions of Drs. Carandang, Koenig, and Repsher, I find that [claimant] has demonstrated by a

[4]Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[5]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1) (2000), 718.203(b) (2000) and 718.204(c)(1)-(3) (2000) are not challenged on appeal, we affirm these findings. *See* 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(b)(2)(i)-(iii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

preponderance of the evidence that he does have coal workers' pneumoconiosis." Decision and Order at 13.

Employer asserts that the administrative law judge erred in failing to provide an adequate explanation for finding that Dr. Cohen's qualifications are superior to the qualifications of Drs. Cook and Dahhan. Drs. Cook and Dahhan are Board-certified in internal medicine and in the subspecialty of pulmonary disease. In contrast, Dr. Cohen is Board-certified in internal medicine and in the subspecialty of pulmonary medicine as well as the subspecialty of critical care medicine. Nonetheless, the administrative law judge did not explain why Dr. Cohen's credentials in the subspecialty of critical care medicine are relevant to his ability to formulate an opinion on the existence of pneumoconiosis or total disability. 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Thus, because the administrative law judge did not provide a valid basis for finding Dr. Cohen's qualifications superior to the qualifications of Drs. Cook and Dahhan, *see generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*), we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000), and remand the case for further consideration of the evidence. On remand, the administrative law judge must explain the bases for his conclusions. *See Wojtowicz, supra*; *see also Hall, supra*; *Shaneyfelt, supra*.

Employer also argues that the administrative law judge mischaracterized Dr. Tuteur's opinion since, employer asserts, Dr. Tuteur's opinion is *not* sufficient to establish the existence of pneumoconiosis. As previously noted, Dr. Tuteur opined that claimant does not suffer from "significant" coal workers' pneumoconiosis. Employer's Exhibits 31, 52. The administrative law judge concluded, "I find this diagnosis to be a positive finding for coal workers' pneumoconiosis." Decision and Order at 13. The administrative law judge stated, "[i]n finding *insignificant* pneumoconiosis, Dr. Tuteur reviewed the objective medical data and considered [c]laimant's employment and social histories." *Id*. (emphasis added). The administrative law judge drew a reasonable inference that Dr. Tuteur's finding of no significant pneumoconiosis constitutes a finding of insignificant pneumoconiosis, which is nonetheless pneumoconiosis. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we reject employer's assertion that the administrative law judge mischaracterized Dr. Tuteur's opinion.

Employer further argues that the administrative law judge mischaracterized Dr. Castle's opinion since, employer asserts, Dr. Castle did *not* opine that claimant suffers from pneumoconiosis. The administrative law judge stated, "[i]n weighing the evidence, I am faced with Dr[]. Castle['s]...opinion[] that [claimant] has pneumoconiosis." Decision and Order at 13. Contrary to the administrative law judge's finding, Dr. Castle opined that claimant does not suffer from coal workers' pneumoconiosis. *See* Employer's Exhibit 10; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Therefore, the administrative law judge must reconsider Dr. Castle's opinion.

We reject, however, employer's assertion that the administrative law judge erred in discrediting Dr. Repsher's opinion because it is equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Employer's assertion is based upon the premise that the administrative law judge ignored Dr. Repsher's actual opinion and improperly focused on, and mischaracterized, an isolated statement in Dr. Repsher's deposition with respect to a CT scan. In a report dated March 30, 1999, Dr. Repsher opined that claimant may have early mild coal workers' pneumoconiosis. Employer's Exhibit 8. However, in a subsequent report dated November 5, 1999, Dr. Repsher opined that there is no evidence of coal workers' pneumoconiosis or any other respiratory disease related to coal mine dust exposure. Employer's Exhibit 34. Nonetheless, in a deposition dated May 3, 2000, Dr. Repsher stated, "I haven't had the opportunities to review the CT scan, but if the CT scan does show some opacities consistent with very mild coal workers' pneumoconiosis, he may well have very mild – and subradiographic on the normal chest x-ray – coal workers (sic) pneumoconiosis or Category 0 coal workers (sic) pneumoconiosis." Employer's Exhibit 48 (Dr. Repsher's Deposition at 23-24). Thus, contrary to employer's assertion, Dr. Repsher did not unequivocally opine that claimant does not suffer from coal workers' pneumoconiosis.

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c)(4) (2000). Whereas Drs. Cohen and Koenig opined that claimant suffers from a totally disabling respiratory impairment, Claimant's Exhibits 1, 2, 8, Drs. Castle, Cook, Dahhan, Repsher and Tuteur opined that claimant does not suffer from a totally disabling respiratory impairment, Employer's Exhibits 1, 7-10, 31-34, 48, 50, 52. Employer asserts that the administrative law judge erred in discrediting Dr. Castle's disability opinion because Dr. Castle is not familiar with claimant's coal mine employment. The administrative law judge stated that "[claimant's] last mining position was as a mechanic for Peabody Coal Company at a mine operated in Carlisle, Indiana." Decision and Order at 3. The administrative law judge also stated that "[i]n his capacity as a mechanic, [claimant] frequently walked around the mine inspecting equipment, climbing on and crawling under the vehicles to perform maintenance." *Id*. In addition, the administrative law judge stated that "[claimant] spent approximately four

hours per day in the mine pits where dust limited visibility to twenty to fifty feet" and "[h]e was also required to periodically carry machine parts ranging in weight from seventy-five to one hundred fifty pounds." *Id*. The administrative law judge concluded that "Dr. Castle demonstrated a lack of familiarity with the facts regarding [claimant's] employment." *Id*. at 15.

In a deposition dated July 12, 2000, Dr. Castle indicated that he did not talk to claimant or review claimant's testimony with respect to the requirements of his last coal mine employment. Employer's Exhibit 52 (Dr. Castle's Deposition at 43). Nonetheless, Dr. Castle stated, "I reviewed [Dr.] Cohen's history and [Dr.] Cook's history." *Id*. The administrative law judge accorded determinative weight to Dr. Cohen's opinion. Dr. Castle indicated that he agreed that claimant's responsibilities in the last year of his coal mine employment involved heavy labor. *Id*. at 43-44. Dr. Castle testified that "if [claimant] had to lift 50 pounds from the floor and put it up here on a desk or something, I think he could do that." *Id*. at 43. Dr. Castle also testified, "I don't think most 62-year-old men probably could lift 150 pounds alone...[b]ut,...if he could before, he could probably do it again, just lift it and put it up there." *Id*. Dr. Castle concluded, "I don't think that a limited event such as that kind of heavy labor would be impaired by his degree of airway obstruction." *Id*.

Although Dr. Castle did not consider claimant's testimony with regard to the specific requirements of his usual coal mine employment, Dr. Castle nonetheless indicated that he was familiar with claimant's last coal mine employment as reported by the medical reports of Drs. Cohen and Cook. Dr. Castle indicated that he was aware that claimant's last coal mine employment required him to perform heavy labor. Dr. Castle also indicated that claimant's pulmonary impairment would not prevent him from performing heavy labor. While Dr. Castle did not know the actual weight of the heavy equipment on the large vehicles claimant was required to lift and carry as a mechanic, Dr. Castle opined that claimant could lift 150 pounds. As previously noted, the administrative law judge found that claimant's job responsibilities required him to carry machine parts that weighed seventy-five to one hundred and fifty pounds. Thus, we hold that the administrative law judge erred in discrediting Dr. Castle's disability opinion because he was not familiar with claimant's coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984).

Employer additionally asserts that the administrative law judge erred in discrediting Dr. Repsher's disability opinion. The administrative law judge found that Dr. Repsher's opinion that coal dust exposure cannot cause an obstructive impairment without a significant restrictive impairment is contrary to 20 C.F.R. §718.201(a)(2), and thus, contrary to the Act. However, the pertinent issue under 20 C.F.R. §718.204(b)(2)(iv) is total disability, and not the existence of pneumoconiosis, the cause of pneumoconiosis or the cause of disability. *See*

20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge must further consider Dr. Repsher's disability opinion in weighing the conflicting medical opinion evidence.

Employer also argues that the administrative law judge erred in according greater weight to the opinions of Drs. Cohen and Koenig than to the contrary opinions of record with regard to the issue of total disability because of their superior qualifications. Drs. Cohen, Cook, Dahhan and Koenig are Board-certified in internal medicine and in the subspecialty of pulmonary disease. Although Drs. Cohen and Koenig are Board-certified in the subspecialty of critical care medicine, the administrative law judge did not explain why their credentials in this subspecialty are relevant to their ability to formulate an opinion on the issue of total disability. *See Wojtowicz, supra*; *see also Hall, supra*; *Shaneyfelt, supra*. Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c)(4) (2000), and remand the case for further consideration of the evidence, if reached. *See* 20 C.F.R. §718.204(b)(2)(iv); *see generally Melnick, supra*. On remand, the administrative law judge must explain the bases for his conclusions. *See Wojtowicz, supra*; *see also Hall, supra*; *Shaneyfelt, supra*.

Further, employer argues that the administrative law judge erred in according greater weight to the opinion of Dr. Cohen than to the contrary opinions of Drs. Castle, Dahhan, Repsher and Tuteur based upon Dr. Cohen's status as an examining physician. The administrative law judge stated that "Drs. Cohen and Cook physically examined [claimant], entitling their opinions to additional weight." Decision and Order at 15. In *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992), the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, held that an administrative law judge erred in discrediting the opinion of Dr. Tuteur, a non-examining physician, since Dr. Tuteur was a qualified expert and since Dr. Tuteur's opinion was consistent with the opinion of Dr. Sanjabi, an examining physician. In the instant case, the administrative law judge did not explain why the opinion of a physician who examined claimant should be entitled to greater weight than to the opinion of a physician who did not examine claimant. Thus, we hold that the administrative law judge erred in according determinative weight to Dr. Cohen's opinion because he examined claimant and we instruct the administrative law judge to further consider the conflicting medical opinion evidence. *See Wojtowicz, supra*; *see also Hall, supra*; *Shaneyfelt, supra*.

In addition, employer argues that the administrative law judge erred in finding Dr. Koenig's opinion well reasoned and documented since, employer asserts, the administrative law judge discredited Dr. Koenig's opinion earlier because he found it to be inadequately reasoned. In weighing the evidence with respect to the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Koenig's opinion that claimant suffers from chronic obstructive pulmonary disease related to coal dust exposure is not

reasoned. However, with regard to the issue of total disability, the administrative law judge found that Dr. Cohen's opinion was "bolstered by the well documented and reasoned opinion of Dr. Koenig with respect to this issue." Decision and Order at 16. The administrative law judge did not explain why he found Dr. Koenig's opinion well reasoned and documented with respect to the issue of total disability when he previously found it unreasoned as to the existence of pneumoconiosis. *See Wojtowicz, supra*; *see also Hall, supra*; *Shaneyfelt, supra*. Thus, the administrative law judge must further consider the medical opinion evidence in accordance with the APA.

If reached, the administrative law judge 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. *See* 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987).

Finally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Specifically, employer asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Cohen than to the contrary opinion of Dr. Tuteur because of Dr. Cohen's superior qualifications and because Dr. Cohen examined claimant. Whereas Dr. Tuteur is Board-certified in internal medicine and the subspecialty of pulmonary medicine, Employer's Exhibit 50, Dr. Cohen is Board-certified in internal medicine and in the subspecialty of pulmonary medicine as well as the subspecialty of critical care medicine, Employer's Exhibit 1. As previously noted, the administrative law judge did not explain why he found that Dr. Cohen's credentials in the subspecialty of critical care medicine are relevant to his ability to formulate an opinion on the issues of the existence of pneumoconiosis and total disability. *See generally Melnick, supra*. Moreover, the administrative law judge did not explain why he found that Dr. Cohen's opinion should be accorded determinative weight because he examined claimant. *See Beasley, supra*. Thus, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000), and remand the case for further consideration of the evidence in accordance with the APA, if reached.[6] *See* 20 C.F.R. §718.204(c); *Wojtowicz, supra*; *see also Hall, supra*; *Shaneyfelt,*

[6]Citing *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990), and *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990), the administrative law judge stated that "[t]he Seventh Circuit holds that pneumoconiosis must be a 'simple contributing cause' of the miner's total disability (pneumoconiosis must be a necessary, but need not be a sufficient cause of the miner's total disability)." Decision and Order at 16. The revised regulation at 20 C.F.R. §718.204(c) provides that:

supra.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief

> 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:
>
> (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).

Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting in part and concurring in part:

I respectfully dissent from the majority opinion with regard to Dr. Castle's disability opinion. I would reject employer's assertion that the administrative law judge erred in discrediting Dr. Castle's disability opinion on the ground that he was not familiar with claimant's coal mine employment. Dr. Castle did not talk to claimant or review claimant's testimony with respect to the requirements of his last coal mine employment. Although Dr. Castle indicated that he was aware that claimant worked as a mechanic on large vehicles, Dr. Castle also indicated that he did not know what were the physical requirements of a person assigned the responsibility of changing equipment, i.e., axles, hydraulic pumps, door cylinders, air starters, etc., on the large vehicles used in claimant's last coal mine employment. Thus, I would hold that the administrative law judge permissibly discredited Dr. Castle's disability opinion because Dr. Castle was not familiar with the job responsibilities of claimant's last coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984).

I agree with the majority opinion in all other respects.

BETTY JEAN HALL
Administrative Appeals Judge