BRB No. 10-0385 BLA

RICHARD SPRAGUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING COMPANY	)	DATE ISSUED: 03/30/2011
	)	
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 from the Court of Appeals for the Seventh Circuit of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

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

John A. Washburn (Gould & Ratner LLP), Chicago, Illinois, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 on Remand from the Court of Appeals for the Seventh Circuit[1] (Decision and Order) (2003-BLA-5980) of Administrative Law Judge Adele H. Odegard, awarding benefits on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for the third time.[3] In its last Decision and Order, the Board considered claimant's appeal of Administrative Law Judge Jeffrey Tureck's denial of benefits. In a split decision, the Board affirmed Judge Tureck's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore affirmed the denial of benefits. *R.S.* [*Sprague*] *v. Freeman United Coal Mining Co*., BRB No. 07-0358 BLA (Jan. 24, 2008) (Hall, J. dissenting)(unpub.) The United States Court of Appeals for the Seventh Circuit subsequently vacated the Board's Decision and Order, concluding that Judge Tureck's "treatment of the X-ray evidence, his substitution of his opinion for that of the medical evidence, and his failure to address whether coal mining contributed to [claimant's] lung impairment are sufficient to vacate and remand the entire case" for further consideration. The Court also granted claimant's request that this case be assigned to a new administrative law judge on remand for "a fresh look at the evidence." *Sprague v. Director, OWCP*, No. 08-1574, slip op. at 4-6 (7th Cir. Feb. 9, 2009)(unpub.).

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[1] The law of the United States Court of Appeals for the Seventh Circuit is applicable, as claimant 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.

[2] In a letter dated June 16, 2010, the Director, Office of Workers' Compensation Programs (the Director), stated that the amendments to the Act contained in Section 1556 of Public Law No. 111-148, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)) have no impact on this case because claimant's subsequent claim was filed prior to January 1, 2005. Employer agrees with the Director's position. The amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), reinstated the rebuttable presumption of total disability due to pneumoconiosis for miners with at least fifteen years of qualifying coal mine employment who filed their claims after January 1, 2005 and whose claims were pending on or after March 23, 2010. Upon review, we agree that the amendments do not apply to this case, based on the May 6, 2002 filing date of the claim.

[3] The lengthy procedural history of this case is set forth in the administrative law judge's February 17, 2010 Decision and Order currently on appeal, and in the Board's decisions in *R.S.* [*Sprague*] *v. Freeman United Coal Mining Co*., BRB No. 07-0358 BLA (Jan. 24, 2008)(Hall, J., dissenting)(unpub.), and *R.S.* [*Sprague*] *v. Freeman United Coal Mining Co*., BRB No. 05-1020 BLA (Aug. 31, 2006)(unpub.).

Subsequently, the Board issued an order remanding this case to the Office of Administrative Law Judges for further consideration consistent with the Seventh Circuit Court's decision. The case was assigned to Administrative Law Judge Adele H. Odegard (the administrative law judge), who found that, although the CT scan evidence failed to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.107, the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203. The administrative law judge also found that the medical opinion evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and disability causation pursuant to 20 C.F.R. §718.204(c).[4] Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's weighing of the evidence in finding the existence of pneumoconiosis and disability causation established pursuant to Sections 718.202(a) and 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this case. Employer has filed a reply brief 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. 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).

Employer contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Specifically, employer contends that the administrative law judge erred in failing to accord deference to the negative x-ray readings of Drs. Scott and Wheeler, over the positive interpretations by Drs. Ahmed and Cappiello. Employer argues that Drs. Scott and Wheeler, both of whom are professors of radiology at Johns Hopkins University, possess superior skills and qualifications to those of Drs. Ahmed and Cappiello, and have published scores of peer-reviewed articles, some having to do with lung disease. Employer further argues that the administrative law judge erred in not crediting Dr.

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[4] At the hearing before Administrative Law Judge Jeffrey Tureck, employer did not contest the issue of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Hearing Transcript at 8. As claimant had failed to establish total respiratory disability in his prior claim, Judge Tureck properly determined that a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) had been demonstrated, based on total disability at Section 718.204(b)(2). Decision and Order dated August 30, 2005 at 2.

Wheeler's challenge to Dr. Cappiello's conclusion that pneumoconiosis was present in all six lung zones. Employer's Brief at 12. Employer's arguments are without merit.

In finding that the weight of the x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge accurately summarized the conflicting interpretations of three x-rays dated April 30, 1999, June 18, 2002, and July 8, 2003, and the qualifications of the readers. Decision and Order at 5-6; *see* 20 C.F.R. §718.102. The administrative law judge initially determined, within her discretion, to "give equal weight to interpretations made by doctors who possess the same professional credentials (for example, all dually-qualified physicians)."[5] Contrary to employer's assertion, the administrative law judge was not required to defer to the radiological experience or status as professors of radiology of Drs. Scott and Wheeler. Decision and Order at 8; *see Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Scheckler v. Clinchfield Coal Co*., 7 BLR 1-128, 1-131 (1984). The administrative law judge determined that the x-ray dated April 30, 1999 was in equipoise, as it was read as positive for pneumoconiosis by two dually-qualified readers, Drs. Ahmed and Cappiello, and as negative by two dually-qualified readers, Drs. Wheeler and Scott. Claimant's Exhibits 2, 3; Employer's Exhibits 9, 15. The administrative law judge further determined that the x-ray dated June 18, 2002 was in equipoise, as it was read as positive by two dually-qualified readers, Drs. Ahmed and Cappiello, and as negative by two dually-qualified readers, Drs. Wheeler and Scott.[6] Claimant's Exhibits 6, 7; Employer's Exhibits 2, 3. While Dr. Cohen also interpreted the June 18, 2002 x-ray as positive, the administrative law judge accorded his interpretation no weight, as Dr. Cohen is a B reader, but not dually-qualified. Director's Exhibit 25. In addition, the administrative law judge found that the x-ray dated July 8, 2003 was positive for pneumoconiosis, as it

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[5] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The terms "A reader" and "B reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. A dually-qualified physician is one who is both a Board-certified radiologist and a B reader. *See* 42 C.F.R. §37.51.

[6] The administrative law judge, in her discretion, permissibly determined that Dr. Wheeler's comment, that he did not observe opacities in all lung zones, did not undermine Dr. Cappiello's finding that opacities were present in all zones, as Dr. Wheeler stated that such a finding would be rare, but was not inconsistent with pneumoconiosis. Decision and Order at 9; Employer's Exhibits 9, 13; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

was read as positive by a dually-qualified reader, Dr. Ahmed, and as negative by Dr. Repsher, a B reader. Claimant's Exhibit 1; Employer's Exhibit 1. Considering the x-ray evidence as a whole, the dates of each of the films, and the qualifications of the readers, the administrative law judge concluded that, based on the relative recency of all the x-rays, "some weight should be given to all interpretations," but as "there is a lapse of three years between the first and second x-rays, . . slightly less weight [should be given] to the earliest x-ray." Decision and Order at 9. Thus, the administrative law judge acted within her discretion in finding that the weight of the x-ray evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on the numerical preponderance of positive interpretations by dually-qualified readers. Decision and Order at 14; see *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 889, 22 BLR 2-514, 2-526 (7th Cir. 2002); *Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-65 (2004)(*en banc*); *Scheckler*, 7 BLR at 1-131. As substantial evidence supports the administrative law judge's findings at Section 718.202(a)(1), they are affirmed.

Employer next argues that, based on the superiority of CT scan technology, the administrative law judge erred in failing to credit the negative CT scan evidence over the positive x-ray evidence. Employer's Brief at 13. We disagree. While the administrative law judge determined that Dr. Fishman's negative reading of the July 8, 2003 CT scan outweighed Dr. Cohen's positive interpretation of the same scan, based on Dr. Fishman's qualifications as a radiologist, the administrative law judge was not required to accord determinative weight to the CT scan evidence. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 890, 22 BLR 2-409, 2-417 (7th Cir. 2002); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989).

Regarding Section 718.202(a)(4), employer contends that the administrative law judge erred in crediting the opinion of Dr. Cohen over that of Dr. Repsher, arguing that Dr. Cohen may have underestimated claimant's smoking history by half; that he erroneously concluded that all of claimant's coal mine employment was underground; and that he failed to fully take into account the negative x-ray evidence. Employer further asserts that the administrative law judge credited the opinion of Dr. Cohen for the improper reason that the doctor concluded that there were two causes of claimant's condition. Employer's Brief at 13-14. Employer's arguments lack merit.

The record contains numerous medical reports from three physicians. Dr. Cohen performed the Department of Labor evaluation, and diagnosed clinical pneumoconiosis and chronic obstructive pulmonary disease (COPD) due to coal dust exposure and cigarette smoking. Director's Exhibits 20, 22; Claimant's Exhibits 4, 5, 8. Dr. Repsher examined claimant and diagnosed severe COPD with emphysema from a severe cigarette addiction, but found no evidence of pneumoconiosis. Employer's Exhibits 4, 8, 10. Dr. Tuteur provided a consulting opinion and diagnosed severe COPD due to cigarette smoking. Employer's Exhibit 5.

In evaluating the conflicting medical opinion evidence of record, the administrative law judge summarized the opinions of Drs. Cohen, Repsher, and Tuteur, and initially examined each opinion in light of her findings that claimant established twenty-four years of coal mine employment and that claimant's smoking history was "closer to 56 pack years (56 years at one pack per day) than 28 pack years (56 years at ½ pack per day)."[7] Decision and Order at 21. The administrative law judge concluded that "any variances in the amount of employment presumed in the medical opinions [are] insignificant, as all of the physicians noted that claimant's coal mine employment ended in 1987."[8] *Id.* The administrative law judge further found that the smoking histories used by all the physicians were "substantially equivalent."[9] *Id.* The administrative law judge also found that all three of the physicians have similar professional credentials, as all are Board-certified in internal medicine and pulmonary disease, and noted that they all diagnosed claimant with emphysema or COPD. *Id.* In determining that the weight of the medical opinions supported a finding of legal pneumoconiosis, the administrative law judge permissibly credited the opinion of Dr. Cohen, as she found that the physician

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[7] The administrative law judge noted that "claimant's reports of his smoking history were remarkably consistent," and that he began smoking at about age eighteen, and has smoked at varying levels up to one pack per day. The administrative law judge noted that while claimant indicated on several occasions that he "cut back his smoking to one-half pack per day" since 2001, the most common level of smoking reported was one pack per day for fifty-six years. Decision and Order at 21.

[8] Dr. Repsher recorded more than twenty-five years of coal mine employment, Employer's Exhibit 4, and Dr. Tuteur's report reflected well over twenty years. Employer's Exhibit 5. Dr. Cohen recorded coal mine employment histories of twenty-two to twenty-four years, and also twenty-five years. Furthermore, because Dr. Cohen noted that claimant worked underground and above-ground, and that claimant's most recent coal mine employment was as a heavy equipment operator in an above-ground mine, we reject employer's contention that Dr. Cohen erroneously concluded that all of claimant's coal mine employment was underground. Decision and Order at 13; Director's Exhibit 22; Claimant's Exhibit 4.

[9] Dr. Cohen reviewed all smoking histories reported by claimant and noted a smoking history of from one half pack per day to one pack per day for fifty-six years. Director's Exhibits 20, 22; Claimant's Exhibits 4, 5, 8. Dr. Repsher noted a smoking history of up to one pack per day, beginning at age seventeen or eighteen, and continuing to present. Employer's Exhibits 4, 8, 10. Dr. Tuteur noted that claimant smoked cigarettes regularly since his eighteenth birthday, most often at about one pack per day, sometimes more. Employer's Exhibit 5.

reviewed "a large quantum of medical evidence spanning more than a decade," and persuasively explained why he concluded that claimant's disabling COPD was due to both smoking and coal dust exposure. Decision and Order at 22-23; *see Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469, 22 BLR 2-311, 2-317 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Contrary to employer assertion, the administrative law judge specifically weighed Dr. Cohen's diagnosis in light of the doctor's awareness of the inconsistent x-ray evidence and his understanding of claimant's smoking and coal mine employment histories. Decision and Order at 21, 23. The administrative law judge, therefore, permissibly found that Dr. Cohen's opinion was well-reasoned and entitled to significant probative weight. Decision and Order at 22-23; *see Livermore v. Amax Coal Co*., 297 F.3d 668, 672, 22 BLR 2-399, 2-408 (7th Cir. 2002); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992); Decision and Order at 22-23. In contrast, the administrative law judge acted within her discretion in according little weight to the opinion of Dr. Repsher, because his conclusions did not fully explain all of the evidence he examined and because the doctor's determination, that claimant's obstructive impairment is due to smoking, rather than coal dust exposure, focused more on the general rule and did not provide an adequate discussion of claimant's extensive smoking history and significant coal mine employment history. Decision and Order at 23-25; *see Knizner v. Bethlehem Mines Corp*. 8 BLR 1-5, 1-8 (1985). The administrative law judge also permissibly discounted Dr. Tuteur's opinion as conclusory, because the doctor failed to specifically address why he determined that claimant's condition could not have multiple contributing factors, and because he failed to discuss the abnormalities in claimant's diffusing capacity, which both Dr. Cohen and Dr. Repsher noted. Decision and Order at 25-28; *see Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002); *McCandless*, 255 F.3d at 465, 22 BLR at 2-311; *Clark*, 12 BLR at 1-155. Accordingly, we affirm the administrative law judge's decision to assign determinative weight to Dr. Cohen's opinion at Section 718.202(a)(4). *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

Because we have affirmed the administrative law judge's determination that claimant suffers from clinical and legal pneumoconiosis, and employer has not alleged any specific error in the administrative law judge's weighing of the evidence on the issue of disability causation at Section 718.204(c), employer has presented no basis for disturbing the administrative law judge's disability causation finding. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 29-32. We therefore affirm the administrative law judge's determination, under Section 718.204(c), that claimant is totally disabled as a result of his pneumoconiosis.

As an additional matter, on July 14, 2010, the Board received an application for approval of attorney fees from claimant's counsel, requesting compensation in the

amount of $4,631.00 for legal services rendered to claimant from September 22, 2005 to September 5, 2006, and from January 4, 2007 to January 29, 2008, when the case was twice previously before the Board on appeal. The requested fee represents 21.05 hours of legal services billed at the rate of $220.00 per hour.

The regulation pertaining to fees before the Board provides, in relevant part, that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation [and] the complexity of the legal issues involved[.]" 20 C.F.R. §802.203(e). In support of her fee petition, counsel has stated that her normal billing rate is $220.00 per hour, and has provided a copy of her resume and affidavits from various attorneys who either practice black lung law or practice in the same geographic area, attesting to the reasonableness of her hourly rate. *See Maggard v. Int'l Coal Group*, 24 BLR 1-172 (2010).

Employer was served with a copy of the fee petition, and has not filed an objection. The Board finds the requested fee to be reasonable. Thus, we hereby approve attorney fees in the amount of $4,631.00, for services rendered before the Board in BRB Nos. 05-1020 BLA and 07-0358 BLA, to be paid directly to claimant's counsel by employer. 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand from the Court of Appeals for the Seventh Circuit awarding benefits is affirmed, and we grant attorney fees to claimant's counsel for her work before the Board as requested.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge