BRB No. 10-0463 BLA

ROBERT DALE OPP (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 05/16/2011
	)	
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 3rd Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on 3rd Remand (2001-BLA-00564) of Administrative Law Judge Stuart A. Levin (the administrative law judge), on a claim filed pursuant to 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).[1] This is the fourth time that this case has been before the Board. In the Board's most recent Decision and Order, the Board vacated the administrative law judge's findings that claimant[2] did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remanded the case to the administrative law judge for reconsideration of the relevant medical opinion evidence.[3] *R.D.O.* [*Opp*] *v. Peabody Coal Co.*, BRB No. 08-0402 BLA (Feb. 24, 2009) (unpub.). On remand, the administrative law judge determined that the opinions of Drs. Anderson and James were sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to

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[1] The recent amendments to the Act, which changed the criteria for establishing entitlement in claims filed on, or after, January 1, 2005 and pending on March 23, 2011, do not apply to this claim, filed on January 11, 2000. Director's Exhibit 1.

[2] Claimant, the miner, died on September 3, 2002, while this claim was pending before the Office of Administrative Law Judges. His surviving spouse continues to pursue the claim on behalf of his estate.

[3] In the initial Decision and Order in this case, Administrative Law Judge Donald B. Jarvis accepted employer's stipulation that claimant was totally disabled, but denied benefits as claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. On appeal, the Board vacated Judge Jarvis's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remanded the case for further consideration. *Opp v. Peabody Coal Co.*, BRB No. 03-0618 BLA (May 27, 2004) (unpub.). Due to Judge Jarvis's unavailability, the case was reassigned to Administrative Law Judge Stuart A. Levin (the administrative law judge). The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. The Board vacated the award of benefits and remanded the case to the administrative law judge for further consideration of the evidence at 20 C.F.R. §§718.202(a)(4) and 718.204(c). *Opp v. Peabody Coal Co.*, BRB No. 05-0704 BLA (June 29, 2006) (unpub.). On remand, the administrative law judge determined that, pursuant to the Board's instructions, he was required to accord greatest weight to the opinions of the physicians who found that claimant's totally disabling pulmonary impairment was caused solely by his cigarette smoking. The administrative law judge found, therefore, that claimant failed to prove that he had pneumoconiosis arising out of coal mine employment or that he was totally disabled by the disease and denied benefits accordingly. Claimant's appeal, which the Board addressed in its most recent prior Decision and Order, followed.

legal pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge did not comply with the Board's specific remand instructions and did not properly weigh the medical opinions relevant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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.[4] 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's findings, that claimant established the existence of legal pneumoconiosis arising out of coal mine employment and total disability due to legal pneumoconiosis, must be vacated, as the administrative law judge did not comply with the Board's remand instructions. Employer maintains that the administrative law judge merely reiterated, *verbatim*, large portions of his prior decisions, rather than rendering findings regarding the medical opinions of Drs. Anderson and James, as instructed by the Board. Employer further alleges that, in resolving the conflict among the medical opinions of record, the administrative law judge misinterpreted and misapplied the comments made by the Department of Labor (DOL) in the preamble to the amended regulations.

Because assessing the credibility of the medical opinions of record is committed to the administrative law judge, in the exercise of his or her role as fact-finder, the Board will defer to the administrative law judge's credibility determinations unless they are inherently incredible or patently unreasonable. *See* 33 U.S.C. 921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §§725.351(b), 725.477; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Milburn Colliery Co. v. Hicks*, 138 F. 3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Upon review of the administrative law judge's Decision and Order on 3rd

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, as claimant's coal mine employment occurred in Montana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

Remand, the arguments on appeal, and the relevant evidence, we hold that the administrative law judge's findings with respect to the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(c) do not contain any errors requiring reversal or remand.

As an initial matter, we reject employer's argument that the administrative law judge erred in reiterating large portions of his prior decisions in addressing the medical opinion evidence. On remand, the administrative law judge rendered findings that were a combination of undisturbed findings from his prior decisions, and new findings. Because the administrative law judge addressed the issues outlined by the Board in its remand instructions and set forth his findings in detail, including the underlying rationale, his Decision and Order on 3rd Remand accords with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In reconsidering the medical opinion evidence relevant to 20 C.F.R. §§718.202(a)(4) and 718.204(c), the administrative law judge first considered whether the opinions in which Drs. James and Anderson determined that claimant's chronic obstructive pulmonary disease (COPD) was related, in part, to coal dust exposure were adequately reasoned and documented. The administrative law judge rationally found that, although both physicians used qualifying terms in rendering their diagnoses of legal pneumoconiosis, their opinions were "sufficiently definitive to support a finding that [claimant's] pulmonary disease was attributable, at least in part, to his coal dust exposure."[5] Decision and Order on 3rd Remand at 4; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501 (1984). The administrative law judge also acted within his discretion in determining that the physicians' opinions were consistent with the underlying objective evidence, and were adequately explained, as the physicians discussed how the objective data supported their conclusions. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Hicks*, 138 F. 3d at 533, 21

[5] Dr. Anderson stated that coal dust exposure was "most probably" a contributing cause of claimant's chronic obstructive pulmonary disease (COPD) because the severity of the COPD was greater than that expected in a smoker of claimant's age and because claimant's CT scan revealed the presence of granulomas. Claimant's Exhibit 1. Dr. James identified coal dust exposure as, "more likely than not," a contributing cause of claimant's COPD, based upon the severity of his obstructive impairment and the medical literature recognizing a link between coal dust exposure and obstructive lung disease. Director's Exhibit 12; Employer's Exhibit 10.

BLR at 2-336; *Clark*, 12 BLR at 1-153; *Anderson*, 12 BLR at 1-113; Decision and Order on 3rd Remand at 5-7.

The administrative law judge further acted within his discretion in declining to discredit Dr. James's opinion because he indicated that there are no tests capable of distinguishing between the effects of coal dust exposure and the effects of smoking. The administrative law judge reasonably determined that, in light of Dr. James's identification of coal dust exposure as a contributing cause of claimant's COPD, he was not required to apportion a precise percentage of claimant's lung disease to smoking or coal dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003); Decision and Order on 3rd Remand at 8-9.

Regarding Dr. James's citation of medical literature in support of his attribution of claimant's COPD, in part, to coal dust inhalation, the administrative law judge accurately summarized the criticisms of the literature made by Drs. Fino, Repsher, Tuteur and Renn. Decision and Order on 3rd Remand at 13-23. The administrative law judge stated, "[a]ccording to [e]mployer's experts, all of the articles relied upon by Dr. James are flawed, in one way or another, and yield no evidence of a clinically significant reduction in lung function resulting from coal mine dust exposure."[6] *Id*. at 16. The administrative law judge acted within his discretion in concluding that, in significant part, the opinions expressed by employer's experts were rejected by the DOL in the comments in the preamble to the amended definition of pneumoconiosis set forth in 20 C.F.R. §718.201. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], F. 3d , BLR 2- , 2011 WL 1366355 (3rd Cir 2011); Decision and Order on 3rd Remand at 17-23, *citing* 65 Fed. Reg. 79,923,

[6] A review of the opinions of Drs. Fino, Repsher, Tuteur and Renn indicates that, according to their review of the medical literature, coal dust exposure does not cause clinically significant obstruction, x-ray evidence of pneumoconiosis is required before coal dust exposure can credibly be identified as a source of emphysema, the Attfield and Hodous study is of little or no value, coal dust inhalation does not have an additive effect on smoking-induced obstructive lung disease, and legal pneumoconiosis is not progressive. Decision and Order on 3rd Remand at 17-23; Director's Exhibit 33; Employer's Exhibits 1-4, 9.

79,938-39, 79,941-42 (Dec. 20, 2000).[7] Accordingly, the administrative law judge rationally found that Dr. James's interpretation of the medical literature was entitled to greater weight than the interpretations advanced by Drs. Fino, Repsher, Tuteur and Renn. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Clark*, 12 BLR at 1-153; Decision and Order on 3rd Remand at 11-23. The administrative law judge permissibly concluded, therefore, that the opinions of Drs. James and Anderson were well-documented and well-reasoned, as to the issues of the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis, and that Dr. James's opinion was entitled to great weight. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order on 3rd Remand at 5, 7, 25, 30.

In addition to rationally finding that the credibility of the opinions of Drs. Fino, Repsher, Tuteur and Renn was diminished by their reliance upon views of the medical literature that conflicted with the DOL's view, *see Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Shores*, 358 F.3d at 490, 23 BLR 2-25-26; *Obush*, 24 BLR at 1-125-26, the administrative law judge reasonably determined that there were other factors that detracted from the probative weight to which these opinions were entitled. The administrative law judge permissibly found that Dr. Fino's opinion, that the significant emphysema with bullae seen on claimant's CT scan was inconsistent with a diagnosis of coal dust-related pulmonary disease, was entitled to less weight because he did not address the diffuse form of emphysema seen by Dr. James. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Hicks*, 138 F. 3d at 533, 21 BLR at 2-336; *Clark*, 12 BLR at 1-153; *Anderson*, 12 BLR at 1-113; Decision and Order on 3rd Remand at 24. The

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[7] Contrary to employer's contention, the administrative law judge did not err in citing *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008) and *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004), in support of his finding. Because the United States Court of Appeals for the Ninth Circuit has not addressed the issue of the credibility of a physician's opinion that is based upon a premise that is inconsistent with the view adopted by the Department of Labor (DOL), the administrative law judge was not constrained from citing *Beeler* and *Shores* as persuasive precedent. *See United States Internal Revenue Serv. v. Osborne (In re Osborne)*, 76 F.3d 306 (9th Cir. 1996). Similarly, the administrative law judge did not err in citing, as persuasive precedent, the Board's holdings, in unpublished decisions, that an administrative law judge may accord less weight to a medical opinion that is based on a premise at odds with the scientific consensus recognized by the DOL when drafting the amended regulations.

administrative law judge also acted within his discretion in citing, in support of his finding, the DOL's recognition that the medical literature documents a causal connection between coal dust exposure and emphysema, without any specification that this causal effect exists only with respect to certain types of emphysema. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Shores*, 358 F.3d at 490, 23 BLR 2-25-26; *Obush*, 24 BLR at 1-125-26; Decision and Order on 3rd Remand at 24, *citing* 65 Fed. Reg. 79,938 (Dec. 20, 2000). Regarding Dr. Fino's assertion that the amount of emphysema attributable to coal dust inhalation increases with the degree of a miner's coal workers' pneumoconiosis, the administrative law judge reasonably determined that this theory was rejected by the DOL. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Shores*, 358 F.3d at 490, 23 BLR 2-25-26; *Obush*, 24 BLR at 1-125-26; Decision and Order on 3rd Remand at 24, *citing* 65 Fed. Reg. 79,939 (Dec. 20, 2000). Based upon these findings, the administrative law judge acted within his discretion in according "diminished evidentiary weight" to Dr. Fino's opinion. Decision and Order on 3rd Remand at 24; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Clark*, 12 BLR at 1-153; *Anderson*, 12 BLR at 1-113.

The administrative law judge permissibly discredited the opinions of Drs. Tuteur and Renn because they based their opinions, in part, on the fact that claimant's pulmonary function studies showed that his obstructive impairment had a reversible component. The administrative law judge reasonably determined that the physicians' failure to consider whether claimant's "residual, disabling, fixed impairment[,] that worsened over time," could be related to claimant's coal mine employment, diminished the credibility of their opinions ruling out the presence of legal pneumoconiosis. Decision and Order on 3rd Remand at 24-25, *citing Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. May 11, 2004) (unpub.); *see Barrett*, 478 F.3d at 356, 23 BLR 2-483-84. We also reject employer's argument that the administrative law judge's finding cannot be affirmed, as he relied upon the unpublished decision of the United States Court of Appeals for the Fourth Circuit in *Swiger*. The administrative law judge did not indicate that the Fourth Circuit's unpublished disposition was binding in this case, arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Rather, his application of the Fourth Circuit's reasoning in *Swiger* regarding the significance of a fixed, irreversible impairment, constituted a permissible rationale for discrediting the opinions of Drs. Tuteur and Renn. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Hicks*, 138 F. 3d at 533, 21 BLR at 2-336; *Clark*, 12 BLR at 1-153; *Anderson*, 12 BLR at 1-113.

In light of the foregoing, we affirm the administrative law judge's determination that Dr. James's opinion diagnosing legal pneumoconiosis and total disability due to legal pneumoconiosis was entitled to more weight than the contrary opinions of Drs. Fino, Tuteur, Repsher and Renn, as it is rational and supported by substantial evidence. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Hicks*, 138 F. 3d at 533, 21 BLR at 2-336;

Clark, 12 BLR at 1-153; *Anderson*, 12 BLR at 1-113. We also affirm, therefore, the administrative law judge's finding that Dr. James's opinion, as supported by Dr. Anderson's opinion, was sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to legal pneumoconiosis under 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on 3rd Remand awarding benefits 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