BRB No. 98-0311 BLA

WILLIAM D. MEAKIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JOY TECHNOLOGIES, INCORPORATED	)	
	)	
	)	
Employer-Petitioner	)	
	)	DATE ISSUED:
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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

William D. Meakin, Vero Beach, Florida, *pro se*.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Cathryn Celeste Helm (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH, and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (96-BLA-1566) of Administrative Law Judge Ainsworth H. Brown with respect to 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). The administrative law judge determined that claimant, an engineer who conducted ventilation surveys and sold ventilation systems to

various coal mining companies, was engaged in coal mine employment with employer for 6.78 years. The administrative law judge also indicated that prior to his work for employer, claimant had worked for 8.83 years "in a traditional mining capacity." Decision and Order at 3. Thus, the administrative law judge credited claimant with a total of 15.61 years of coal mine employment. The administrative law judge considered the claim, filed on February 3, 1995, pursuant to the regulations set forth in 20 C.F.R. Part 718 and accepted the parties' stipulation that claimant is suffering from a totally disabling pulmonary impairment under 20 C.F.R. §718.204(c). The administrative law judge determined that the medical opinions of record supported a finding that claimant has pneumoconiosis arising out of coal mine employment and is totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(b). Accordingly, benefits were awarded.

Employer argues on appeal that the administrative law judge erred in determining that claimant was a miner under the terms of the Act. Employer also contends that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(4) and 718.204(b). Claimant has responded, without the assistance of counsel, and urges affirmance of the award of benefits.[1] The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that the administrative law judge acted rationally in finding that claimant was employed as a miner. The Director further asserts, however, that remand is required in order to permit the administrative law judge to reconsider his findings under Sections 718.202(a)(4) and 718.204(b).[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

[1]Claimant died on October 24, 1997. Claimant's son, who is not an attorney, submitted a response brief on his father's behalf.

[2]We affirm the administrative law judge's findings under 20 C.F.R. §718.202(a)(1)-(3), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

As an initial matter, it is noted that the selection of which circuit court's law applies in the present case is a pertinent issue. The Board has held that it will apply the law of the circuit in whose jurisdiction the miner most recently performed coal mine employment. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). In light of the circumstances unique to this case, we decline to disturb the administrative law judge's determination that the law of the Third Circuit constitutes binding precedent. The documentary evidence and hearing testimony in the present case simply do not support a definitive finding regarding where claimant last performed work that could be treated as coal mine employment. Claimant testified that his job with employer entailed making brief visits to mine sites in states located in the Third, Fourth, Sixth, Seventh, and Eighth circuits for the purpose of conducting ventilation surveys. Hearing Transcript at 85. The administrative law judge appears to have erred in concluding that claimant worked primarily in western Pennsylvania, particularly toward the end of his career, Decision and Order at 4, as claimant indicated that he could not identify the state in which he spent the most time, even in the last year of his tenure with employer.[3] *Id.* at 85-86. Nevertheless, in the absence of evidence establishing a predominant location of claimant's alleged coal mine employment, we concur with the Director's suggestion that the administrative law judge's finding on this issue not be disturbed.[4] Our holding in this regard does not preclude any party from initiating an appeal of the Board's decision to the United States Court of Appeals for any circuit in which claimant engaged in coal mine employment as provided under 33 U.S.C. §921(c). *See Danko v. Director, OWCP*, 846 F.2d 366, 368, 11 BLR 2-157, 2-159 (6th Cir. 1988); *Wetherill v. Director, OWCP*, 812 F.2d 376, 379 n.6, 9 BLR 2-239, 2-242 n.6 (7th Cir. 1987); *Shupe*, *supra*.

[3]Claimant's detailed discussion of the various mine sites that he visited in Pennsylvania occurred in response to questions posed to him by the administrative law judge. Hearing Transcript at 67-68. When asked where in Pennsylvania he had worked, claimant stated "western Pennsylvania, primarily," but never indicated that his work occurred largely in Pennsylvania. *Id.*.

[4]Claimant explicitly stated that eighty percent of his duties were performed at employer's office in New Philadelphia, Ohio. Hearing Transcript at 82. However, this work did not constitute coal mine employment, as it did not occur in or near a coal mine or coal preparation facility. 30 U.S.C. §902(d); *see also* 20 C.F.R. §725.101(a)(26).

The next issue pertinent to the present appeal concerns whether claimant worked as a miner for employer. The administrative law judge considered claimant's duties under the situs-function test, which has been adopted by the United States Court of Appeals for the Third Circuit, in addition to a number of other circuits, in order to determine whether his work was that of a miner under the Act. 30 U.S.C. §902(d); 20 C.F.R. §725.101(a)(26); *see Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988); *Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987)("status of coal" inquiry included as part of the "function" test); *see also Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); *Mitchell v. Director, OWCP*, 855 F.2d 485 (7th Cir. 1988); *Baker v. U.S. Steel Corp.*, 867 F.2d 1297, 12 BLR 2-213 (11th Cir. 1989). The situs prong of the test requires that the work have occurred in or around a coal mine or coal preparation facility. *See Hanna*, *supra*; *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985). The function prong requires that the work be integral to the extraction or preparation of coal. *Id.*. The administrative law judge determined that inasmuch as claimant visited coal mine sites and went underground to conduct ventilation surveys, this portion of his employment met the situs test. Decision and Order at 4. The administrative law judge further found that claimant's duties were integral to the extraction of coal, stating that "but for Mr. Meakin's function in assessing the ventilation needs of a mine to make sure it is adequate in moving air sufficiently - there is not going to be any extraction in this post-canary era." *Id.* The administrative law judge concluded, therefore, that claimant worked as a miner for employer, thereby rendering employer the responsible operator pursuant to 20 C.F.R. §§725.491(a)(1) and 725.493(a)(1). *Id*.

On appeal, employer concedes that claimant's work met the situs prong, but argues that the administrative law judge erred in determining that claimant's work satisfied the function prong of the situs-function test. Employer maintains that claimant's duties conducting air quality surveys, which served as a prelude to selling ventilation systems, were not integral to the extraction of coal, as claimant was not involved in installing, demonstrating, or servicing the ventilation equipment. The Director responds, contending that because claimant's work enabled mine operators to install, replace, or improve ventilation systems, which are necessary to keep a mine in operation, his duties were clearly an integral part of the extraction and preparation processes. We hereby affirm the administrative law judge's finding that claimant performed the work of a miner, as it is rational and supported by substantial evidence.

In order for persons who perform duties that do not directly entail the extraction or preparation of coal to meet the function requirement, the work must constitute an integral part of the coal mining process. *See Stroh*, *supra*; *Clemons*, *supra*; *Tobin v. Director, OWCP*, 8 BLR 1-115 (1985). Under this standard, individuals who execute tasks necessary to keep a mine operational are generally classified as miners, while those whose tasks are merely convenient, but not vital or essential to the coal production process, are generally not classified as miners. *Id*. In the present case, the

administrative law judge acted within his discretion in finding that claimant's work conducting ventilation surveys and advising mine operators on the design and purchase of ventilation systems was integral to the installation of these systems, without which mines cannot operate. The administrative law judge rationally concluded, therefore, that the tasks performed by claimant were necessary, rather than merely convenient, to the coal production process.[5] *See Stroh*, *supra*; *Clemons*, *supra*. Accordingly, the administrative law judge properly determined that because claimant performed the work of a miner, employer is the responsible operator in this case.[6] 20 C.F.R. §§725.491, 725.493; *see Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992)(en banc).

Turning to the merits of entitlement, both employer and the Director contend that the administrative law judge's findings under Sections 718.202(a)(4), 718.203(b), and 718.204(b) must be vacated on the ground that the administrative law judge did not properly weigh the medical opinions of Drs. Suen, Fino, Castle, and Kleinerman. Dr. Suen was claimant's treating physician and in notes covering a two week period in January of 1995, he stated that a lung biopsy obtained from claimant showed fibrosis with large amounts of anthracotic pigment, which was consistent with coal workers' pneumoconiosis. Director's Exhibit 9. Dr. Suen also indicated that a CT scan of claimant's lungs confirmed the presence of diffuse interstitial fibrosis. *Id.* In his deposition testimony, Dr. Suen reiterated his diagnosis of pneumoconiosis and stated that it was based upon claimant's history of coal dust exposure and the findings revealed on

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[5]Employer cites *Elliot Coal Mining Co. v. Director, OWCP [Kovalchick]*, 17 F.3d 616, 18 BLR 2-125 (3d Cir. 1994), in support of the proposition that an individual who performs tasks that do not directly involve the extraction or preparation of coal does not satisfy the definition of a miner under the Act. *Kovalchick* can be distinguished from the present case, inasmuch as the activities which the court held did not meet the function test, including assisting in the performance of noise samples, were not necessary to keep the mines operational. Similarly, contrary to employer's suggestion, the Board's holdings in *Price v. Dresser Industries, Inc.*, 8 BLR 1-179 (1985) and *Tobin v. Director, OWCP*, 8 BLR 1-115 (1985), do not mandate the reversal of the administrative law judge's finding in the present case. The Board merely indicated in *Price* and *Tobin*, cases which involved persons who repaired mining equipment, that in order for an individual who is not engaged in the actual extraction or preparation of coal to be considered a miner, his or her work must be integral to the coal production process.

[6]In light of our affirmance of the administrative law judge's finding that claimant performed the work of a miner for employer, we also affirm the administrative law judge's
determination that claimant had a total of 15.61 years of coal mine employment, as it is rational and supported by substantial evidence. Decision and Order at 4; *see Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988).

claimant's lung biopsy, chest x-ray, pulmonary function study, and CT scan. Employer's Exhibit 1 at 12, 18, 22, 24, 26.

Dr. Fino reviewed the medical evidence of record, excluding x-ray interpretations, and concluded that claimant was suffering from diffuse interstitial pulmonary fibrosis, which was not caused by the inhalation of coal dust. Employer's Exhibit 4. During his deposition, Dr. Fino indicated that subsequent to the preparation of his report, he reviewed Dr. Kleinerman's pathology report and the x-ray evidence of record. Employer's Exhibit 9 at 11-12. Dr. Fino stated that the shape and location of the opacities revealed on claimant's chest x-rays and CT scan were not typical of pneumoconiosis. *Id*. at 15. Dr. Fino also indicated that the rapid changes reflected in claimant's x-rays were not consistent with coal workers' pneumoconiosis. *Id*. at 16. Dr. Fino diagnosed idiopathic interstitial pulmonary fibrosis and concluded that the results of claimant's blood gas studies with exercise and pulmonary function studies supported this diagnosis. *Id.* at 37. Finally, Dr. Fino stated that he did not consider coal workers' pneumoconiosis to be a purely restrictive disease. *Id.* at 39.

Dr. Castle also conducted a review of the medical evidence of record. Employer's Exhibit 8. Dr. Castle concluded that claimant was suffering from usual interstitial pneumonitis, a disease process that Dr. Castle stated is of unknown etiology, but is totally unrelated to coal mine employment and coal dust exposure. *Id*. Dr. Kleinerman reviewed the medical evidence of record, including the tissue slides from claimant's lung biopsy. Employer's Exhibit 2. Dr. Kleinerman determined that there was insufficient evidence, both pathological and clinical, to justify a diagnosis of coal workers' pneumoconiosis. *Id*. Dr. Kleinerman reiterated these conclusions at his deposition. Employer's Exhibit 6.

In determining whether claimant established the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge weighed the opinions of Drs. Fino and Suen, stating that "since Dr. Castle's exposition was not as extensive as Dr. Fino's review...the real conflict in determining the existence of 'legal' pneumoconiosis is between Dr. Fino and Dr. Suen." Decision and Order at 7. With respect to opinion in which Dr. Kleinerman ruled out the presence of a coal dust related disease process, the administrative law judge discredited it under Section 718.202(a)(2), stating that:

> The wide ranging inquiry of Dr. Kleinerman seemingly was meant to illustrate his panexpertise, extending beyond his certification in pathology. While certainly as a physician he can address anything in the field of medicine, the probative value of his opinion should be focused on his specialty area of expertise, pathology.

Decision and Order at 5; Employer's Exhibit 6. The administrative law judge found that Dr. Fino's conclusions were not supported by any credible reasoning, as Dr. Fino appeared to rule out the existence of a coal dust related condition solely on the basis of negative x-ray evidence. Decision and Order at 6. The administrative law judge also found that Dr. Fino's reference to the rapid progression of claimant's respiratory

dysfunction did not bolster his conclusions, as Dr. Fino did not identify the typical rate of progression of pneumoconiosis. Decision and Order at 7. The administrative law judge credited Dr. Suen's diagnosis of coal dust related fibrosis and determined that it was sufficient to carry claimant's burden under Sections 718.202(a)(4), 718.203(b), and 718.204(b). *Id*.

Both employer and the Director assert that the administrative law judge erred in failing to consider the opinions of Drs. Castle and Kleinerman under Section 718.202(a)(4). Employer and the Director also maintain that the administrative law judge did not provide an adequate rationale for his findings with respect to the opinions of Drs. Fino and Suen. These contentions have merit. With respect to the opinion of Dr. Castle, inasmuch as it constitutes evidence relevant to Section 718.202(a)(4), under the terms of 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), the administrative law judge was required to render a finding as to the probative weight of the opinion, based upon a consideration of the extent to which Dr. Castle's report is reasoned and documented. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge's statement that Dr. Castle's "exposition was not as extensive as Dr. Fino's review" does not comport with this requirement. Decision and Order at 7; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The administrative law judge's rejection of Dr. Kleinerman's opinion on the ground that his area of specialization is pathology also does not accord with the APA. The administrative law judge did not indicate that he fully considered Dr. Kleinerman's specific credentials regarding pulmonary pathology and the diagnosis of pneumoconiosis.[7] In addition, the administrative law judge did not explain how Dr. Kleinerman's status as a pathologist negated the probative value of his evaluation of any evidence other than histological slides. The administrative law judge did not, therefore, properly weigh Dr. Kleinerman's opinion. *See Tackett*, *supra*; *Lafferty*, *supra*.

Regarding Dr. Fino's opinion, the administrative law judge's determination that it was based primarily upon negative x-ray interpretations and, therefore, entitled to little weight is not supported by the evidence of record. In both his report and his deposition testimony, Dr. Fino indicated that in addition to finding that the shape and pattern of opacities appearing on claimant's chest x-rays over time were not consistent with coal workers' pneumoconiosis, the results of claimant's CT scan, lung volume studies, and exercise blood gas studies were consistent with idiopathic interstitial pulmonary fibrosis, a condition that is not related to coal dust exposure. Employer's Exhibits 4, 9 at 15-18, 27, 37. Dr. Fino stated specifically that in the absence of the x-ray interpretations and CT

[7]According to Dr. Kleinerman's curriculum vitae, which is in the record, he is a Board-certified pathologist with a subspecialty in pulmonary pathology. Employer's Exhibits 2, 6. In addition, Dr. Kleinerman was a member of the Mine Health Research Advisory Committee of the National Institute of Occupational Safety and Health and the American College of Radiology Task Force on Pneumoconiosis. *Id.*

scan, his diagnosis would remain the same based upon his review of the remaining medical evidence. Employer's Exhibit 9 at 37. Thus, contrary to the administrative law judge's characterization, Dr. Fino did not rule out the presence of pneumoconiosis based solely upon negative x-ray interpretations. Rather, he examined the changes on x-ray as reflected over a period of years and considered the significance of the other medical data available to him. In addition, the administrative law judge's reliance upon Dr. Fino's failure to identify the rate of progression of an occupationally related dust disease of the lungs was not rational. Decision and Order at 7. Implicit in Dr. Fino's discussion of the fact that claimant's respiratory symptoms did not appear until two years after his coal dust exposure ended and rapidly became quite severe was Dr. Fino's understanding that respiratory symptoms attributable to pneumoconiosis begin during or shortly after the cessation of dust inhalation and progress gradually. The administrative law judge did not, therefore, properly weigh Dr. Fino's opinion.[8] *See Tackett*, *supra*.

Finally, with respect to the administrative law judge's crediting of Dr. Suen's opinion, the administrative law judge's finding cannot be affirmed, as the administrative law judge engaged in a selective analysis of the medical opinion evidence of record. *See Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Although the administrative law judge closely examined Dr. Fino's opinion, he did not apply the same level of scrutiny to Dr. Suen's conclusion that coal dust exposure contributed to claimant's pulmonary fibrosis. The administrative law judge did not compare the credibility of the rationale underlying Dr. Suen's diagnosis to the rationales supplied by Drs. Fino, Castle, and Kleinerman. *See Lafferty*, *supra*. Moreover, the administrative law judge did not resolve the conflict between Dr. Suen's statement during his deposition that he observed small, rounded opacities consistent with pneumoconiosis on claimant's chest x-ray and CT scan and his acknowledgment during the hearing that these items do not reflect the classic changes caused by pneumoconiosis. Employer's Exhibit 1 at 24; Hearing Transcript at 53; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge also did not assess the significance of Dr. Suen's shift from noting at his deposition that he could rule out the presence of idiopathic interstitial pulmonary fibrosis and his contrary statement at the hearing. Employer's Exhibit 1 at 31; Hearing Transcript at 39; *see Tackett v. Cargo Mining Co.*, *supra*; *Justice*, *supra*.

[8]Dr. Fino's reference to an exercise study that does not appear in the record does not provide a ground upon which to discredit his opinion, as a doctor is not required to supply all of the documentation underlying his conclusions. *See Peabody Coal Co. v. Director, OWCP, [Durbin]*, 165 F.3d 1126, BLR (7th Cir. 1999); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).

In light of the foregoing, we vacate the administrative law judge's findings under Section 718.202(a)(4), 718.203(b), and 718.204(b) and remand the case to the administrative law judge for reconsideration of the medical opinions of Drs. Suen, Fino, Kleinerman, and Castle. On remand, when reconsidering whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge must apply the United States Court of Appeals for the Third Circuit's holding in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), which was issued approximately three months before the date of the administrative law judge's Decision and Order Awarding Benefits. In *Williams*, the Third Circuit ruled that the evidence relevant to Section 718.202(a)(1)-(4) must be weighed together to determine whether a claimant has established the existence of pneumoconiosis. When reconsidering the medical opinion evidence on remand, the administrative law judge must also weigh and render specific findings with respect to the medical report of Dr. Robbins. The administrative law judge summarized Dr. Robbin's opinion, referring to him as a "Department of Labor consultant" rather than by name, but did not consider the report under any of the relevant regulations. Decision and Order at 6.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge