BRB No. 04-0330 BLA

CHARLES W. LEMUNYON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 11/26/2004
CYPRUS CUMBERLAND RESOURCES	)	
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach (Kovach & Kovach), Uniontown, Pennsylvania, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-1137) of Administrative Law Judge Michael P. Lesniak 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] This case has been before the Board previously. In the original decision, the administrative law judge credited the parties' stipulation to seventeen years and one month of coal mine employment. Decision and Order dated July 20, 1999. Considering

[1] Amended regs. footnote.

entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge concluded that claimant established the existence of totally disabling pneumoconiosis pursuant to 20 C.F.R. §§718.202, 718.203 and 718.204 (1999).[2] Decision and Order dated July 20, 1999. Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(3) (1999) and that the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204 (1999). The Board vacated, however, the administrative law judge's findings pursuant to Section 718.202(a)(4) (1999) and his disability causation finding and remanded the case for the administrative law judge to determine whether the medical reports of record were reasoned and documented and to consider if the existence of pneumoconiosis was established in light of the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). *Lemunyon v. Cyprus Cumberland Resources*, BRB No. 99-1198 BLA (August 21, 2000)(unpublished).

On remand, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) (1999) and 718.203 (1999) and that the evidence was also sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order on Remand dated January 11, 2001. Accordingly, benefits were awarded.

Employer appealed and the Board affirmed the administrative law judge's award of benefits and granted claimant's attorney fee request. *Lemunyon v. Cyprus Cumberland Resources*, BRB No. 01-0464 BLA (February 28, 2002)(unpublished). Employer subsequently requested reconsideration and the Board modified its decision, vacated the award of benefits and remanded the case for the administrative law judge to reconsider the opinion of Dr. Fino. The Board rejected employer's contentions with respect to the weighing of the opinions of Drs. Weinberg and Cho and reaffirmed the administrative law judge's credibility determinations with respect to these opinions. *Lemunyon v. Cyprus Cumberland Resources*, BRB No. 01-0464 BLA (February 27, 2003)(unpublished)(McGranery, J., dissenting)

On second remand, the administrative law judge found that the opinion of Dr. Fino was reasoned and documented but outweighed by the contrary evidence of record. Decision and Order on Remand at 3. Considering the evidence pursuant to *Williams*, the

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[2]Claimant filed his claim for benefits with the Department of Labor on September 29, 1995. Director's Exhibit 1.

administrative law judge further concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis as the medical opinion evidence outweighs the x-ray evidence which was mostly negative. Decision and Order on Remand at 3-4. The administrative law judge further found that the medical opinion evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204. Decision and Order on Remand at 4. Accordingly, benefits were awarded.

In the instant appeal, employer contends that the administrative law judge erred as he failed to follow the Board's remand instructions, erred in finding the existence of pneumoconiosis established and in finding that claimant's total disability was due to pneumoconiosis. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. Employer has filed a reply brief to which claimant has filed a supplemental brief in response. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[3] Employer contends that the administrative law judge failed to properly weigh the medical opinion evidence and therefore erred in finding it established the existence

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

of pneumoconiosis and disability causation pursuant to Section 718.202(a)(4) and 718.204(c). Employer's Brief at 10-22. Specifically, employer contends that the administrative law judge impermissibly accorded less weight to the opinion of Dr. Fino and greater weight to the opinions of Drs. Weinberg and Cho. We do not find merit in employer's argument.

Initially, employer's assertion that the administrative law judge failed to follow the Board's remand instructions lacks merit. Contrary to employer's contention, the administrative law judge noted the specifics of the Board's holdings and reconsidered the evidence within the parameters of those instructions. Decision and Order on Remand at 2-5; *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993). The administrative law judge discussed the evidence of record and articulated a rational reason for not relying on the conclusions of Dr. Fino. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order on Remand at 2-5.

In its previous Decision and Order, the Board vacated the administrative law judge's weighing of the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(c) inasmuch as the administrative law judge did not accurately characterize Dr. Fino's opinion and therefore provided an improper rationale for according it less weight. The Board specifically instructed the administrative law judge to reconsider the medical opinion evidence in determining whether claimant established the existence of pneumoconiosis and disability causation. *Lemunyon*, BRB No. 01-0464 BLA (February 27, 2003). Upon considering the medical reports pursuant to Section 718.202(a)(4) on remand, the administrative law judge concluded that the opinion of Dr. Fino was reasoned and documented. Decision and Order on Remand at 3. The administrative law judge also found that the opinions of Drs. Weinberg and Cho were reasoned and documented. Decision and Order on Remand at 3. The administrative law judge further found the opinion of Dr. Weinberg to be highly persuasive, and entitled to great weight because he had been claimant's treating physician since 1991, his opinion was supported by: the objective diagnostic studies, claimant's history of underground coal mine employment, medical history, and social history; the physical examination and claimant's progressively worsening symptoms that continued long after claimant stopped smoking; and the well reasoned opinion of Dr. Cho. Decision and Order on Remand at 3. The administrative law judge concluded, therefore, that the weight of the medical opinion evidence supported a finding of pneumoconiosis under Section 718.202(a)(4) as Dr. Fino's opinion was outweighed by the opinions of Drs. Weinberg and Cho. Decision and Order on Remand at 3.

With respect to disability causation, the administrative law judge found that claimant met his burden of proof by a preponderance of the evidence as the opinion of Dr. Fino was accorded less weight because his finding was at odds with the persuasive evidence that claimant established the existence of pneumoconiosis and the opinion did not identify any specific or persuasive reason for concluding that the physician's disability causation

conclusion did not rest on his belief that claimant did not have pneumoconiosis. Decision and Order on Remand at 4.

Employer asserts that the administrative law judge erred in finding that claimant established both the existence of pneumoconiosis, pursuant to Section 718.202(a)(4), and that claimant's total disability was due to pneumoconiosis, pursuant to 718.204(c), in that he failed to accord appropriate weight to the contrary opinion of Dr. Fino. Employer contends that the contrary opinion of Dr. Fino is entitled to greater weight in light of his qualifications, reasoning and documentation and that the administrative law judge erred in according greater weight to Dr. Weinberg's opinion because he is claimant's treating physician. We disagree. Although an administrative law judge may assign more weight to a physician's opinion based on his qualifications, the administrative law judge, contrary to employer's contention, is not obligated to do so. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). Rather, the administrative law judge must consider the reliability and credibility of the relevant evidence in rendering his findings. *Collins*, 21 BLR 1-181; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Worley*, 12 BLR 1-20.

Employer additionally contends that the administrative law judge erred in relying on the opinion of the treating physician, Dr. Weinberg, as supported by the opinion of Dr. Cho. Contrary to employer's assertion, although the administrative law judge may not mechanically accord greater weight based solely upon the physician's status as the treating physician, the administrative law judge is not prohibited from according weight to the opinion based upon more than a mechanical recognition of the physician's status as a treating physician. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Evosevich v. Consolidation Coal* Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Clark*, 12 BLR 1-149. In this case, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion of Dr. Weinberg, in comparison to the contrary opinion of Dr. Fino, was highly persuasive and based on several rational grounds, one of which was that Dr. Weinberg (*see* discussion of Decision and Order at 3 *supra*) was claimant's treating physician. *See Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Evosevich*, 789 F.2d 1021, 9 BLR 2-10; *Tedesco*, 18 BLR 1-103; *Clark*, 12 BLR 1-149; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order on Remand at 3; Director's Exhibits 15, 22, 35, 39; Claimant's Exhibit 1; Employer's Exhibit 1. Moreover, employer's contention with respect to the weight accorded to the opinions of Drs. Weinberg and Cho was addressed by the

Board in its prior Decision and Order, we decline to further review the administrative law judge's weighing of this evidence as it constitutes the law of the case and employer has not advanced any compelling rationale for altering our holding. *See Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We therefore affirm the administrative law judge's weighing of Dr. Fino's opinion and his finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Perry*, 9 BLR 1-1.

Employer further contends that the administrative law judge erred in considering all the evidence in determining that pneumoconiosis was established. Employer's Brief at 15-16. The administrative law judge correctly addressed the issue of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in accordance with the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), requiring that all types of evidence enumerated by the four distinct provisions of Section 718.202(a) be weighed together to determine if the miner suffers from the disease. Decision and Order on Remand at 3-4. In his case, the administrative law judge properly weighed the medical opinions of Drs. Weinberg and Cho against the other relevant evidence at Section 718.202(a)(1)-(4), and explained that he found the highly persuasive opinions of these physicians outweigh the predominantly negative x-ray evidence. *Williams*, 114 F.3d 22, 21 BLR 2-104; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; Decision and Order on Remand at 4. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a). *See* 20 C.F.R. §718.202(a); *Williams*, 114 F.3d 22, 21 BLR 2-104.

Finally, we affirm the administrative law judge's finding that the evidence is sufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge considered the relevant evidence of record and permissibly determined that the opinion of Dr. Fino was entitled to less weight than the opinions of Drs. Weinberg and Cho. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order on Remand at 4. We reject employer's assertion that the administrative law judge erred in discounting the opinion of Dr. Fino because the physician did not diagnose pneumoconiosis because it was within his discretion to accord less weight to an opinion regarding causation which is based on a faulty premise regarding the presence or absence of pneumoconiosis. *See Clites v. J & L Steel Co.*, 663 F.3d 14, 3 BLR 2-86*; (*3d Cir. 1981); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989)*; Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986)*; see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995)*; Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993). Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm the administrative law judge's findings that claimant has established the existence of pneumoconiosis and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §§718.202 and 718.204(c). *See Williams*, 114 F.3d

22, 21 BLR 2-104; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Coleman*, 18 BLR 1-9; *see also Clites*, 663 F.2d 14, 3 BLR 2-86.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Worley*, 12 BLR 1-20. Consequently, we affirm the administrative law judge's award of benefits as it is supported by substantial evidence and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge