BRB No. 99-1141 BLA

DALE B. MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Paul (Rick) Rauch (McNamar Fearnow & McSharar, P.C.), Indianapolis, Indiana, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (98-BLA-0370) of Administrative Law Judge Rudolf L. Jansen 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). The administrative law judge considered the instant claim, which was filed on February 22, 1993, pursuant to the applicable regulations at 20 C.F.R. Part 718. After crediting claimant with eleven years and five months of coal mine employment based upon the stipulation of the parties, the administrative found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). The

administrative law judge further found the evidence of record sufficient to establish total disability under 20 C.F.R. §718.204(c). In light of his finding that claimant did not establish the presence of pneumoconiosis, however, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's finding that the existence of pneumoconiosis was not established under Section 718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not intend presently to participate in the proceedings on appeal.[1]

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).

In challenging the administrative law judge's finding that the evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), claimant contends that the administrative law judge erred in discounting the opinions of Drs. Combs, Garcia and Cohen, which indicate that claimant suffers from pneumoconiosis, and in according determinative weight to the contrary opinions of Drs. Repsher, Renn and Cook. Specifically, claimant argues that the administrative law judge erred in finding that Drs. Combs and Garcia seriously underestimated claimant's cigarette smoking history, and thus erred in rejecting the opinions of these two physicians on that basis. Claimant further argues that the administrative law judge also improperly discounted the opinions of Drs. Combs and Garcia, as well as Dr. Cohen's medical opinion, because he did not consider the significance of each doctor's qualifications and status as a treating and/or examining physician. Claimant further contends that the administrative law judge erred in crediting the contrary opinions of Drs. Repsher, Renn and Cook on the ground that they were supported by readings of the CT scan administered on May 29, 1997, readings which claimant argues were, contrary to the administrative law judge's finding, positive for pneumoconiosis. Finally, claimant asserts that the opinions of Drs. Repsher, Renn and Cook should have been accorded little, if any, weight, because the doctors stated that coal dust inhalation cannot cause an obstructive lung disease, such as emphysema or chronic bronchitis.

Initially, we reject claimant's contention that the administrative law judge erred in finding that the four CT scan interpretations of record support the opinions of Drs. Repsher, Renn and Cook indicating that claimant does not have pneumoconiosis. *See* Decision and

[1]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, and findings under 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 14-17.

Order at 15. Contrary to claimant's contention, while the four interpretations of the CT scan in question, which was administered on May 29, 1997, indicate that claimant has emphysema, none of the four physicians providing the interpretations linked the emphysema to coal dust exposure. Director's Exhibits 39, 43; Employer's Exhibits 42, 43. Moreover, while Dr. Broderick did not explicitly indicate that claimant does not have pneumoconiosis, the other three physicians who read the CT scan, Drs. Renn, Spitz and Wiot, specifically opined that the CT scan showed no changes consistent with pneumoconiosis. *Id*.

Furthermore, we reject claimant's argument that the opinions of Drs. Repsher, Renn and Cook should have been rejected as hostile to the Act because these doctors opined that coal dust inhalation cannot cause an obstructive lung disease. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction the instant case arises, held in *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995), that medical opinions which indicate that coal dust exposure does not cause obstructive impairment are not "hostile to the Act" or inherently incredible and necessarily less persuasive.[2]

[2]Moreover, contrary to claimant's assertion, Dr. Repsher did not state that pneumoconiosis never causes obstructive disorders. Dr. Repsher testified at his August 31, 1998 deposition that, where pneumoconiosis is present, one would "expect to see primarily restrictive disease that as it becomes more severe may have some obstructive features." Employer's Exhibit 51 at 25. Dr. Renn testified that he recognizes that obstructive airways disease can be associated with pneumoconiosis, but indicated that he believes the degree of obstruction present in claimant's particular case is too great to be associated with pneumoconiosis. Employer's Exhibit 49 at 45-48. Dr. Cook stated that pneumoconiosis in his view does not cause obstructive lung disorders. Employer's Exhibit 50 at 38. Dr. Cook further stated that he recognizes there are studies that suggest that there is an obstructive component to pneumoconiosis, *id*., but that "pneumoconiosis is basically a restrictive disorder, whereas cigarette-related disease is primarily an obstructive disorder." *Id*. at 36.

We agree with claimant, however, that the administrative law judge erred in rejecting the opinions of Drs. Combs and Garcia on the ground that Drs. Combs and Garcia "seriously underestimated" claimant's smoking history. Decision and Order at 15. Dr. Combs, who examined claimant on April 15, 1993, noted that claimant smoked cigarettes for approximately thirty-four years ending in 1978, and smoked, on average, about one to one and one-half packages per day.[3] Director's Exhibit 10. Dr. Garcia, who examined claimant on May 29, 1997, likewise noted that claimant smoked for approximately thirty-four years, from age 21 until quitting in 1978, smoking one to two packs per day.[4] Director's Exhibit 39. Thus, Dr. Combs indicated that claimant has a thirty-four to an approximate fifty pack year smoking history, and Dr. Garcia indicated that claimant has a thirty-four to sixty-eight pack year smoking history. Director's Exhibits 10, 39. We hold that the administrative law judge's finding that Drs. Combs and Garcia "seriously underestimated" claimant's smoking history is not supported by substantial evidence, in light of a comparison of the histories they relied upon to the smoking histories noted by employer's physicians, Drs. Repsher, Renn and Cook. Decision and Order at 15. Dr. Repsher stated that claimant smoked one and one-half packs of cigarettes per day for thirty-four years and thus has an approximately fifty-one pack year history. Employer's Exhibit 6. Dr. Renn indicated in his deposition that his review of the evidence of record revealed that varying smoking histories, from as little as seventeen pack years to as many as seventy pack years, were elicited from claimant by the physicians of record. Employer's Exhibit 49 at 18. Dr. Renn testified, "I tend to believe more the history of the longer or the more pack years than I do the one history of the seventeen pack years, because all the others substantiate each other." *Id*. Dr. Cook noted a seventeen pack year smoking history.[5] Director's Exhibit 23. We vacate, therefore, the administrative law judge's rejection of the opinions of Drs. Combs and Garcia on the basis that Drs. Combs and Garcia seriously underestimated claimant's smoking history.

In addition, as claimant contends, it is evident that the administrative law judge did not discuss, when discounting the opinions of Drs. Combs, Garcia and Cohen under Section 718.202(a)(4), the significance of the fact that these physicians examined and/or treated claimant. Decision and Order at 15; Director's Exhibits 10, 39; Claimant's Exhibits

[3]Dr. Combs indicated in a supplemental letter dated February 12, 1997, that claimant smoked approximately one pack of cigarettes per day for thirty-four years, from 1944 to 1978. Claimant's Exhibit 1.

[4]In a supplemental report dated June 16, 1997, Dr. Garcia noted that claimant smoked for thirty-four years, smoking approximately one pack per day. Claimant's Exhibit 8.

[5]We agree with claimant that it was irrational for the administrative law judge to reject the opinions of Drs. Combs and Garcia on the ground that these two physicians relied upon an underestimated smoking history, and yet credit the contrary opinion of Dr. Cook who relied on a less extensive smoking history than Drs. Combs and Garcia. Decision and Order at 15; Director's Exhibits 10, 23, 39; Claimant's Exhibits 1, 8; Employer's Exhibit 50.

1, 8, 20. Additionally, to the extent the administrative law judge accorded greater weight to the opinions of Drs. Cohen, Repsher, Renn and Cook because these physicians are Board-certified in internal medicine, such a basis of distinction was irrational inasmuch as Dr. Combs and Garcia are likewise Board-certified in internal medicine. Claimant's Exhibits 1, 8. Accordingly, we vacate the administrative law judge's finding under Section 718.202(a)(4), and remand the case for the administrative law judge to reconsider whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis thereunder. If, on remand, the administrative law judge determines that the evidence is sufficient to establish that claimant has pneumoconiosis, the administrative law judge must then consider whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and whether the evidence of record is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) by establishing that claimant's total disability was necessarily due in part to pneumoconiosis. *See Hawkins v. Director, OWCP,* 907 F.2d 697, 14 BLR 2-17 (7th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge