BRB No. 98-1656 BLA

GEORGE WARREN DUKES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 10/8/99
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

W. William Prochot (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

SMITH, Administrative Appeal Judge:

Employer appeals the Decision and Order on Remand (90-BLA-2599) of Administrative Law Judge Donald W. Mosser 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). This case has been before the Board previously. In the original Decision and Order, the administrative law judge found, and the parties stipulated to, twenty-four and one-half years of coal mine employment. Decision and Order dated June 17, 1992. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(c). The administrative law judge concluded, however, that the evidence of record was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order dated June 17, 1992. Accordingly, benefits were denied. The Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(c), but vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b) and remanded the case for the administrative law judge to reconsider Dr. Traughber's opinion. *Dukes v. Peabody Coal Co.*, BRB No. 92-2037 BLA (Oct. 27, 1993)(unpublished).

On remand, the administrative law judge found that Dr. Traughber's opinion was sufficient to establish that claimant's total disability was due to pneumoconiosis in light of *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Decision and Order on Remand dated May 25, 1994. Employer appealed and the Board affirmed the administrative law judge's award of benefits. *Dukes v. Peabody Coal Co.*, BRB No. 94-2635 BLA (Feb. 17, 1995)(unpublished). Employer requested reconsideration and the Board vacated the administrative law judge's Section 718.204(b) findings and remanded the case for the administrative law judge to reconsider Dr. Traughber's opinion in light of the subsequent decision by the United States Court of Appeals for the Sixth Circuit,[1] in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). *Dukes v. Peabody Coal Co.*, BRB No. 94-2635 BLA (Jan. 30, 1998)(unpublished Decision and Order on Recon.).

On second remand, the administrative law judge concluded that the opinion of Dr. Traughber was sufficient to establish that claimant's total disability was due to pneumoconiosis in light of *Adams* and *Smith*. Decision and Order on Remand dated September 1, 1998. Accordingly, benefits were awarded. In the instant appeal, employer

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

contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Initially we hold that employer's contention that the administrative law judge's Decision and Order on Remand fails to comport with 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), is without merit.[2] The

[2]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 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).

administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

Employer contends that intervening case law requires that the case be remanded for the administrative law judge to determine if the presence of pneumoconiosis is established pursuant to Section 718.202(a)(4) in light of *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). We disagree. The United States Court of Appeals for the Third Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Williams, supra*. Consequently, within the jurisdiction of the United States Court of Appeals for the Third Circuit, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to any subsection of Section 718.202(a), then the administrative law judge must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Williams, supra*. The instant case, however, arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 2. We decline to apply *Williams*, in the instant case, inasmuch as no other circuit court has adopted the reasoning by the United States Court of Appeals for the Third Circuit and we have consistently applied the long standing precedent that Section 718.202(a) provides four alternative methods by which claimant can establish the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Since we previously affirmed the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge's finding is law of the case and thus we reject employer's contention regarding the existence of pneumoconiosis. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer further asserts that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Employer contends that the administrative law judge erred in finding the opinion of Dr. Traughber sufficient to establish causation in light of *Smith.* We disagree.

In *Smith*, the United States Court of Appeals for the Sixth Circuit held that proving causation "requires a miner to prove more than a *de minimis* or infinitesimal contribution by pneumoconiosis to his total disability." The court noted that it was not overruling its prior holding in *Adams*, that "the miner does not need to prove total disability by pneumoconiosis 'in and of itself' [but noted that] a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment." *Smith, supra*. The administrative law judge, in the instant case, properly stated that pneumoconiosis and total disability were previously established and that the only question to be resolved was whether Dr. Traughber's opinion is sufficient to establish causation. Decision and Order on Remand at 5. Dr. Traughber opined, in relevant part, that "I think the impairment is contributed to in part by his mining experience and in part by his cancer probably due to a larger degree by his pneumonectomy but I cannot apportion the amount due to each." Director's Exhibit 14. The administrative law judge correctly noted that Dr. Traughber attributed claimant's disability to his mining experience and lung cancer and candidly admitted that he could not apportion the amount of disability due each condition. Decision and Order on Remand at 5. The administrative law judge concluded that although the physician's opinion is insufficient to prove the exact percentage that claimant's total disability is due to pneumoconiosis, it does meet claimant's burden of affirmatively establishing that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment. Decision and Order on Remand at 5-6. In the instant case, the administrative law judge specifically considered Dr. Traughber's opinion pursuant to *Smith* and permissibly concluded that the physician's opinion was sufficient to prove that claimant's total disability was caused "at least in part" by his pneumoconiosis.[3] *See* 20 C.F.R. §718.204(b); Decision and Order on Remand at 3-6; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). It is the administrative law judge's function to weigh the evidence of record and draw conclusions, inferences and resolve the conflicts in the medical evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and

[3]A remand is not required, in the instant case, for the administrative law judge to re-open the record to allow employer the opportunity to submit additional evidence in light of *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). The United States Court of Appeals for the Sixth Circuit did not change the standard of proof required in this case but rather clarified its position with regard to 20 C.F.R. §718.204(b) and the standard enunciated in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Consequently, we reject employer's contention that this case should be remanded for further development of the evidence inasmuch as the court in *Smith* merely provided a further definition of what constitutes "at least in part" and has not altered the standard. *See Smith, supra; Adams, supra*.

the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp Coal Co.,* 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence of record establishes causation pursuant to Section 718.204(b) and further affirm the award of benefits as supported by substantial evidence and in accordance with law.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

JAMES F. BROWN
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with the majority's decision to affirm the award of benefits. I also agree that remand is not necessary to afford employer an opportunity to submit additional evidence in light of *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir.1997). As the administrative law judge below observed, the instant case is almost identical to *Smith*: both concern the sufficiency of Dr. Traughber's opinion to establish causation at Section 718.204(b), when he had attributed claimant's total disability to both smoking and pneumoconiosis, but could not apportion the amount due to each. Decision and Order on Remand at 4. When the Sixth Circuit remanded *Smith* for the administrative law judge to apply the proper standard, it did not require that the record be reopened. Hence, the administrative law judge reasonably concluded that he was not obligated to reopen the record.

It cannot be denied, however, that in *Smith*, the court significantly refined Sixth Circuit law on causation since the court acknowledged in *Smith* that it had "expressibly left open [in *Adams*] the question of whether evidence that pneumoconiosis had played only an infinitesimal or *de minimis* part in a miner's totally disabling respiratory impairment would be sufficient to support an award of benefits. 886 F.2d 826 n. 11." *Smith*, 127 F.3d 506, 21 BLR 2-184, 2-185. The

Sixth Circuit explicitly rejected the de minimis standard in *Smith*, 127 F.3d 507, 21 BLR 2-185 and further explained the appropriate standard: "a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment." 127 F.3d 507, 21 BLR 2-186. Since *Smith* increases claimant's burden, employer is not unduly prejudiced by denial of its request to submit new evidence. *See Peabody Coal Co. v. White,* 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998)(Employer had no right to present new evidence at 20 C.F.R. §727.203(b)(2) after the standard changed at that subsection, making it more difficult for employer to establish rebuttal, when employer had previously failed to establish rebuttal under the less stringent standard.) Hence, the administrative law judge properly rejected employer's request to submit additional evidence.

REGINA C. McGRANERY
Administrative Appeals Judge