BRB No. 06-0958 BLA

C. M. O.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY	)	DATE ISSUED: 09/25/2007
	)	
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 Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2002-BLA-5365) of Administrative Law Judge Rudolf L. Jansen rendered 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). Claimant filed a claim for benefits on May 7,

2001. Director's Exhibit 1. In his Decision and Order issued on August 24, 2006, the administrative law judge determined that claimant worked eighteen years in coal mine employment, that the evidence was sufficient to establish that he suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and that it was sufficient to establish that his total respiratory disability was due to pneumoconiosis under 20 C.F.R. §§718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's Decision and Order Awarding Benefits on both procedural and substantive grounds. On procedural grounds, employer asserts first, that the administrative law judge erred in retroactively applying the Board's holding in *Webber v. Peabody Coal Co*., 23 BLR 1-123 (2006) (*en banc*) (J. Boggs, concurring), *aff'd on recon. en banc*, BLR (2007) to limit the number of CT scans employer could enter into the record. Second, employer contends that, if *Webber* is applicable, the administrative law judge erred in failing to afford employer the opportunity to designate the CT scan of its choosing for admission into the record. Employer also contends that the administrative law judge erred in failing to determine whether good cause existed, pursuant to 20 C.F.R. §725.456(b)(1), for the admission of additional CT scans from employer.

Turning to the merits, employer asserts that the administrative law judge erred in his analysis of the evidence in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). Employer further argues that the administrative law judge erred in his analysis of the evidence relevant to the cause of claimant's pneumoconiosis and erred in finding the presumption of causality at Section 718.203(b) [1] applicable in cases where legal pneumoconiosis, not clinical pneumoconiosis, was established.[2] Lastly, employer argues that the administrative law judge erred in finding

[1] Section 718.203(b) provides:

> [i]f a miner who is suffering from or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that such pneumoconiosis arose out of such employment.

20 C.F.R. §718.203(b).

[2] Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis and includes but is not limited to coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis and silicotuberculosis. 20 C.F.R. §718.201(a)(1).

that claimant established a total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), (c). In response, claimant urges affirmance of the administrative law judge's Decision and Order Awarding Benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief limited to challenging employer's assertions regarding the admission of CT scan evidence and employer's assertions regarding the administrative law judge's finding that pneumoconiosis arose out of coal mine employment at Section 718.203(b). In reply, employer reiterates its contentions.

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.[3] 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 initially challenges the administrative law judge's decision to admit into the record only one of the three CT scan readings proffered by employer.[4] Employer asserts that the administrative law judge's retroactive application of *Webber*, to exclude the CT scan interpretations by Dr. Renn and Dr. Repsher, constitutes error. Employer avers that, in *Webber*, the Board failed to follow the precedent it had set in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*), where it held that the regulations at 20 C.F.R. §718.107, rather than those at 20 C.F.R. §725.414, were applicable to CT scan evidence and that there were no numerical limits on the number of CT-scan readings, which could be submitted in support of a party's affirmative case. *Dempsey*, 23 BLR at 1-60. We reject this contention. We are unable to conclude that the mere application of law in effect at the time of the decision results in a "manifest injustice" to employer. *See Hill v. Director, OWCP*, 9 BLR 1-126, 1-127 n.1 (1986)(an appellate body must apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary);

Legal pneumoconiosis is any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic, restrictive or obstructive lung disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment occurred in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

[4] The only CT scan of record was conducted on January 18, 2002, by Dr. Cook. Director's Exhibit 22. It was interpreted by Drs. Wiot, Repsher, and Renn. Director's Exhibit 22; Employer's Exhibits 4, 5.

Tackett v. Benefits Review Board, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). Moreover, the limitation on CT scan evidence decided by the Board in *Webber* is in keeping with the intent of the Department in placing evidentiary limitations on the evidence at 20 C.F.R. §725.414. *See* 65 Fed. Reg. 79989 (Dec. 20, 2000); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *see also Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-154 (2006).

Employer also argues that, if *Webber* is applicable, the administrative law judge also erred in not allowing employer to designate which CT scan reading it wished to have admitted into the record. We agree. In *Webber*, the Board stated that a "reasonable interpretation of the Section 718.107 regulation would allow only one reading or interpretation of each CT scan to be admitted as affirmative evidence," and that to do otherwise, would "render meaningless the evidentiary limitation" found at Section 725.414(a)(2)(ii), (a)(3)(ii). *Webber*, 23 BLR at 1-134. The Board held that a "party may choose which set of results to submit" in order to best support its position. *Webber*, 23 BLR at 1-135. Here, the administrative law judge stated that *he* would consider the CT scan interpretation of Dr. Wiot, without allowing employer the opportunity to determine which CT scan interpretation it wished to have considered. We, thus, vacate the administrative law judge's decision and remand the case pursuant to *Webber*, 23 BLR at 1-135. Further, on remand, as employer asserts, the administrative law judge should consider whether there is good cause pursuant to Section 725.456(b)(1) for admitting additional CT scan interpretations, an argument which employer made before the administrative law judge. *See* 20 C.F.R. §725.456(b)(1); *Brashear v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006).

We next turn to employer's argument on the merits of entitlement, employer contends that the administrative law judge erred in his analysis of the medical opinions of Drs. Renn, Repsher, Cohen and Houser[5] at Section 718.202(a)(4). Employer contends that the administrative law judge erred in according less weight to the opinion of Dr. Renn, that claimant did not have either clinical or legal pneumoconiosis, Employer's Exhibit 8, because he relied on evidence outside the record, *i.e.*, the x-ray interpretations by Drs. Vedala, Malyala and himself, when, in fact, that evidence was contained in

[5] Employer notes that claimant has not challenged the administrative law judge's finding that the opinion of another doctor, Dr. Houston, was entitled to little weight because it was unreasoned. Decision and Order at 13. That finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710 (1983).

Likewise, employer notes that claimant has not challenged the administrative law judge's finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3). Thus, this finding is also affirmed. *See Skrack*, 6 BLR at 1-711; *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-149 (1990).

claimant's treatment records, which were admitted into evidence as Director's Exhibit 10. Employer also asserts that the administrative law judge failed to consider that Dr. Renn's opinion was buttressed by the negative x-ray readings and the negative CT scan reading. Employer contends, therefore, that the case must be remanded for the administrative law judge to adequately address Dr. Renn's opinion.

In addition, employer contends that the administrative law judge erred in failing to provide a sufficient basis for according more weight to the opinions of Drs. Houser and Cohen, that claimant suffered from both clinical and legal pneumoconiosis, Director's Exhibit 11; Claimant's Exhibit 5, than to the contrary opinion of Dr. Repsher, Employer's Exhibit 5, when the administrative law judge had found that all three opinions were equally reasoned and documented. Employer also contends that the administrative law judge erred in failing to consider Dr. Wiot's negative CT scan interpretation along with the medical opinions at Section 718.202(a)(4). Employer contends, therefore that the case must be remanded and the administrative law judge directed to consider all the relevant evidence at Section 718.202(a)(4) and to provide sufficient rationale for crediting one doctor's opinion over another's. Employer further contends that the case must be remanded because the administrative law judge failed to specifically determine the length of claimant's smoking history, which affects his assessment of the credibility of the medical opinions on the issue of legal pneumoconiosis.

We agree with employer. The administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), based on his cursory analysis of the opinions of Drs. Repsher, Houser and Cohen, requires remand of the case for further discussion. *See* the Administrative Procedure Act, (the 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).

In discussing the medical opinions on remand, the administrative law judge must, as employer asserts, determine the length of claimant's smoking history, *see Webber*, 23 BLR at 1-137, and discuss the credibility of the medical opinions on the issue of legal pneumoconiosis in terms of that history.[6] *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Moreover, on remand, as employer asserts, since some of the evidence Dr. Renn relied on was part of the record, the administrative law judge must discuss Dr. Renn's opinion in terms of that evidence. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon., en banc* BLR (Jun. 27, 2007); *see also Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v.*

[6] The evidence contained smoking histories of anywhere between twenty-six to over fifty pack-years. *See* Decision and Order at 4.

Director, OWCP, 2 BLR 1-111, 1-113 (1979). Additionally, on remand, the administrative law judge must weigh the CT scan interpretation along with the medical opinion evidence in determining whether claimant has established the existence of pneumoconiosis at Section 718.202(a)(4). *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Next, employer argues that the administrative law judge erred in finding claimant entitled to the rebuttable presumption that her pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) inasmuch as the administrative law judge's invocation of the presumption was based on his erroneous interpretation and analysis of the medical opinion evidence at Section 718.202(a)(4). We agree. Because we have vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), we also vacate the administrative law judge's finding at Section 718.203(b). If the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a)(4), he must reconsider whether claimant is entitled to the presumption of causality at Section 718.203(b). We further note, as employer asserts, that if the administrative law judge finds that legal, but not clinical, pneumoconiosis has been established by the medical opinion evidence at Section 718.202(a)(4), the presumption at Section 718.203(b) is not available, as claimant must affirmatively establish that her chronic lung disease or respiratory impairment arose out of coal mine employment. *See* 20 C.F.R. §718.201; *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006), *aff'g, Andersen v. Energy Fuels Mining, Inc.*, BRB No 04-0612 BLA (Apr. 27, 2005) (unpub.); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76; *see also Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-1-7 (1999)(*en banc*).

Employer next asserts that the administrative law judge erred in finding claimant totally disabled at Section 718.204(b)(2)(i) and (iv), based on qualifying pulmonary function studies and the opinions of Drs. Cohen and Houser, that claimant had a totally disabling respiratory impairment. Employer contends that even if pre-bronchodilator studies produced qualifying values, the administrative law judge should have also considered post-bronchodilator values.[7] Employer also asserts that the administrative law judge impermissibly discredited the contrary opinion of Dr. Renn, that claimant was not totally disabled, because he relied, in part, on evidence which was not part of record. Employer contends that Dr. Renn considered evidence that was in claimant's treatment records and his opinion was based on claimant's work history, pulmonary function testing and medical records. Employer also argues that the administrative law judge

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

erred in discrediting the opinion of Dr. Repsher that claimant was not totally disabled, in light of claimant's qualifying pulmonary function studies. Employer contends that this was error because Dr. Repsher, in addition to considering the qualifying pre-bronchodilator pulmonary function study values, also considered the non-qualifying post-bronchodilator values, as well as the non-qualifying blood gas studies. Further, employer asserts that the administrative law judge erred in according superior weight to the opinions of Drs. Cohen and Houser, as these physicians failed to take into account the non-qualifying post-bronchodilator pulmonary function study values. Employer also asserts that the administrative law judge failed to consider the doctors' opinions in light of the exertional requirements of claimant's usual coal mine employment.

In weighing the evidence relevant to total disability, the administrative law judge found that "the well-reasoned and well-documented opinions and pulmonary function studies" were sufficient to support a finding of a totally disabling respiratory impairment, notwithstanding the presence of non-qualifying blood gas studies.[8] As employer argues, however, the administrative law judge erred in failing to acknowledge or discuss non-qualifying post-bronchodilator pulmonary function studies, *see* Director's Exhibits 11, 22; *see Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983); *Strako v. Zeigler Coal Co.*, 3 BLR 1-136 (1981), and erroneously did not consider all of the factors that Dr. Repsher relied on, in assessing the credibility of his opinion on the issue of total disability. *See* Decision and Order at 15. Similarly, the administrative law judge failed to consider whether the opinions of Drs. Houser and Cohen were adequately supported by the underlying documentation and failed to sufficiently discuss their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

The administrative law judge also erred, as employer asserts, in according less weight to the opinion of Dr. Renn on the issue of total disability. Contrary to the administrative law judge's determination that Dr. Renn failed to explain the basis of his conclusion, Dr. Renn based his opinion on claimant's objective testing and the fact that claimant's usual coal mine employment was as a truck driver. Employer's Exhibit 4. As employer contends, however, in assessing the credibility of the medical opinions as to whether claimant is totally disabled, the administrative law judge must consider whether the doctors were aware of the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge failed to do so in this case. Because of these errors, the administrative law judge's finding that a totally disabling impairment was established

[8] The administrative law judge's findings that the non-qualifying blood gas study evidence could not demonstrate total disability at Section 718.204(b)(2)(ii) and that there was no evidence of cor pulmonale with right-sided congestive heart failure to demonstrate total disability at Section 718.204(b)(2)(iii) are affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-710.

pursuant to Section 718.204(b)(2)(i) and (iv) is vacated, and the case is remanded for further consideration of this issue, if reached. On remand, if reached, the administrative law judge must also weigh together all the relevant evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987).

Lastly, employer contends that the administrative law judge erred in finding that claimant established that her totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(c), based on the reports of Drs. Houser and Cohen opining that claimant's disability was due, in part, to her coal mine employment. Employer argues that the "in part" language used by the doctors in insufficient to establish that pneumoconiosis was a substantially contributing cause of total disability as required by Section 718.204(c).[9] Employer further argues that the administrative law judge erred in discrediting the contrary opinions of Drs. Renn and Repsher on the issue of disability causation, on the ground that neither physician diagnosed the existence of either clinical or legal pneumoconiosis. Employer contends, that this was error because the administrative law judge did not find the existence of clinical pneumoconiosis established. Likewise, employer contends that the administrative law judge erred in crediting the opinions of Drs. Cohen and Houser on the issue of causation, as they found, contrary to the administrative law judge, the existence of both clinical and legal pneumoconiosis.

Because we have vacated the administrative law judge's findings as to the existence of pneumoconiosis at Section 718.202(a), and total disability at Section 718.204(b)(2), we must also vacate the administrative law judge's finding regarding disability causation at Section 718.204(c). If reached, the administrative law judge must consider all evidence relevant to this section in a manner consistent with the standard set forth therein, *i.e.*, whether pneumoconiosis is a substantially contributing cause of disability. 20 C.F.R. §718.204(c). Further, in assessing the credibility of the doctors'

---

[9] Pneumoconiosis is a "substantially contributing" cause of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

opinions on the issue of disability causation, the administrative law judge must determine whether clinical or legal pneumoconiosis, or both, have been established, *see Webber*, 23 BLR at 1-139; *Harris*, 23 BLR at 1-118-119, and must consider the physicians' opinions on the issue of disability causation in light of their findings regarding the existence of clinical and legal pneumoconiosis. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge