BRB No. 00-0890 BLA

ROBERT L. TANNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
AMAX COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand - Awarding Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

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

Mark Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Dorothy L. Page (Howard M. Radzely, Acting 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (97-BLA-0432) of Administrative Law Judge Ellin M. O'Shea 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 is before

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the

the Board for the second time. In the original Decision and Order, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's September 29, 1994 filing date. In weighing the medical evidence of record, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) (2000). In addition, the administrative law judge found employer's concession of total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000) supported by the evidence of record. The administrative law judge further found the evidence sufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits, commencing September 1994.

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case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Pursuant to employer's appeal, the Board vacated the administrative law judge's Decision and Order awarding benefits and remanded the case to the administrative law judge for further consideration. *Tanner v. Amax Coal Co.*, BRB No. 98-0456 BLA (Dec. 18, 1998)(unpub.). Initially, the Board affirmed the administrative law judge's determination of the date of onset and her findings pursuant to Sections 718.203(b) and 718.204(c) (2000), as unchallenged on appeal. *Tanner*, slip op. at 2, n.2. The Board also affirmed the administrative law judge's finding that the CT scan evidence of record was inconclusive and, therefore, did not establish either the presence or absence of pneumoconiosis. *Tanner*, slip op. at 2. Furthermore, the Board affirmed the administrative law judge's finding that the opinions of Drs. Wiot and Repsher were unpersuasive.[2] *Id*. However, the Board vacated the administrative law judge's findings with respect to the medical opinions of Drs. Castle, Dahhan, Renn, Selby and Tuteur, remanding the case for the administrative law judge to reconsider these medical opinions under Sections 718.202(a)(4) and 718.204(b) (2000), holding that the administrative law judge did not provide adequate and rational bases for discrediting these opinions. *Tanner*, slip op. at 3-4.

On remand, the administrative law judge again found that the medical opinion evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). In addition, the administrative law judge found the medical evidence sufficient to establish that pneumoconiosis was a necessary cause of claimant's total respiratory disability pursuant to Section 718.204(b) (2000). Accordingly, the administrative law judge again awarded benefits on remand.

In challenging the administrative law judge's award of benefits in the instant appeal, employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000) and that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000). In response, claimant urges affirmance of the administrative law judge's award of benefits, arguing that the administrative law judge properly

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[2] In addition, the Board rejected employer's contention that the administrative law judge erred in failing to weigh the reports of Drs. Stotlar, Nordlicht and Wood, holding that the omission in their opinions of a diagnosis of pneumoconiosis is not the equivalent of a diagnosis of no pneumoconiosis under 20 C.F.R. §718.201(2000). *Tanner v. Amax Coal Co.*, BRB No. 98-0456 BLA, slip op. at 3 (Dec. 18, 1998)(unpub.).

considered the medical evidence on remand and reasonably found the evidence sufficient to establish entitlement to benefits. In its reply brief, employer reiterates the arguments as set forth in its Petition for Review and brief. Specifically, employer again contends that the administrative law judge did not follow the Board's remand instructions and, therefore, the case must be remanded. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

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).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the relevant evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and there is no reversible error therein. Initially, employer contends that the administrative law judge erred in failing to follow the remand instructions of the Board in reconsidering the medical opinion evidence pursuant to Section 718.202(a)(4). In particular, employer contends that the administrative law judge again found the medical opinions of Drs. Selby and Tuteur biased and, therefore, discredited them, which is contrary to the Board's remand instructions. Employer also argues that the administrative law judge again rejects the opinions of Drs. Renn, Dahhan and Castle for the same reasons that were found insufficient by the Board in its 1998 Decision and Order. We disagree.

Contrary to employer's contention, the administrative law judge did not fail to apply the Board's remand instructions in her consideration of the medical evidence. Rather, 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 3-12. While the administrative law judge again notes her conclusion that the medical opinions of Drs. Selby and Tuteur tended to be less than objective inasmuch as they did not cooperate fully during their depositions, she nonetheless properly considered these medical opinions in their entirety. The administrative law judge, within a reasonable exercise of her discretion, found that the opinions of Drs. Selby and Tuteur were not as well reasoned and not as well supported by their underlying medical documentation as the contrary opinions of Drs. Cohen and Sandoval, that stated claimant's respiratory impairment was due to a combination of his coal dust exposure and cigarette smoking. Decision and Order on Remand at 5, 6, 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lafferty v.*

Cannelton Industries, Inc., 12 BLR 1-190 (1989). Specifically, the administrative law judge considered the totality of the documentation underlying the relevant medical opinions, including the clinical evidence, employment and social histories, and medical literature discussed in the opinions. In weighing this evidence, the administrative law judge reasonably found that Dr. Cohen's opinion was the most persuasive opinion inasmuch as he better "explained the relationship between the development of COPD [Chronic Obstructive Pulmonary Disease], manifested in chronic bronchitis and emphysema and Mr. Tanner's coal dust exposure." Decision and Order on Remand at 11-12; *Clark, supra; Lafferty, supra*; *see also Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Similarly, the administrative law judge did not fail to follow the Board's remand instructions with respect to the opinions of Drs. Renn, Dahhan and Castle. In considering these opinions, the administrative law judge again noted the Board's holdings in its 1998 decision and her disagreement with some of the Board's characterizations of her prior opinion and the medical evidence. Nonetheless, the administrative law judge weighed each of the medical reports in its entirety, and after discussing the shortcomings of each of the reports, reasonably found that none was as well reasoned, documented or persuasive as the opinions of Drs. Cohen and Sandoval. *See* Decision and Order on Remand at 6-11. Inasmuch as the administrative law judge's analysis is rational and supported by substantial evidence, we affirm the administrative law judge's findings that the medical opinions of Drs. Renn, Dahhan and Castle were not as well supported by their underlying documentation and rationale as the opinions of Drs. Cohen and Sandoval. Decision and Order on Remand at 10-12; *see Clark, supra; Fagg, supra*.

In addition, contrary to employer's contentions, the administrative law judge reasonably exercised her discretion as fact-finder in determining that the opinion of Dr. Cohen was well reasoned and persuasive, and, thus, that it was entitled to the greatest weight because it was better supported, reasoned and more comprehensive, in light of its underlying documentation. Decision and Order on Remand at 10; *see Clark, supra; Lafferty, supra*; *see also Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Similarly, contrary to employer's contention, the administrative law judge considered the specific text of Dr. Sandoval's medical report, that "COPD **can be** related to exposure to coal dust and as such represents coal miner pneumoconiosis," but reasonably found that the use of the words "can be" do not indicate an equivocation in relating claimant's respiratory disease to coal dust exposure. Decision and Order on Remand at 10-11 (emphasis added); Director's Exhibit 10; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16

(1987). Also, contrary to employer's contention, the administrative law judge did not mechanically accord greater weight to the diagnoses offered by Drs. Cohen and Sandoval, based on their status as examining physicians, but rather, properly considered the respective qualifications of the physicians, the extent to which their reports reflect a thorough knowledge of the miner's occupational, medical, social and smoking histories, and the extent to which their conclusions are supported by the underlying documentation. *See Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992). Inasmuch as the administrative law judge has considered all of the relevant evidence, and provided rational bases for her crediting of the opinions of Drs. Cohen and Sandoval, that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), we affirm her findings as supported by substantial evidence.[3] 20 C.F.R. §§718.201, 718.202(a)(4) (2000); *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

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(b) (2000). Contrary to employer's contention, the administrative law judge did not discredit the opinions of Drs. Tuteur, Selby, Dahhan, Renn and Castle on the issue of causation because they did not diagnose pneumoconiosis when she found it existed. Brief for Employer at 29. The administrative law judge plainly stated that Dr. Cohen's well-reasoned opinions were more convincing than those of the other doctors, considered in light of his "far weightier background and foundation for his reasoned opinions...." Decision and Order on Remand at 11. Furthermore, the administrative law judge found causation established based upon the opinions of Drs. Cohen and

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[3] Employer also contends that the administrative law judge erred in failing to weigh the contrary x-ray evidence and CT scan evidence against the medical opinion evidence under Section 718.202(a) (2000), in light of *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). We disagree. The instant case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2. Inasmuch as the Seventh Circuit court has not 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, we decline to apply *Williams* in this case. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *cf. Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Williams, supra*.

Sandoval, showing that pneumoconiosis contributed significantly to claimant's disabling lung disease.[4] Decision and Order on Remand at 12. Because it is rational and supported by substantial evidence, we affirm the administrative law judge's finding and hold claimant has established that pneumoconiosis was a substantially contributing cause of his totally disabling pulmonary impairment established pursuant to Section 718.204(c).[5]

Finally, in light of our affirmance of the administrative law judge's weighing of the medical evidence and her finding that the evidence is sufficient to establish entitlement to benefits, we decline employer's request that this case be remanded to a new administrative law judge for reconsideration of the evidence.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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[4] In view of this determination, we reject employer's contention that the administrative law judge erred in finding that Dr. Cohen's opinions established that pneumoconiosis was a necessary condition of claimant's totally disabling pulmonary disease. Decision and Order on Remand at 12. *See Shelton v. Director, OWCP*, 899 F.2d 690, 693, 13 BLR 2-444, 2-448 (7th Cir. 1990); *but see* 20 C.F.R. §718.204(c)(1)(i)- (ii) (2001).

[5] The administrative law judge applied the disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations the disability causation regulation is now set forth at Section 718.204(c).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge