BRB No. 10-0476 BLA

ROBERT TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 04/12/2011
	)	
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 Second Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand – Awarding Benefits (2004-BLA-5350) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board for the

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 2.

third time.[2] In its most recent decision in this case, the Board, pursuant to claimant's appeal, vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to reconsider the medical opinion evidence on the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, the Board held that the administrative law judge failed to sufficiently explain why he found the opinions of Drs. Zaldivar and Branscomb to be better reasoned than the opinion of Dr. Cohen on the issue of whether claimant's chronic respiratory impairment was due, in part, to coal mine employment, in violation of the requirements of 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). The Board instructed the administrative law judge to reconsider whether the opinions of Drs. Zaldivar, Branscomb, and Cohen were reasoned and documented, and the relative weight to accord their opinions.[3] As the issue of total respiratory disability pursuant to 20 C.F.R. §718.204(b) was conceded, the Board instructed the administrative law judge to determine whether the evidence was sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c) if, on remand, he found the existence of legal pneumoconiosis established at Section 718.202(a). *R.T.* [*Taylor*] *v. Peabody Coal Co.*, BRB No. 08-0622 BLA (May 29, 2009)(unpub.).

On remand, the administrative law judge found that the weight of the evidence was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), and disability causation pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence on the issues of legal pneumoconiosis and disability causation at Sections 718.202(a)(4) and 718.204(c). Specifically, employer alleges that the administrative law judge mischaracterized evidence and imposed an improper standard of proof that amounts to a presumption that any chronic obstructive pulmonary impairment suffered by a miner is caused by coal dust exposure. Employer maintains that Dr. Cohen's opinion is insufficient affirmative evidence of legal pneumoconiosis, and that the administrative law judge's reliance on non-record evidence constitutes a violation of employer's due process rights. Lastly, employer contends that

[2] The lengthy procedural history of this case is set forth in the Board's decisions in *R.T.* [*Taylor*] *v. Peabody Coal Co.*, BRB No. 08-0622 BLA (May 29, 2009)(unpub.), and *Taylor v. Peabody Coal Co.*, BRB No. 06-0843 BLA (Aug. 24, 2007)(unpub.).

[3] The Board affirmed the administrative law judge's decision to accord no weight to Dr. Porterfield's diagnosis of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Taylor v. Peabody Coal Co.*, BRB No. 06-0843 BLA, slip op. at 9 n. 12 (Aug. 24, 2007) (unpub.).

the administrative law judge erroneously discredited the opinions of Drs. Zaldivar and Branscomb as "hostile," and requests that the case be remanded to a new administrative law judge for a "fresh look" at the evidence. Employer's Brief at 16-28. Claimant has filed a response brief, urging affirmance of the award of benefits. Employer has replied in support of its position. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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.[4] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to employer's arguments, in considering the medical opinion evidence on the issues of legal pneumoconiosis and disability causation, the administrative law judge permissibly examined whether the medical rationales expressed were consistent with the conclusions contained in the medical literature and scientific studies relied upon by the Department of Labor (DOL) in drafting the definition of legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). Furthermore, because the preamble and DOL's comments are relevant to the appropriate interpretation of the 2001 amendments to the regulations, their use cannot come as a surprise to parties involved in the litigation of black lung claims under these regulations. The preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). We find no merit, therefore, to employer's argument that the administrative law judge's review of the medical opinions in light of the regulatory materials set forth in the preamble constituted use of extra-record evidence, improper judicial notice of a fact, or a denial of due process.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

After summarizing the medical opinions of Drs. Cohen, Zaldivar and Branscomb, and noting that all three doctors were pulmonary specialists, the administrative law judge permissibly accorded determinative weight to the opinion of Dr. Cohen, that claimant's disabling chronic obstructive pulmonary disease/emphysema was attributable to both smoking and coal dust exposure, as the administrative law judge determined that Dr. Cohen's opinion was supported by its underlying documentation, better explained, and consistent with the conclusions contained in the preamble. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order on Second Remand at 2-4. We find no merit to employer's contention that Dr. Cohen failed to analyze any data specific to claimant, and that his opinion is, therefore, insufficient to constitute affirmative evidence of legal pneumoconiosis. The record reflects, and the administrative law judge found, that Dr. Cohen's opinion was based upon his analysis of claimant's smoking, medical and employment histories, symptoms, the fixed impairment revealed on pulmonary function studies after bronchodilation, and medical literature accepted by DOL. Decision and Order on Second Remand at 2-3; Claimant's Exhibits 5, 6, 7. The administrative law judge acted within his discretion in according less weight to the contrary opinions of Drs. Zaldivar and Branscomb, as he found that both physicians disagreed with the conclusions reached in various studies accepted by DOL in revising the regulatory definition of legal pneumoconiosis, and neither physician provided a persuasive reason for "completely discounting" coal dust exposure as a contributing cause of claimant's pulmonary disease and disability. Decision and Order on Second Remand at 3-4; *see J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125 (2009). As the administrative law judge properly evaluated the medical opinion evidence, and his credibility determinations are supported by substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and disability causation pursuant to Section 718.204(c). Consequently, we affirm the award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge