

BRB No. 97-1668 BLA
Case No. 96-BLA-0467

DONALD CRANOR)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: <u>OCT 29, 1999</u>
)	
PEABODY COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
)	DECISION and ORDER on
)	RECONSIDERATION
Party-in-Interest)	<i>EN BANC</i>

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

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

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

Edward Waldman (Henry L. Solano, 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, the United States Department of Labor.

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

PER CURIAM:

Employer has filed a timely Motion for Reconsideration requesting that the Board reconsider its Decision and Order in the above captioned case. The administrative law judge accepted the parties' stipulation to twenty-eight years of coal mine employment, and found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found that the evidence was insufficient to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was sufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits as of November 1, 1996. On appeal, employer challenged the administrative law judge's findings at Section 718.202(a)(1) and Section 718.204(b), (c)(1), and (c)(4). In rejecting employer's contentions at Section 718.202(a)(1), the Board held that the administrative law judge properly restricted her consideration of Dr. Sargent's March 10, 1995 x-ray reading to his positive, 1/1 classification and properly declined to consider Dr. Sargent's accompanying notes on the form. The Board also held that the administrative law judge's failure to consider the x-ray interpretation in which Dr. Fino read the January 18, 1996 film as unreadable was harmless error. Thus, the Board affirmed the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Furthermore, the Board affirmed the administrative law judge's finding of total disability due to pneumoconiosis under Section 718.204(b) and (c). Finally, the Board affirmed the administrative law judge's findings pursuant to Section 718.203(b), and the date of onset of total disability as unchallenged on appeal. *Cranor v. Peabody Coal Co.*, BRB No. 97-1668 BLA (Aug. 20, 1998)(unpub.).

In its motion for reconsideration, employer argues that the Board erred in affirming the administrative law judge's findings under Section 718.202(a)(1) and Section 718.204(c)(4) and (b). In his response brief, claimant argues that the Board properly affirmed the administrative law judge's award of benefits. On April 15, 1999, the Board issued an Order requesting supplemental briefing on the issue of whether comments of no coal workers' pneumoconiosis made by a physician who has read an x-ray as positive for pneumoconiosis under the ILO-U/C classification system should be considered at Section 718.202(a)(1) or at Section 718.203.¹ *Cranor v. Peabody Coal Co.*, BRB No. 97-1668 BLA

¹The ILO-U/C system is a system for classifying "the radiological appearances seen in all types of pneumoconiosis." *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconiosis*, International Labour Office, p. v (Revised Ed. 1980); 20 C.F.R. §718.102(b).

(Apr. 15, 1999)(unpub. Order). Claimant, employer and the Director, Office of Workers' Compensation Programs (the Director), filed briefs addressing this issue. In a reply brief, employer contends that the arguments advanced by the Director lack merit.² We grant employer's Motion for Reconsideration, but deny the specific relief requested.

Employer argues on reconsideration that the administrative law judge erred in determining that claimant established the presence of pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, employer contends that the administrative law judge erred by failing to consider Dr. Sargent's comment on his March 10, 1995 x-ray form which indicates "not CWP etiology unknown. Compare to old films. Need oblique views." Director's Exhibit 13. Employer argues that Dr. Sargent's comment must be considered under Section 718.202(a)(1) because it raises a question as to whether the doctor's reading of 1/1 is positive for pneumoconiosis as defined in the Act and the regulations.³ 30 U.S.C. §902(b); 20 C.F.R. §718.201. Employer further contends that postponing consideration of Dr. Sargent's explanation of his positive classification to Section 718.203(b) effectively precludes rebuttal

²The Director, Office of Workers' Compensation Programs (the Director), filed a motion to strike employer's reply brief on the ground that the filing of such a brief was not authorized by the Board's April 15, 1999 Order. Claimant joined in the Director's motion. We deny the Director's motion and accept employer's reply brief. 20 C.F.R. §802.215.

³The Act defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b). A disease "arising out of coal mine employment" is defined at 20 C.F.R. §718.201 as "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

of the presumption that claimant's pneumoconiosis arose, at least in part, from his coal mine employment. Finally, employer contends that the Board's decision in *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*) requires that the fact-finder consider Dr. Sargent's comment under Section 718.202(a)(1).

Both the Director and claimant argue that Dr. Sargent's comment that the x-ray was not indicative of coal worker's pneumoconiosis addresses the cause of the pneumoconiosis diagnosed, not its existence, and is therefore relevant under Section 718.203(b). The Director argues that to consider Dr. Sargent's comment under Section 718.202(a) would deprive claimant of the benefit of the presumption of causation under 30 U.S.C. §921(c)(1), as implemented by Section 718.203(b).

We reaffirm our prior holding that the administrative law judge properly weighed Dr. Sargent's x-ray reading as positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) without considering the doctor's comment. Section 718.202(a)(1) permits an administrative law judge to find the existence of pneumoconiosis based on a chest x-ray that is classified as Category 1/0 or greater. 20 C.F.R. §§718.102(b), 718.202(a)(1). We find unpersuasive employer's argument that comments regarding the source of the pneumoconiosis found by x-ray should be considered at Section 718.202(a)(1). Dr. Sargent's comment that the pneumoconiosis was not coal workers' pneumoconiosis does not undermine his diagnosis of pneumoconiosis, the relevant issue at Section 718.202(a)(1), but merely addresses the source of the diagnosed pneumoconiosis. Accordingly, comments that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis at Section 718.202(a)(1).

Neither are we persuaded that the holding in *Melnick* supports employer's position. In *Melnick*, the x-ray reading at issue under Section 718.202(a)(1) was rendered by Dr. Radebaugh, who diagnosed pneumoconiosis 3/2 and large opacities size A. *Melnick*, 16 BLR at 1-37. Dr. Radebaugh also noted, "can't rule out mesothelioma either side," on the x-ray form. *Id.* The Board held that it was unclear from the record whether Dr. Radebaugh's comment constituted an alternative diagnosis, thereby calling into question his diagnosis of pneumoconiosis, or merely represented an additional diagnosis of cancer. *Id.* The Board thus instructed the administrative law judge to discuss Dr. Radebaugh's entire x-ray report, including his additional notations, when evaluating the evidence under Section 718.202(a)(1) on remand. *Id.* Consequently, the Board in *Melnick* concluded that an administrative law judge should consider internal inconsistencies within an x-ray reading that detract from the credibility of the x-ray interpretation under Section 718.202(a)(1). *Id.* The instant case differs from *Melnick* in that Dr. Sargent's comment regarding the source of the diagnosed pneumoconiosis does not undermine the credibility of the positive ILO classification. *Id.*

Employer also states that the United States Supreme Court indicated in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988) that an x-ray, in isolation, does not establish the presence of pneumoconiosis and that a fact-finder must weigh both the x-ray itself and “other evidence” that sheds light on the significance of the x-ray when considering whether the x-ray evidence is sufficient to establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(1). Employer’s Supplemental Brief at 4. However, the Supreme Court’s reference to “other evidence” in *Mullins* related to the requirement that the administrative law judge weigh conflicting interpretations of the same x-ray in order to determine whether it tends to prove or disprove the existence of pneumoconiosis. *Mullins*, 484 U.S. at 148-149, 11 BLR at 2-8. Moreover, the Supreme Court noted that although only the first of the four alternative methods of invoking the Section 727.203(a) presumption requires proof that the claimant’s disease is, in fact, pneumoconiosis, none of the methods “requires proof of causation.” 484 U.S. at 143, 11 BLR at 2-5. Thus, we reject employer’s assertion that *Mullins* requires that Dr. Sargent’s comments be considered under Section 718.202(a)(1).

Consequently, we hold that Dr. Sargent’s comment indicating that the diagnosed pneumoconiosis was not coal workers’ pneumoconiosis is to be considered by the fact-finder pursuant to Section 718.203. Such a holding affords claimant the full benefit of the presumption that his pneumoconiosis arose, at least in part, out of his coal mine employment, to which he is entitled since he has established more than ten years of qualifying coal mine employment, yet also satisfies the requirement that all relevant evidence be considered by the administrative law judge. 30 U.S.C. §923(b); *Mullins, supra*. We find no merit in employer’s contention that considering Dr. Sargent’s comment at Section 718.203 would preclude giving full consideration to highly relevant evidence. If a claimant establishes at least ten years of coal mine employment, then such comments must be considered by the administrative law judge when determining whether rebuttal of the presumption that the diagnosed pneumoconiosis arose, at least in part, out of the claimant’s coal mine employment has been established. 20 C.F.R. §718.203(b). Claimants with fewer than ten years of qualifying coal mine employment must affirmatively establish this element. 20 C.F.R. §718.203(c); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Thus, such evidence must always be considered by the administrative law judge.

Employer also asserts that the Board erred in holding that administrative law judge’s failure to consider Dr. Fino’s reading of the January 18, 1996 x-ray at Section 718.202(a)(1) was harmless error. Employer argues that although the Board believed that Dr. Fino’s finding that the film was unreadable was neither a positive nor a negative reading, other inferences were possible. Specifically, employer states that the administrative law judge could have found that Dr. Fino’s reading called into question the positive reading of the same film by Dr. Baker, especially since Dr. Baker read the film quality as a “3,” or that the

conflict among the readers could not be resolved and therefore the film did not establish the existence of pneumoconiosis.

The administrative law judge found that the record contained two readings of the January 18, 1996 film. Decision and Order at 6, 7. She concluded that the two readings neither established nor disproved the existence of pneumoconiosis since Dr. Baker, a B reader, interpreted the film as positive and Dr. O'Bryan, a B reader, interpreted the film as negative. *Id.* at 7, 8; Claimant's Exhibit 2; Employer's Exhibit 8. The Board held that although the administrative law judge erred in failing to consider the interpretation by Dr. Fino, a B reader, the error did not require remand since the interpretation was neither positive nor negative and did not impact the administrative law judge's ultimate finding that the preponderance of the evidence, as indicated by the numerical superiority of the interpretations by physicians with superior credentials, established that claimant suffers from pneumoconiosis. *Cranor*, slip opinion at 3; Employer's Exhibit 2.

We reaffirm our previous holding that the administrative law judge's failure to consider Dr. Fino's interpretation of the January 18, 1996 x-ray was harmless error. It is well established that error which does not alter the disposition of a case is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988). In the instant case, the administrative law judge gave greatest weight to the interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6, 7. Inasmuch as the record indicates that none of the physicians who read the January 18, 1996 x-ray, including Dr. Fino, possesses those dual qualifications, the administrative law judge's failure to consider Dr. Fino's reading did not alter his ultimate conclusion that the x-ray evidence was sufficient to establish the existence of pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibits 2, 8. Thus, we decline to remand this case for consideration of Dr. Fino's interpretation, *see Johnson, supra*, and reaffirm the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Turning to Section 718.203(b), the administrative law judge determined in her Decision and Order that claimant was entitled to the presumption that his pneumoconiosis arose, at least in part, out of his coal mine employment and that employer did not rebut this presumption. The Board affirmed this finding as unchallenged on appeal. *Cranor*, slip opinion at 2, n.1. In light of our holding that a comment of no coal workers' pneumoconiosis must be considered under Section 718.203(b), however, we must vacate the administrative law judge's finding and remand this case to the administrative law judge for consideration of whether Dr. Sargent's comment supports a finding of rebuttal pursuant to Section 718.203(b).

Finally, we decline to disturb our previous affirmance of the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to

Section 718.204. In arguing that the Board erred in affirming the administrative law judge's weighing of the evidence under Section 718.204(c), employer argues that the administrative law judge did not cite any support in the record for her conclusion that pneumoconiosis is progressive, or that later pulmonary function studies are more reliable indicators of the extent of a claimant's respiratory or pulmonary impairment. Employer also argues that there is no support in the record for the administrative law judge's finding that the qualifying pulmonary function studies suggested a deterioration in the miner's condition. Employer thus contends that the administrative law judge either reached outside the record to find disability or relied on a presumption without permitting the parties notice and an opportunity to respond with proof in violation of 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).

In arguing that the administrative law judge applied an impermissible presumption in crediting the most recent evidence, employer ignores a large body of relevant court decisions. In *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, held that as pneumoconiosis is a "progressive and degenerative disease," an administrative law judge may credit x-ray evidence based on its recency when the evidence has shown that the miner's condition has deteriorated. *Woodward*, 991 F.2d at 320, 17 BLR at 2-85; *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). In *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997), the Sixth Circuit observed that later evidence "is particularly important in black lung cases, where because of the progressive nature of pneumoconiosis, more recent evidence is often accorded more weight." *See Crace*, 109 F.3d at 1167, 21 BLR at 2-82. Furthermore, the Supreme Court has characterized pneumoconiosis as a "serious and progressive pulmonary condition." *Mullins*, 484 U.S. at 138, 11 BLR at 2-3. Inasmuch as the administrative law judge's decision to accord greater weight to more recent evidence is in accord with applicable case law, we reject employer's argument that the administrative law judge reached outside the record or applied an impermissible presumption in relying on the later evidence.

Employer further cites the United States Supreme Court's decision in *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998) and the Sixth Circuit's decision in *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995) for the proposition that administrative fact-finders must offer rational bases for their determinations and that unsubstantiated inferences and shortcuts in fact-finding under the APA are inappropriate.⁴

⁴Employer has not presented a convincing argument as to why these decisions apply in the instant case. In *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998), the employer petitioned for review of an Order of the National Labor

The Board has long held that the APA requires that an administrative law judge provide a sufficient rationale for his findings and conclusions. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-444 (1981). In the instant case, however, we reject employer's contentions that the administrative law judge's weighing of the evidence does not comport with the APA. In finding that claimant established total disability pursuant to Section 718.204(c), the administrative law judge acted within her discretion as fact-finder in crediting the two most recent pulmonary function studies, which produced qualifying values, and the medical opinions of Drs. Baker and Simpao, as they were based on the most recent evidence of record and more thorough and complete examinations. Decision and Order at 10, 15; Claimant's Exhibits 1, 2; *see Crace, supra*; *Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Inasmuch as the administrative law judge discussed all of the relevant evidence and provided a rationale for her findings, her decision complies with the requirements of 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 and 30 U.S.C. §932(a); *see generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also contends that the administrative law judge erred by mischaracterizing

Relations Board (NLRB) requiring the employer to recognize and bargain with its union, after the NLRB found that the employer had committed an unfair labor practice by polling its employees concerning union support without a good faith reasonable doubt as to the union's majority support. The Supreme Court held that the NLRB's standard for employer polling of union support was rational and consistent with the National Labor Relations Act. 29 U.S.C.A. §151 *et seq.*; *Allentown Mack, supra*.

In *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995), the United States Court of Appeals for the Sixth Circuit addressed the Federal Communications Commission's refusal to eliminate structural separation requirements for the provision of cellular service by Bell Operating Companies. The court noted that the Commission had declined to decide the structural separation issue during the Personal Communications Service rulemaking process based on what the agency termed an insufficient record. *See Cincinnati Bell Telephone Co., supra*. After noting that the Commission's structural separation requirement was somewhat dubious, the court held that the agency's insufficient record justification was arbitrary and capricious. *Id.* Accordingly, the court remanded the case to the Commission for a reexamination of whether the structural separation requirement was in the public interest. *Id.*

Dr. Fino's opinion under Section 718.204(b). In weighing the evidence under Section 718.204(c), the administrative law judge concluded that Dr. Fino's opinion was entitled to less weight as it was based on a CT scan that was not in the record and because Dr. Fino did not have the benefit of the two most recent qualifying pulmonary function studies. Decision and Order at 15; Employer's Exhibit 2. The administrative law judge then found that Dr. Fino's opinion was not probative evidence with regard to the cause of claimant's total disability under Section 718.204(b) because Dr. Fino based his disability assessment on the erroneous conclusions that claimant did not have pneumoconiosis and was not totally disabled. Decision and Order at 16.

Employer is correct that Dr. Fino stated that even if he were to assume that pneumoconiosis were present, he believed that there was no pulmonary impairment related to the inhalation of coal mine dust. Employer's Exhibit 2. However, inasmuch as the administrative law judge properly discredited Dr. Fino's assessment regarding disability, the administrative law judge acted within her discretion in finding that Dr. Fino's opinion was not entitled to probative weight on the issue of causation at Section 718.204(b). *See generally Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). We therefore reaffirm the administrative law judge's finding that Dr. Fino's opinion was not entitled to determinative weight under Section 718.204(b).

In light of the foregoing, we grant employer's Motion for Reconsideration, but deny the specific relief requested. Inasmuch as we have held that the administrative law judge did not consider all of the evidence relevant to Section 718.203(b), however, we must remand this case to the administrative law judge.

Accordingly, the Board's Decision and Order is modified in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

DESKBOOK SECTIONS: Part VIII.A; Part VII.B.2; Part VII.C and Part X.C.

The Board held that a physician's comments that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Rather, those comments are to be considered at 20 C.F.R. §718.203. *Cranor v. Peabody Coal Co.*, BLR (1999).