BRB No. 00-0674 BLA

FOREST GALLAHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
BELLAIRE CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Thomas McK Hazlett (Harper & Hazlett), St. Clairsville, Ohio, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for employer.

Barry H. Joyner (Judith E. Kramer, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0083) of Administrative Law Judge Daniel L. Leland 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] The administrative law judge considered the instant claim, a duplicate claim which was filed on October 20, 1997, pursuant to the applicable regulations at 20 C.F.R. Part 718.[2] After crediting claimant with sixteen years and four months of coal mine employment, the administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and, that therefore, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). However, considering the claim on the merits, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Consequently, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge improperly discounted Dr. Reddy's medical opinion in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating she presently does not

[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.

[2]Claimant previously filed a claim on May 14, 1996, which was finally denied by the district director on October 9, 1997 for claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 21. Claimant took no further action thereafter until filing the instant duplicate claim on October 20, 1997. Director's Exhibit 1.

intend to participate in this appeal.[3]

[3]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, his finding under 20 C.F.R. §725.309 (2000), and his finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3) (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 5-6.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule in an Order issued on March 2, 2001, to which the Director and employer have responded. The Director states that the regulations at issue in the lawsuit do not affect the outcome of this case.[4] Employer states that the amended regulations would affect the outcome of the case, and submits that the case should, therefore, be stayed.[5] Based upon the

[4]Claimant has not responded to the Board's Order issued on March 2, 2001. Pursuant to the Board's instructions, the failure of a party to submit a brief within twenty days following receipt of the Board's Order issued on March 2, 2001 would be construed as a position that the challenged regulations will not affect the outcome of this case.

[5]Employer contends that the amended regulations governing the issues of the definition of pneumoconiosis, the detection of pneumoconiosis after the cessation of coal dust exposure, and the effect of non-pulmonary or non-respiratory conditions on the element of total disability due to pneumoconiosis could affect the outcome of this case. The issue on appeal in the present case, however, is whether the administrative law judge properly discounted Dr. Reddy's medical opinion that claimant has pneumoconiosis in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). The regulation governing this issue is identical to the previous

briefs submitted by the Director and employer, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will adjudicate the merits of 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 rational, supported by substantial evidence, and in accordance with applicable law. 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).

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regulation at 20 C.F.R. §718.202(a)(4) (2000). The issues governed by the regulations referred to by employer in its supplemental brief were not reached by the administrative law judge in his Decision and Order which is under review.

On appeal, claimant argues that the administrative law judge improperly discounted Dr. Reddy's medical opinion in favor of the contrary opinions of Drs. Altmeyer and Fino in finding the evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000). We agree. Dr. Reddy examined claimant on July 19, 1996, and on December 12, 1997. In his 1996 opinion, Dr. Reddy did not diagnose claimant with coal workers' pneumoconiosis,[6] Director's Exhibit 21, but, in his 1997 report, Dr. Reddy did diagnose claimant with the disease. Director's Exhibit 6. Dr. Reddy stated in his 1997 report that he based his diagnosis of pneumoconiosis on claimant's coal mine employment history and on Dr. Noble's positive reading of an x-ray dated November 20, 1997.[7] *Id*. The administrative law judge discounted Dr. Reddy's opinion because "[the x-ray reading upon which Dr. Reddy relied] is the only positive x-ray reading in the record and the overwhelming weight of the x-ray readings is negative for pneumoconiosis." Decision and Order at 6. The administrative law judge stated that "[u]doubtedly, without [the positive x-ray reading], Dr. Reddy would not have diagnosed coal workers' pneumoconiosis." *Id.*; Director's Exhibit 6.

As claimant argues, the administrative law judge failed to consider that Dr. Reddy stated that he based his later, 1997 opinion that claimant has pneumoconiosis, in part, on claimant's coal mine employment history. Director's Exhibit 6. There is no merit in employer's suggestion that this factor is irrelevant because Dr. Reddy considered identical coal mine employment histories in each of his two reports. Dr. Reddy in fact considered two different coal mine employment histories. In his earlier, 1996 report, Dr. Reddy noted that claimant worked as an underground coal miner from 1956 until 1973. Director's Exhibit 21. In his subsequent, 1997 report, Dr. Reddy noted that claimant's work for approximately seventeen to eighteen years in underground coal mine employment was more recent; *i.e.*, that

[6]Dr. Reddy diagnosed in his 1996 report chronic obstructive pulmonary disease attributable to cigarette smoking. Director's Exhibit 21.

[7]Dr. Reddy conducted a physical examination, and administered pulmonary function and arterial blood gas studies as part of his examination of claimant on December 12, 1997. Director's Exhibit 6. In addition, Dr. Reddy noted that claimant had a nineteen year coal mine employment history, and a forty pack-year cigarette smoking history. *Id.*

claimant worked as a continuous miner operator and roof bolter from *1965 until 1983*. Director's Exhibit 6. Moreover, claimant is correct in contending that the administrative law judge erred in discounting Dr. Reddy's opinion on the basis that the overwhelming weight of the x-ray interpretations of record is negative for pneumoconiosis. Decision and Order at 6. An administrative law judge may not discount a medical report based upon a positive x-ray merely because the preponderance of x-ray readings in the record is negative. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984). In its response brief, employer contends that the administrative law judge properly discounted Dr. Reddy's opinion pursuant to *Winters* since the positive x-ray reading upon which Dr. Reddy based his opinion was reread as negative by three B reader/Board-certified radiologists and two B readers. While employer is correct that the administrative law judge could have permissibly discounted Dr. Reddy's opinion on that specific ground, the administrative law judge did not clearly do so in his Decision and Order. Rather the administrative law judge discounted Dr. Reddy's opinion because the positive x-ray reading underlying Dr. Reddy's opinion was outweighed by the negative interpretations in the record as a whole. Accordingly, we vacate the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), and remand the case for the administrative law judge to reconsider Dr. Reddy's opinion. If on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis at Section 718.202(a)(4), he must then consider the evidence of record with regard to causation at Section 718.203(b), and, if reached, total disability due to pneumoconiosis at Section 718.204.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge