BRB No. 05-0663 BLA

ANTHONY POLCHITO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LANCASHIRE COAL COMPANY	)	DATE ISSUED: 04/28/2006
	)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5088) of Administrative Law Judge Daniel L. Leland denying benefits on a subsequent 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). The administrative law judge credited claimant with thirty-four and one-half years of coal mine employment based on employer's concession and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found the newly submitted evidence

[1]Claimant filed his first claim on June 5, 1984. Director's Exhibit 1. This claim was denied by the district director on September 17, 1984 on the bases that the evidence

sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] On the merits, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable

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did not show pneumoconiosis, the evidence did not show that the disease was caused at least in part by coal mine work, and the evidence did not show that claimant was totally disabled by the disease. *Id*. In response to claimant's request, Administrative Law Judge Daniel A. Sarno, Jr. held a hearing on November 13, 1987. *Id*. On February 8, 1988, Judge Sarno issued a Decision and Order denying benefits on the basis that claimant failed to establish the existence of pneumoconiosis. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on June 14, 2002. Director's Exhibit 3.

[2]Administrative Law Judge Daniel L. Leland (the administrative law judge) stated that "[b]ecause the newly submitted evidence is sufficient to demonstrate an element of entitlement, total disability, which was previously adjudicated against the miner, the record will be reviewed de novo." 2005 Decision and Order at 7. As discussed *supra*, although the district director found that claimant failed to establish any of the elements of entitlement, Judge Sarno's denial of the previous claim was based only on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 1. No party, however, has challenged the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at Section 725.309.

[3]Because no party challenges the administrative law judge's findings that the evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant initially contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that "this evaluation [by the administrative law judge] is nothing more than a counting of the x-ray evidence based on the qualifications of the radiologists" and "[he] is required to give a more detailed analysis of the x-ray evidence." Claimant's Brief at 4. The administrative law judge considered the eight interpretations of five x-rays, dated August 5, 2002,[4] December 12, 2002, February 13, 2003, May 29, 2003 and October 27, 2003.[5] Of the eight x-ray interpretations, four readings are positive for pneumoconiosis, Director's Exhibit 42; Claimant's Exhibits 3, 5, 6, and four readings are negative for pneumoconiosis, Director's Exhibits 16, 38, 49. Taking the *quantity of physicians* into consideration, on the basis of their qualifications, the administrative law judge found that the preponderance of the x-ray evidence is negative for pneumoconiosis. The administrative law judge specifically stated:

> Dr. Abrahams' interpretation of 0/1 is negative under the regulations, and Dr. Wiot found no evidence of pneumoconiosis. Dr. Harron's interpretations were positive for pneumoconiosis. All three physicians are dually qualified as [B]oard certified radiologists and B–readers. Therefore, two dually qualified physicians found [that] this miner did not suffer from radiographical pneumoconiosis, and one found evidence of pneumoconiosis. Dr. Fino and Dr. Castle, who are B-readers, found no evidence of pneumoconiosis. Dr. Schaaf, who is not a B reader or a [B]oard certified radiologist, found x-ray evidence of pneumoconiosis. Therefore, the preponderance of the x-ray evidence is negative for the existence of pneumoconiosis.

Decision and Order at 10.

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[4]Dr. Barrett, a B reader and a Board-certified radiologist, read the August 5, 2002 x-ray for quality only. Director's Exhibit 17.

[5]The administrative law judge did not independently consider the previously submitted evidence with the newly submitted evidence on the merits. Rather, the administrative law judge stated, "I have reviewed the evidence from the prior claim and I find that a preponderance of the evidence does not support a finding of pneumoconiosis." 2005 Decision and Order at 11. No party challenges the administrative law judge's weighing of only the newly submitted evidence on the merits.

Although Section 718.202(a)(1) directs the administrative law judge to consider the radiological qualifications of physicians when x-ray readings are in conflict, the pertinent regulation clearly requires the weighing of the x-ray readings, not merely the weighing of qualified physicians. 20 C.F.R. §718.202(a)(1); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). For example, we note that in this case, Drs. Abrahams, Wiot and Harron are the only physicians who are dually qualified as B readers and Board-certified radiologists. Although the administrative law judge correctly stated that two of the three physicians who are dually qualified provided negative x-ray readings, he did not indicate that he recognized that both of them were interpreting the August 5, 2002 x-ray and that the other dually qualified physician interpreted three separate x-rays, namely, the August 5, 2002, May 29, 2003, and October 27, 2003 x-rays, as positive for pneumoconiosis. Because the administrative law judge has not fully considered the x-ray evidence, we remand for him to do so. 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Castle, Fino, Munoz, Schaaf, and Malhotra. Dr. Castle, in reports dated February 11, 2004 and November 23, 2004 and in a deposition dated May 10, 2004, opined that claimant does not have clinical pneumoconiosis. Employer's Exhibits 4, 5. Similarly, in reports dated June 26, 2003 and December 10, 2003 and a deposition dated April 26, 2004, Dr. Fino opined that claimant does not have legal pneumoconiosis. Employer's Exhibits 2, 3, 6. In contrast, Dr. Munoz, in an August 28, 2002 report, opined that claimant has legal pneumoconiosis. Director's Exhibit 11. Although Dr. Munoz also opined that most of claimant's impairment is ventilatory and secondary to pneumoconiosis/chronic obstructive pulmonary disease, he did not render an opinion on the cause of chronic obstructive pulmonary disease. *Id*. In a February 13, 2003 report and a July 2, 2004 deposition, Dr. Schaaf opined that claimant has clinical pneumoconiosis. Director's Exhibit 42. Lastly, in a February 27, 2004 report and a December 30, 2004 deposition, Dr. Malhotra opined that claimant has clinical pneumoconiosis. Claimant's Exhibit 10. Although the administrative law judge found that the opinions of Drs. Castle and Fino are well reasoned and well documented,[6] he

[6]The administrative law judge stated that he disregarded the opinions of Drs. Castle and Fino to the extent that they relied on inadmissible evidence and evidence that is not part of the record. 2005 Decision and Order at 11 n.2 and n.3. The administrative law judge specifically stated that "Dr. Castle's opinion regarding radiographical pneumoconiosis was based upon what the 'vast majority' of x-rays provided, and as the majority of films reviewed are inadmissible, Dr. Castle's opinion regarding radiographical pneumoconiosis is afforded weight *only to the extent that his opinion relies upon his own negative x-ray interpretation that is within the record*." *Id*. at 6.

discounted Dr. Munoz's opinion because it is not well reasoned and well documented,[7] discounted Dr. Schaaf's opinion because it is based on a positive x-ray reading that is against the weight of the x-ray evidence,[8] and discounted Dr. Malhotra's opinion because it is based on inadmissible x-ray readings. 2005 Decision and Order at 10-11.

Initially, we will address the administrative law judge's consideration of Dr. Schaaf's opinion at Section 718.202(a)(4). As discussed *supra*, the administrative law judge discounted Dr. Schaaf's opinion on the sole ground that it is based on a positive x-ray that is against the weight of the x-ray evidence. In view of our decision to vacate the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), and remand the case for further consideration of that evidence, we also remand the case to the administrative law judge for further consideration of Dr. Schaaf's opinion.

Next, we address claimant's specific arguments on the merits at Section 718.202(a)(4). Claimant asserts that the administrative law judge erred in discounting Dr. Malhotra's opinion in its entirety, on the basis that Dr. Malhotra relied in part on inadmissible x-ray readings. Claimant's Brief at 3. The regulations, as amended, provide that only admissible medical evidence may appear in medical reports submitted by the claimant or the responsible operator, *see* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), and that a physician whose testimony is admissible may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence that is inadmissible, *see* 20 C.F.R. §725.457(d). Contrary to claimant's assertion, in considering the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Malhotra's opinion, that claimant is totally disabled from a pulmonary impairment, is well reasoned and supported by the arterial blood gas study evidence of record. However, in considering the issue of the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge stated that "Dr. Malhotra testified that his opinion *regarding pneumoconiosis* was based on past medical records and upon inadmissible evidence in the form of his own [x-ray] interpretation and Dr. Stankiewicz's

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[7]The administrative law judge stated, "[p]resumptively, Dr. Munoz relied upon the x-ray interpretation by Dr. Abrahams, which is not classifiable as pneumoconiosis under the ILO classification system." 2005 Decision and Order at 10. The administrative law judge also stated that "Dr. Munoz'[s] opinion is not well reasoned, does not provide a clear diagnosis, and fails to account for how the miner's documented twenty-six pack year smoking history would impact his potential diagnosis of chronic obstructive pulmonary disease." *Id*.

[8]As noted *supra*, the positive reading of the February 13, 2003 x-ray by Dr. Schaaf is the only reading of this x-ray. Director's Exhibit 42.

interpretation."[9] 2005 Decision and Order at 10. Thus, the administrative law judge discounted Dr. Malhotra's opinion that claimant has coal workers' pneumoconiosis because it is based primarily on inadmissible evidence. *Id.* As the administrative law judge's exclusion of discussions of inadmissible evidence from consideration comports with the regulations and applicable precedent, the administrative law judge acted within his discretion in this regard. 20 C.F.R. §§725.414, 725.457; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2000) (*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Malhotra's opinion with regard to the issue of pneumoconiosis.

Claimant also asserts that the administrative law judge erred in accepting Dr. Fino's opinion. Claimant's assertion is based on the premise that it is difficult to reconcile how the administrative law judge could accept Dr. Fino's opinion that claimant does not have clinical pneumoconiosis, legal pneumoconiosis, or a restrictive lung disease, yet find the same evidence sufficient to establish a totally disabling pulmonary impairment. Claimant's Brief at 3. In the June 26, 2003 report, Dr. Fino opined that claimant does not have legal pneumoconiosis based upon his review of negative chest x-ray readings, his negative reading of the May 29, 2003 x-ray, and his review of objective studies. Director's Exhibit 49. With respect to the pulmonary function study, Dr. Fino specifically noted that "[t]he [total lung capacity] was not reduced and this rules out the presence of restrictive lung disease and significant pulmonary fibrosis." *Id.* In considering Dr. Fino's opinion with regard to the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge stated that "Dr. Fino relies upon objective medical testing which is inadmissible when determining the nature of the miner's disability." 2005 Decision and Order at 9. The administrative law judge also stated that "Dr. Fino's opinion will be afforded less weight due to his reliance on inadmissible evidence." *Id*. Consequently, the administrative law judge did not rely on Dr. Fino's opinion with respect to the issue of total disability at Section 718.204(b)(b)(iv).

Regarding the issue of pneumoconiosis at Section 718.202(a)(4), the administrative law judge stated that "Dr. Fino's assessment of the miner's pulmonary function studies also effectively diminishes any finding of legal pneumoconiosis." *Id*. at 11. The administrative law judge further stated that he disregarded Dr. Fino's opinion to the extent that Dr. Fino relied on inadmissible evidence. *Id*. at 11 n.3. However, unlike his treatment of Dr. Fino's opinion under Section 718.204(b)(2)(iv), the administrative law judge relied on Dr. Fino's opinion in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Since

[9]At the February 16, 2005 hearing held by the administrative law judge, claimant withdrew Dr. Stankiewicz's positive reading of the October 27, 2003 x-ray from the record. Transcript at 10.

the administrative law judge did not explain how his consideration of the pulmonary function studies with regard to the issue of legal pneumoconiosis at Section 718.202(a)(4) is different from his consideration of those same studies with regard to the issue of total disability at Section 718.204(b)(2)(iv), *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), we hold that the administrative law judge erred in selectively analyzing Dr. Fino's opinion with regard to the issues of pneumoconiosis and total disability.

In view of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) and remand the case for further consideration of the relevant medical opinion evidence. On remand, the administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether claimant has established the existence of pneumoconiosis in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), if he finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) or (a)(4). *See also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In addition, the administrative law judge, on remand, must determine whether the evidence is sufficient to establish that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), if reached.

Further, the administrative law judge, on remand, must determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), if reached. We additionally instruct the administrative law judge, on remand, to weigh together all of the contrary probative evidence of disability, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b) overall, if reached. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Finally, the administrative law judge, on remand, must determine whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), if reached. *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

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 proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge