BRB No. 06-0621 BLA

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| HAYMOND ROSE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| SEWELL COAL COMPANY | ) | DATE ISSUED: 04/27/2007 |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-BLA-5326) of Administrative Law Judge Alice M. Craft 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). The administrative law judge found that claimant established a coal mine employment history of twelve years, Decision and Order at 4, that the evidence was sufficient to establish the existence of both clinical and legal pneumoconiosis at 20 C.F.R §718.202(a)(1) and (a)(4), Decision and Order at 17- 20, and that claimant was entitled to the presumption that such pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), based on his over ten years of coal mine employment. Decision and Order at 20. The administrative law judge also found that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R §718.204(b), and that pneumoconiosis was a substantially contributing cause of the totally disabling

respiratory impairment pursuant to 20 C.F.R. §718.204(c)(disability causation). Decision and Order at 20-22. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings that the evidence is sufficient to establish the existence of pneumoconiosis and sufficient to establish disability causation. Employer also contends that the administrative law judge erred in excluding some of the evidence offered by employer. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Initially, employer asserts that the administrative law judge "arbitrarily and capriciously" excluded the x-rays readings of Drs. Wiot, Spitz and Meyer, Employer's Exhibits 2-4, 8-10, proffered by employer. Employer also asserts that the administrative law judge erred in excluding the consultation reports rendered by Drs. Branscomb and Castle, Employer's Exhibits 5, 6. Employer contends that 20 C.F.R. §725.414 of the revised black lung regulations is invalid because it is contrary to the Act's requirement that "all relevant evidence shall be considered…." 30 U.S.C. §923(b). Employer also relies upon the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), where the court held that administrative law judges "must consider all relevant evidence, erring on the side of inclusion…." *Underwood*, 105 F.3d at 951, 21 BLR at 2-32. We reject employer's assertion in this regard, however, as the same arguments have been previously rejected by the Fourth Circuit and the Board. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], F.3d , BLR , 2007 WL 678248 (4th Cir. 2007); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58.

Employer also contends that Section 725.414 conflicts with the holding of the Supreme Court in *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Employer's reliance on *Mullins* is misplaced, however. In *Mullins*, the Court held that, in a Part 727 claim, Section 923(b) of the Act is satisfied so long as all relevant evidence is considered at some point, at either the invocation stage or rebuttal stage of the claim. *Mullins*, 484 U.S. at 149-50, 11 BLR at 2-8-9. The Court did not address the amount of evidence that could be considered relevant under Section 923(b), however, nor did the court address the Department of Labor's authority to impose limitations on the admission of evidence in black lung claims. Moreover, that case dealt with invocation of the interim presumption at Section 727.203, and not the regulations at 20 C.F.R. Part 718. We, therefore, reject

employer's argument that the administrative law judge erred in applying the evidentiary limits of 20 C.F.R. §725.414.

Employer next argues that the administrative law judge erred in his analysis of the admitted x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Employer contends that because the administrative law judge erred in excluding additional negative readings of the February 18, 2002 x-ray, proffered by employer, the administrative law judge erroneously found the positive and negative readings of this x-ray to be in equipoise. However, because we have affirmed the administrative law judge's exclusion of these additional readings as excessive under 20 C.F.R. §725.414, we need not address this argument. 20 C.F.R. §725.414; *see Blake*, F.3d , BLR , 2007 WL 678248; *Dempsey*, 23 BLR at 1-58.

Employer also contends that the administrative law judge erred by giving greater weight to the positive reading of the June 5, 2002, by Dr. Pathak, a B reader and Board-certified radiologist,[1] than to the negative reading by Dr. Zaldivar, a B reader and Board-certified pulmonary specialist. Employer contends that B readers, whether they are pulmonary specialists or radiologists are presumed to be equally qualified and thus the administrative law judge should not have given greater weight to Dr. Pathak's positive reading and concluded that the June 5, 2002 x-ray was positive.

In considering the June 5, 2002 x-ray, the administrative law judge accorded greater weight to Dr. Pathak because he was a dually qualified reader, while Dr. Zaldivar was only a B reader. This was proper. Contrary to employer's argument, only a physician's additional "radiological" qualifications may be given weight in determining the credibility of his x-ray reading. *See Worhach v. Director, OWCP*, 17 BLR 1-105

[1] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

Relying upon the unpublished Board case, *Hendrix v. Jim Walter Resources, Inc.*, BRB No. 99-1132 BLA, (Nov 30, 2000)(unpub.), the administrative law judge noted that Dr. Pathak's Board certification in the United Kingdom was equivalent to Board certification in the United States. Decision and Order at 6 n.2. No challenge has been made to this determination and it is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

(1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991). As employer has not otherwise challenged the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), it is affirmed. *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985).

Additionally, employer argues that the administrative law judge erred in determining that claimant established the existence of clinical and legal pneumoconiosis by medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Regarding clinical pneumoconiosis, employer argues that the administrative law judge erred in granting "any weight" to the opinion of Dr. Snead (the administrative law judge found that Dr. Snead provided support for the diagnosis made by Dr. Mullins) in light of the administrative law judge's statement that she gave less weight to the opinions of Dr. Snead because he was an orthopedist and because he did not identify which chest x-ray reading he relied upon in diagnosing the existence of pneumoconiosis. Moreover, employer contends that Dr. Snead did not "diagnose" pneumoconiosis, but merely cited to medical records that contained a diagnosis of pneumoconiosis. In addition, employer challenges the administrative law judge's crediting of Dr. Mullins's diagnosis of coal workers' pneumoconiosis, Director's Exhibit 14. Employer contends that Dr. Mullins's report should not have been credited as it was based on a positive x-ray that was subsequently reread as negative, and that the doctor never reviewed other negative x-rays of record. Employer contends that because almost an equal number of x-rays were read as negative, the administrative law judge erred in relying on the opinion of Dr. Mullins to find the existence of clinical pneumoconiosis at Section 718.202(a)(4). Further, employer contends that the administrative law judge erred in not crediting the opinions of Drs. Zaldivar and Crisalli, on the grounds that they each relied on negative x-ray readings when they opined that claimant did not suffer from clinical pneumoconiosis, Employer's Exhibits 1, 11, 13. Employer avers that this was error because both physicians reviewed several chest x-ray readings as part of their review of the record and that their opinions should, therefore, be credited as they were based on more extensive documentation.

Regarding legal pneumoconiosis, employer argues that the administrative law judge erred in finding it established and in rejecting the opinions of Drs. Crisalli and Zaldivar, as both physicians fully addressed the concept of legal pneumoconiosis. Employer asserts that Dr. Zaldivar thoroughly explained why claimant's emphysema was not the result of coal dust exposure. Employer further argues that Dr. Crisalli, contrary to the administrative law judge's determination, gave more than "lip service" to the concept of legal pneumoconiosis, in finding that there was insufficient objective evidence to justify a diagnosis of any chronic dust disease of the lung related to coal mine dust exposure. Employer's Brief at 16. Instead, employer contends that the administrative

law judge erred in crediting Dr. Mullins's opinion on legal pneumoconiosis as Dr. Mullins did not provide any discussion concerning the possibility of a smoking-induced pulmonary impairment, or concerning the cause of claimant's emphysema. Thus, employer contends that on weighing the x-ray and medical opinion evidence together, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge should not have found that it established either the existence of clinical and legal pneumoconiosis.[2]

In considering the evidence at Section 718.202(a)(4), the administrative law judge noted that the medical opinions addressing whether claimant had clinical and legal pneumoconiosis, were split. The administrative law judge noted that Drs. Snead and Mullins diagnosed clinical pneumoconiosis based on x-ray evidence, and Dr. Mullins also diagnosed chronic obstructive pulmonary disease due to both smoking and coal mine employment. In contrast, the administrative law judge noted that Drs. Zaldivar and Crisalli found no clinical pneumoconiosis based on negative x-ray evidence, and also

[2] A review of the medical opinions relevant to the existence of clinical and legal pneumoconiosis show that Dr. Snead examined claimant and opined that claimant suffered from chronic obstructive pulmonary disease, as demonstrated by pulmonary function studies and x-rays, and coal worker's pneumoconiosis as demonstrated by x-rays, Director's Exhibit 13; Dr. Mullins, after examining claimant, opined that claimant suffered from coal worker's pneumoconiosis as demonstrated by x-ray evidence and chronic obstructive pulmonary disease arising from coal mine dust exposure and cigarette smoking, Director's Exhibit 14. Dr. Mullins further opined that claimant was moderately impaired due to both coal workers' pneumoconiosis and smoking and that claimant would be unable to return to his previous coal mine employment. *Id.* Dr. Zaldivar examined claimant and opined that claimant's x-ray was completely negative for the existence of pneumoconiosis and that claimant's physical examaination failed to demonstrate any dust disease of the lung. Director's Exhibit 33. Dr. Zaldivar also opined that claimant suffered from severe emphysema entirely due to his smoking habit and that claimant was totally disabled from a pulmonary standpoint but that this disability was due entirely to claimant's smoking induced emphysema and not at all from coal mine dust exposure. *Id.* Further, Dr. Zaldivar testified on deposition that claimant's breathing difficulties were also attributable to sleep apnea and general deconditioning and that "there is no reaction to [coal mine] dust" present in claimant and that only claimant's smoking habit results in his disability. Employer's Exhibit 11. The record also contains the medical opinion of Dr. Crisalli, who concluded that claimant did not suffer from coal worker's pneumoconiosis or any dust-related disease of the lung. Employer's Exhibit 1. Dr. Crisalli opined that while claimant was totally disabled, his total disability was due entirely to emphysema which, in turn, was caused entirely by claimant's smoking. Employer's Exhibit 1. Dr. Crisalli ruled out any role of coal dust exposure and/or pneumoconiosis in claimant's disability.

found that claimant did not have legal pneumoconiosis, *i.e.*, coal mine employment did not contribute to claimant's chronic obstructive pulmonary disease or emphysema. The administrative law judge further noted that all four of the opinions were documented and reasoned, and that Drs. Mullins, Zaldivar and Crisalli were qualified pulmonologists.

Regarding the existence of clinical pneumoconiosis, the administrative law judge accorded greater weight to the opinion of Dr. Mullins as it was consistent with the weight of the x-ray evidence, which was positive. This was proper. *See Compton*, 203 F.3d at 211, 22 BLR at 2-174. We therefore affirm the administrative law judge's finding that clinical pneumoconiosis was established on the basis of medical opinion evidence pursuant to Section 718.202(a)(4). 20 C.F.R. §718.202(a)(4).

Regarding the existence of legal pneumoconiosis, the administrative law judge found that while the conclusions of Drs. Zaldivar and Crisalli, that claimant was a heavy smoker, Decision and Order at 19, were supported by the objective evidence, their conclusions that coal mine employment was not a contributing cause of claimant's pulmonary disease were not supported. The administrative law judge found that a close examination of the opinions of Drs. Zaldivar and Crisalli showed that they based their opinions, that claimant's coal mine employment did not contribute to his emphysema, on their conclusions that claimant did not have clinical pneumoconiosis, *e.g.*, Dr. Zaldivar rejected coal dust exposure as a cause of claimant's chronic obstructive pulmonary disease because claimant's x-ray showed that "the amount of dust retained in lungs were low." Decision and Order at 19. Thus, the administrative law judge found that Dr. Zaldivar's opinion ignored the premise, in the regulations, that coal dust can contribute to chronic obstructive pulmonary disease, even without positive x-ray evidence. 65 Fed. Reg. 79971 (Dec. 20, 2000). The administrative law judge further found that the fact that Dr. Zaldivar viewed the x-ray evidence to be negative, when it had been found to be positive, further undermined his opinion. *See Compton*, 211 F.3d at 212-213, 22 BLR at 1-175-178. Regarding the opinion of Dr. Crisalli, the administrative law judge rejected the doctor's opinion, on legal pneumoconiosis, as the doctor never offered a convincing explanation as to why exposure to coal dust could not be a contributing cause of emphysema, and the doctor relied on the fact that the x-ray evidence was negative in making his determination. Instead, the administrative law judge properly found that the opinion of Dr. Mullins, that claimant had both clinical and legal pneumoconiosis, as supported by Dr. Snead's opinion and claimant's treatment records, was entitled to the greatest weight, as Dr. Mullins provided an opinion most consistent with the positive x-ray evidence and most consistent with the premise underlying the regulations, that coal mine employment can cause chronic obstructive pulmonary disease. Decision and Order at 20; 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. 79971; *Compton*, 211 F.3d at 213, 22 BLR at 1-178; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility

of medical opinion is for administrative law judge to determine); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Contrary to employer's assertion, the administrative law judge rationally concluded that neither Dr. Zalidvar nor Dr. Crisalli thoroughly explained their opinions regarding legal pneumoconiosis and rationally found that these physicians did not fully address the presence or the absence of the condition, regarding this particular claimant. The administrative law judge, thus, permissibly, accorded superior weight to the opinion of Dr. Mullins and permissibly found that the medical evidence of record supported a finding of the existence of both clinical and legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Hicks*, 138 F.3d 524, 21 BLR 2-323 *Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Accordingly, we affirm the administrative law judge's finding that claimant established that the existence of both clinical and legal pneumoconiosis, based on the x-ray and medical opinion evidence. *Compton*, 211 F.3d at 213, 22 BLR at 1-178.

Finally, employer argues that the administrative law judge erred in applying *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70 (4th Cir. 1995) to discredit the opinions of Drs. Zaldivar and Crisalli, regarding the cause of the miner's pneumoconiosis. Employer contends that since disability causation is a separate element, from the existence of pneumoconiosis, the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Crisalli merely because she did not agree with the physicians' conclusions concerning the existence of pneumoconiosis. Employer contends that, in *Scott*, the Fourth Circuit identified two distinct categories of precedent relevant to this issue.

Employer contends that the Fourth Circuit in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), held that an administrative law judge may credit physicians' assessments regarding disability or death causation, even when the physicians' opinions are contrary to the administrative law judge's finding concerning the existence of pneumoconiosis, if the doctors had diagnosed claimant with, or found symptoms consistent with legal pneumoconiosis. Employer contends that the Fourth Circuit in *Scott* and *Toler*, held that the administrative law judge cannot credit physicians' assessments as to disability and disability causation where the physicians find no symptoms related to coal dust exposure and the physicians' opinions are contrary to the administrative law judge's findings regarding the existence of pneumoconiosis. In this case, employer contends that the administrative law judge should have applied the reasoning set forth in *Mays*, 176 F.3d 753, 21 BLR 2-587, *Ballard*, 65 F.3d 1189, 19 BLR 2-304; and *Hobbs*, 45 F.3d 819, 19 BLR 2-86, since both Drs. Zaldivar and Crisalli independently diagnosed

a totally disabling pulmonary or respiratory impairment, and found symptoms consistent with legal pneumoconiosis.

In considering the cause of claimant's disability, the administrative law judge found that Dr. Mullins's attribution of fifty percent of claimant's impairment to coal workers' pneumoconiosis was sufficient to satisfy claimant's burden of establishing disability causation, Director's Exhibit 14; Decision and Order at 22. The administrative law judge further found that the contrary opinions of Drs. Zaldivar and Crisalli *i.e.*, that claimant's disabling respiratory impairment was unrelated to coal mine dust exposure and/or pneumoconiosis, were undermined, because these physicians did not diagnose pneumoconiosis. In addressing the opinions of Drs. Zaldivar and Crisalli, the administrative law judge concluded "I can find no specific and persuasive reasons for concluding that their opinions on the question of causation did not rest on their finding[s]" that claimant did not suffer from pneumoconiosis. *Id.* While we agree with employer that the administrative law judge failed to consider the holdings in *Mays*, *Ballard* and *Hobbs*, we nevertheless hold that remand for further consideration of the disability causation is not necessary in this case because neither Dr. Zaldivar nor Dr. Crisalli diagnosed the existence of legal pneumoconiosis and employer is unable to point to any specific findings from the physicians that could be rationally viewed as a diagnosis of symptoms consistent with legal pneumoconiosis. Accordingly, the administrative law judge's failure to address the standard enunciated in *Mays*, 176 F.3d 753, 21 BLR 2-587, *Ballard*, 65 F.3d 1189, 19 BLR 2-304; and *Hobbs*, 45 F.3d 819, 19 BLR 2-86, constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985). We therefore affirm the administrative law judge's determination that claimant established that pneumoconiosis was a substantially contributing cause of the miner's disabling respiratory impairment pursuant to Section 718.204(c).[3] *See* 20 C.F.R. §718.204(c); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).

[3] In this case, the administrative law judge found that the existence of both clinical and legal pneumoconiosis were established. The opinions of Drs. Zaldivar and Crisalli, that claimant had neither clinical nor legal pneumoconiosis, therefore, contradicted both findings of the administrative law judge.

Accordingly, the administrative law judge's Decision and Order 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