BRB No. 07-0635 BLA

E.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHARPLES COAL CORPORATION	)	
	)	DATE ISSUED: 04/22/2008
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 on Remand of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (04-BLA-5641) of Administrative Law Judge Daniel L. Leland denying benefits 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). This case, involving a subsequent claim filed on July 10, 2001, is before the Board for the second time.[1] In the initial decision, the

[1] The record reflects that claimant's initial claim for benefits was finally denied on December 1, 1980. Director's Exhibit 1. Claimant filed a second claim on February 25, 1993. Director's Exhibit 2. The district director denied benefits on September 3, 1996,

administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), thereby establishing a change in an applicable condition of entitlement since the denial of claimant's previous claim. 20 C.F.R. §725.309(d). The administrative law judge, therefore, considered the merits of claimant's 2001 claim. The administrative law judge found that the evidence of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Crediting claimant with over ten years of coal mine employment,[2] the administrative law judge further found that claimant was entitled to the presumption that his 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 established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the medical opinion evidence established the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Board, however, vacated the administrative law judge's findings that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and remanded the case for further consideration. In light of its decision to vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), the Board also vacated the administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *[E.F.] v. Sharples Coal Corp.*, BRB No. 06-0159 BLA (Oct. 31, 2006) (unpub.).

On remand, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge also found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

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because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. *Id.* There is no indication that claimant took any further action in regard to his 1993 claim. Claimant filed a third claim on July 10, 2001. Director's Exhibit 4.

[2] The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

On appeal, claimant argues that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant argues further that the administrative law judge erred in his consideration of the CT scan evidence. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Claimant argues that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered eleven interpretations of four x-rays taken on September 27, 2001, February 25, 2002, July 10, 2003, and December 8, 2003.

While Dr. Wiot, a B reader and Board-certified radiologist, interpreted claimant's September 27, 2001 x-ray as negative for pneumoconiosis, Employer's Exhibit 12, Dr. Alexander, a B reader and Board-certified radiologist, and Dr. Ranavaya, a B reader, interpreted this x-ray as positive for the disease.[3] Director's Exhibits 14, 33. Because "a

[3] Dr. Binns interpreted claimant's September 27, 2001 x-ray for its film quality only. Director's Exhibit 14.

preponderance of the readings of this x-ray by the most qualified readers [was] positive for pneumoconiosis," the administrative law judge found that claimant's September 27, 2001 x-ray was positive for pneumoconiosis. Decision and Order on Remand at 2.

The administrative law judge next noted that although Dr. Ahmed, a B reader and Board-certified radiologist, interpreted claimant's February 25, 2002 x-ray as positive for pneumoconiosis, and Dr. Miller, a B reader and Board-certified radiologist, interpreted claimant's July 10, 2003 x-ray as positive for pneumoconiosis, Dr. Wheeler, an equally qualified physician, interpreted each of these x-rays as negative for the disease. Decision and Order on Remand at 2; Director's Exhibit 27; Claimant's Exhibits 1, 3; Employer's Exhibit 9. The administrative law judge, therefore, found that the interpretations of claimant's February 25, 2002 and July 10, 2003 x-rays were "in equipoise" and did not support a finding of pneumoconiosis. *Id.*

Although Dr. Cohen, a B reader and Board-certified radiologist, interpreted claimant's December 8, 2003 x-ray as positive for pneumoconiosis, Dr. Wiot, a B reader and Board-certified radiologist, and Dr. Zaldivar, a B reader, interpreted this x-ray as negative for the disease. Claimant's Exhibit 2; Employer's Exhibits 1A, 2. The administrative law judge, therefore, found that claimant's December 8, 2003 x-ray "must be considered negative for pneumoconiosis." Decision and Order on Remand at 2.

Based on the readings of the four x-rays, the administrative law judge found that the x-ray evidence was negative for pneumoconiosis. Decision and Order on Remand at 2.

Claimant contends that the administrative law judge erred in considering Dr. Zaldivar's interpretation of claimant's December 8, 2003 x-ray as negative for pneumoconiosis. We disagree. Dr. Zaldivar indicated that claimant's December 8, 2003 x-ray did not reveal any parenchymal or pleural abnormalities consistent with pneumoconiosis. Employer's Exhibit 1A. The administrative law judge, therefore, properly found that Dr. Zaldivar's interpretation of claimant's December 8, 2003 x-ray was negative for pneumoconiosis.

Claimant also contends that the administrative law judge should have found that the x-ray evidence was "in equipoise." Whether the preponderance of the x-ray evidence is negative for pneumoconiosis or whether the x-ray evidence is "in equipoise," claimant will have failed to satisfy his burden of establishing, by a preponderance of the x-ray evidence, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See generally White v. Director, OWCP*, 6 BLR 1-368 (1983). Consequently, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in his consideration of the CT scan evidence. Drs. Wheeler, Meyer, Wiot, and Alexander interpreted claimant's February 15, 1998 CT scan. Dr. Wheeler opined that the CT scan did not reveal pneumoconiosis. Director's Exhibit 8. Dr. Wiot interpreted the CT scan as revealing "no definite evidence of coal workers' pneumoconiosis." Employer's Exhibit 8. Dr. Meyer interpreted the CT scan as revealing "rare centrilobular nodular opacities predominantly in the right upper lobe." Employer's Exhibit 6. Dr. Meyer opined that "[t]hese [opacities] likely represent mild manifestations of simple coal workers' pneumoconiosis." *Id.* However, given "the subtly [sic] on CT," Dr. Meyer opined that "they may not exceed a profusion of 0/1…on plain film radiography." *Id.* Dr. Alexander opined that:

> The [February 15, 1998] chest CT scan demonstrates small nodular opacities in the mid and upper lung zones more extensive on the right side which would be consistent with the small rounded opacities of simple Coal Workers' Pneumoconiosis.

Claimant's Exhibit 5.

In his evaluation of the CT scan evidence, the administrative law judge stated:

> Dr. Wheeler felt that the CT scan was negative for pneumoconiosis despite having misgivings about his ability to detect pneumoconiosis on the CT scan. Dr. Alexander also questioned whether the CT scan was helpful in diagnosing pneumoconiosis as it was not a high resolution CT scan, but he concluded that the CT scan showed pneumoconiosis. The doubts raised by Drs. Wheeler and Alexander regarding the reliability of the CT scan renders their interpretations of the CT scan, one negative and one positive, entitled to little weight. Dr. Meyer's diagnosis of pneumoconiosis is equivocal and does not support a finding of pneumoconiosis. Dr. Wiot found that the CT scan was negative for pneumoconiosis and his deposition testimony clearly shows that he believed that the CT scan was reliable for determining the presence of pneumoconiosis. After further consideration, I conclude that the CT scan of February 15, 1998 does not show the existence of pneumoconiosis.

Decision and Order on Remand at 3.

Claimant contends that "[w]hat the evidence in this case actually does is it makes clear that the CT scans in this case must and should be rejected." Claimant's Brief at 6. The administrative law judge found that the CT scan evidence did not establish the existence of pneumoconiosis. If the administrative law judge were to reject the CT scan

evidence in this case, claimant would still have failed to establish the existence of pneumoconiosis by virtue of the CT scan evidence. Consequently, we affirm the administrative law judge's finding that the CT scan evidence in this case did not support a finding of pneumoconiosis.

Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[4] An administrative law judge, in considering whether the evidence establishes the existence of pneumoconiosis, should make distinct findings as to the existence of clinical and legal pneumoconiosis. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*).

The record contains medical opinions from Drs. Ranavaya, Cohen, Zaldivar, and Crisalli. Dr. Ranavaya diagnosed clinical pneumoconiosis.[5] Dr. Cohen diagnosed both clinical and legal pneumoconiosis.[6] Drs. Zaldivar and Crisalli opined that claimant did not suffer from either clinical or legal pneumoconiosis.[7]

In considering whether the medical opinion evidence established the existence of pneumoconiosis, the administrative law judge stated:

> In light of my finding that a preponderance of the x-ray and CT scan evidence is negative for pneumoconiosis, I can no longer credit the opinions of Dr. Ranavaya and Dr. Cohen that the miner has

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] Dr. Ranavaya diagnosed pneumoconiosis based upon a positive chest x-ray and claimant's history of coal dust exposure. Director's Exhibit 14.

[6] Dr. Cohen diagnosed coal workers' pneumoconiosis. Claimant's Exhibits 2, 6. Dr. Cohen also diagnosed pulmonary fibrosis due to coal dust exposure. *Id.*

[7] Although Dr. Zaldivar diagnosed pulmonary fibrosis, he opined that claimant did not suffer from coal workers' pneumoconiosis or any dust disease of the lungs. Employer's Exhibits 1, 10. Dr. Crisalli opined that there was not sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis or any other chronic dust disease of the lung caused by, significantly related to, or substantially aggravated by coal mine employment. Director's Exhibit 18; Employer's Exhibit 11.

> pneumoconiosis. Their opinions relied on their own positive interpretations of the x-rays which are inconsistent with the weight of the x-ray and CT scan evidence. Dr. Cohen's statement that the miner's pulmonary fibrosis is caused by his coal mine employment is questionable in light of the preponderance of the x-ray and CT scan evidence. On the other hand, the opinions of Drs. Crisalli and Zaldivar are now consistent with the weight of the x-ray and CT scan evidence and must be credited. I also credit the well reasoned and documented opinions of Drs. Crisalli and Zaldivar that the miner does not have a pulmonary or respiratory impairment arising out of coal mine employment. Dr. Cohen's opinion that the [miner] has a coal dust related pulmonary impairment is not well reasoned and is contrary to the weight of the evidence of record.

Decision and Order on Remand at 3.

The administrative law judge permissibly questioned the respective diagnoses of clinical pneumoconiosis rendered by Drs. Ranavaya and Cohen because they each relied upon positive x-ray interpretations, a finding which the administrative law judge found to be inconsistent with the weight of the x-ray and CT scan evidence. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In addition to diagnosing coal workers' pneumoconiosis, Dr. Cohen also diagnosed pulmonary fibrosis due to coal dust exposure; a finding which, if credited, supports a finding of legal pneumoconiosis. Claimant's Exhibits 2, 6. In considering whether the evidence established the existence of legal pneumoconiosis, the administrative law judge stated:

> Dr. Cohen's statement that the miner's pulmonary fibrosis is caused by his coal mine employment is questionable in light of the preponderance of the x-ray and CT scan evidence. On the other hand, the opinions of Drs. Crisalli and Zaldivar are now consistent with the weight of the x-ray and CT scan evidence and must be credited. I also credit the well reasoned and documented opinions of Drs. Crisalli and Zaldivar that the miner does not have a pulmonary or respiratory impairment arising out of coal mine employment. Dr. Cohen's opinion that the [miner] has a coal dust related pulmonary impairment is not well reasoned and is contrary to the weight of the evidence of record.

Decision and Order on Remand at 3.

Claimant contends that the administrative law judge erred in his consideration of Dr. Cohen's diagnosis of "legal pneumoconiosis." Claimant specifically argues that the administrative law judge, in focusing exclusively upon the x-ray and CT scan evidence, ignored the additional reasons that Dr. Cohen provided for his opinion. Claimant notes that Dr. Cohen's opinion, that claimant's pulmonary fibrosis was due to his coal dust exposure, was also based upon medical literature, medical and occupational histories, and physical examination. *See* Claimant's Brief at 7-8. The administrative law judge found that Dr. Cohen's opinion, that claimant's pulmonary fibrosis was attributable to his coal mine employment, was "questionable in light of the preponderance of the x-ray and CT scan evidence." Decision and Order on Remand at 3. However, as claimant notes, Dr. Cohen's opinion was not based solely upon his review of claimant's x-ray and CT scan interpretations. Dr. Cohen explained that his conclusion, that claimant's pulmonary fibrosis was attributable to his coal dust exposure, was based upon claimant's medical and occupational histories, physiology, chest imaging, and the lack of any other risk factors. *See* Claimant's Exhibit 6. Dr. Cohen also explained that his opinion was supported by the results of claimant's objective studies. Claimant's Exhibit 2. Dr. Cohen further noted his disagreement with Dr. Zaldivar's opinion that claimant's pulmonary fibrosis was idiopathic in nature. *Id.* Dr. Cohen explained that a diagnosis of idiopathic pulmonary fibrosis could not be made in the absence of a surgical lung biopsy. *Id.* Dr. Cohen also cited medical literature in support of his opinion that claimant's pulmonary fibrosis was due to his coal dust exposure. *Id.* Because the administrative law judge did not adequately address all of the bases that Dr. Cohen provided for his opinion, we vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration. *See 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).

On remand, when reconsidering whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[8] *See Hicks*,

[8] Claimant argues that Dr. Zaldivar's opinion is contrary to the Act. In its 2006 Decision and Order, the Board held that:

> Because Dr. Zaldivar has recognized that coal dust exposure may result in a restrictive lung disorder, as well as an obstructive respiratory disorder, as contemplated by Section 718.201, the administrative law judge erred in rejecting Dr. Zaldivar's opinion relevant to the etiology of claimant's respiratory impairment as being contrary to the Act.

138 F.3d at 533, 21 BLR at 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, should the administrative law judge find that the evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence establishes the existence of legal pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174. Should the administrative law judge find that the evidence establishes the existence of legal pneumoconiosis, he must reconsider whether the evidence establishes that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[E.F.] v. Sharples Coal Corp., BRB No. 06-0159 BLA (Oct. 31, 2006) (unpub.), slip op. at 9. The Board's previous holdings on this issue constitute the law of the case and govern the Board's determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We therefore decline to revisit this issue.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
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