BRB No. 12-0447 BLA

VIRGIL R. LILLY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 04/25/2013
	)	
Employer-Petitioner	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Tiffany B. Davis and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2009-BLA-5871) of Administrative Law Judge Michael P. Lesniak. The claim was filed on November 6, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Finding that claimant established fewer than fifteen years of coal mine employment,[1] the administrative law judge found that claimant was

[1] Specifically, the administrative law judge noted that the parties stipulated that claimant had twelve years of coal mine employment and that the district director found over twelve, but fewer than thirteen, years of coal mine employment established. The administrative law judge also found that claimant listed thirteen years and four months of coal mine employment on his history of coal mine employment form, but noted that

not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4). Considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence of record insufficient to establish legal pneumoconiosis, but sufficient to establish clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and that claimant was totally disabled by pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.204(b) and (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his weighing of the x-ray and medical opinion evidence and, thereby, erred in finding clinical pneumoconiosis established pursuant to Section 718.202(a). Employer also contends that the administrative law judge erred in finding that claimant's total disability was due to coal mine employment pursuant to Section 718.204(c).[3] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has responded to 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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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claimant's Social Security records did not corroborate the history given by claimant. Decision and Order at 9.

[2] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. 30 U.S.C. §921(c)(4).

[3] The administrative law judge's finding that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and his finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b) are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Because claimant's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 4.

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Clinical Pneumoconiosis
20 C.F.R. §718.202(a)(1) – X-ray Evidence

Employer first contends that the administrative law judge erred in finding that the x-ray evidence established clinical pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, employer contends that the administrative law judge erred in failing to account for *all* of the physicians' credentials in weighing the x-ray evidence. Employer also contends that the administrative law judge impermissibly "count[ed] heads" when he determined that the x-ray evidence established the existence of clinical pneumoconiosis.

In considering the x-ray evidence, the administrative law judge found that the February 3, 2009 x-ray was read as positive for pneumoconiosis by Dr. Rasmussen, a B reader, and by Dr. Alexander, a B reader and Board-certified radiologist, but as negative for pneumoconiosis by Dr. Spitz, a B reader and Board-certified radiologist. Director's Exhibits 13, 14; Claimant's Exhibit 5. Giving "slightly less weight" to the readings of Drs. Rasmussen and Spitz because those readings were equivocal,[5] the administrative law judge found the x-ray to be positive for pneumoconiosis, based on Dr. Alexander's positive reading. The administrative law judge further noted that, even if he gave "full weight to all three interpretations, the weight of this evidence would be positive for clinical pneumoconiosis, as Drs. Alexander and Spitz are equally qualified readers, and Dr. Rasmussen ultimately agreed [with Dr. Alexander] that his finding indicated the presence of clinical pneumoconiosis." Decision and Order at 11 n.18. The administrative law judge, therefore, found that the February 3, 2009 x-ray was positive for pneumoconiosis. Regarding the May 9, 2009 x-ray, the administrative law judge

[5] The administrative law judge found that the reading of Dr. Rasmussen was equivocal as Dr. Rasmussen initially opined that the abnormalities seen on the February 3, 2000 x-ray were not representative of pneumoconiosis, but later diagnosed clinical pneumoconiosis. Similarly, the administrative law judge found that the reading of Dr. Spitz was equivocal because Dr. Spitz stated that it was difficult to make a diagnosis concerning clinical pneumoconiosis due to claimant's pulmonary edema. Decision and Order at 11.

found that Dr. Ahmed, a B reader and Board-certified radiologist, along with Dr. Alexander, read the x-ray as positive for pneumoconiosis, while Dr. Zaldivar, a B reader, and Dr. Meyer, a B reader and Board-certified radiologist, read it as negative. Employer's Exhibits 1, 2; Claimant's Exhibits 3, 4. The administrative law judge found that the positive interpretations of the dually-qualified readers, Drs. Ahmed and Alexander, were entitled to more weight than the negative reading of Dr. Meyer, the single dually-qualified reader to read the x-ray as negative. The administrative law judge, therefore, found the May 9, 2009 x-ray to be positive for pneumoconiosis. *Id*. Considering the March 4, 2010 x-ray, the administrative law judge found that it was read as positive for pneumoconiosis by Drs. Ahmed and Alexander, but as negative by Drs. Wheeler and Scott, who are also B readers and Board-certified radiologists. Consequently, the administrative law judge found that the March 4, 2010 x-ray was inconclusive on the existence of pneumoconiosis, because it was read as both positive and negative for pneumoconiosis by equally qualified readers. Decision and Order at 11; Claimant's Exhibits 1, 2; Employer's Exhibit 6. Based on the foregoing, the administrative law judge found that the preponderance of the x-ray evidence was positive for the existence of clinical pneumoconiosis because the February 3, 2009 and May 9, 2009 x-rays were positive for pneumoconiosis, while the March 4, 2010 x-ray was inconclusive. Decision and Order at 11.

Employer contends, however, that the negative readings of the February 3, 2009 x-ray, the May 9, 2009 x-ray, and the March 4, 2010 x-ray by Dr. Spitz, Dr. Meyer, and Drs. Wheeler and Scott, respectively, should have been accorded greater weight because the doctors are professors of radiology. Additionally, employer contends that Dr. Zaldivar's negative x-ray reading should have been accorded greater weight because Dr. Zaldivar is Board-certified in internal medicine and pulmonary disease, is a professor of medicine, and is a published author in the field of occupational disability arising from coal mine employment. Employer also contends that Dr. Zaldivar's negative reading should have been accorded greater weight because he examined claimant and reviewed claimant's extensive medical records. Additionally, employer contends that Dr. Spitz's negative reading should have been accorded more weight than Dr. Alexander's positive reading, because he was "more thorough in his reading," insofar as he identified claimant's pulmonary edema. Employer's Brief at 7.

Contrary to employer's contention, the administrative law judge is not required to assign greater weight to the readings of physicians with additional qualifications; while the administrative law judge *may* give greater weight to the interpretations of a physician based upon his professorship in radiology, he is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *citing Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261

(2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Further, contrary to employer's argument, the administrative law judge is not required to consider the non-radiological credentials of a reader in determining the credibility of the x-ray readings. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(en banc). Moreover, the fact that a physician who read an x-ray also conducted a physical examination and reviewed claimant's medical records does not compel the administrative law judge to accord that physician's x-ray reading greater weight pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §§718.102, 718.202(a)(1). Likewise, the fact that a physician diagnosed claimant with other conditions that were identified in the record, does not compel the administrative law judge to accord his x-ray reading greater weight. *See* 20 C.F.R. §§718.102, 718.202(a)(1).

The administrative law judge, therefore, properly accorded greater weight to the x-ray readings by physicians who are both B readers and Board-certified radiologists, over the readings of physicians who were not so qualified. *See* 20 C.F.R. §718.202(a)(1); *see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Because the administrative law judge considered both the quantitative and qualitative nature of the x-ray evidence, we reject employer's assertion that the administrative law judge's weighing of the x-ray evidence was impermissibly based solely on a "head count." *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Clinical Pneumoconiosis
20 C.F.R. §718.202(a)(4) – Medical Opinion Evidence

In finding clinical pneumoconiosis established pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Rasmussen and Gaziano,[6] who found clinical pneumoconiosis, and the opinions of Drs. Zaldivar and Castle, who did not. Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle. In considering the opinions of Drs. Zaldivar and Castle, the administrative law judge found:

> Dr. Zaldivar noted that Dr. Rasmussen, who had interpreted [claimant's] x-ray as showing a 1/1 profusion, 'could not rule out pulmonary fibrosis in the lungs or congestive heart failure or [effect] of uremia in the lungs.'

[6] Employer does not challenge the administrative law judge's finding that Drs. Rasmussen and Castle found clinical pneumoconiosis.

> However, he didn't acknowledge that Dr. Rasmussen had later determined that [claimant's] x-ray findings did in fact support a finding of clinical pneumoconiosis. Additionally, he initially stated that coal workers' pneumoconiosis does not cause linear densities, a fact that he believed to be supported by the medical literature, although he later amended this statement to say that it *rarely* causes linear opacities. This statement is generally contrary to the regulatory scheme, which does not distinguish between rounded and linear opacities in the diagnosis of coal workers' pneumoconiosis by x-ray. *See* §718.102(b). Also, even if coal workers' pneumoconiosis did not cause the enlarged heart/fluid seen by x-ray, this does not preclude an independent finding of both. Therefore, I give little weight to this conclusion. Dr. Castle also stated that although the record contains x-rays indicating the presence of pneumoconiosis, "linear, irregular type opacities…are more consistent with [congestive heart failure] and volume overload than pneumoconiosis." Again, this finding is somewhat inconsistent with Regulations, which allow a finding of pneumoconiosis with irregular opacities. Therefore, I give little weight to this opinion as well. Weighing all of the evidence together, I find that [c]laimant has established the presence of clinical pneumoconiosis pursuant to §718.202.

Decision and Order at 11. Contrary to employer's contention, the administrative law judge permissibly accorded little weight to the opinions of Drs. Zaldivar and Castle as they were inconsistent with the regulations at Sections 718.102 and 718.202(a)(1), which do not premise a finding of clinical pneumoconiosis on a finding of rounded, as opposed to linear, opacities on x-ray. *See* 20 C.F.R. §§718.102; 718.202(a)(1)(i). Further, contrary to employer's contention, the administrative law judge properly found that Dr. Rasmussen's findings on x-ray did not support Dr. Zaldivar's opinion that claimant does not have clinical pneumoconiosis.[7] *See Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-80 (1984). Consequently, we reject employer's argument concerning the administrative law judge's accordance of little weight to the opinions of Drs. Zaldivar and Castle,[8] and we affirm the administrative law judge's finding that the x-ray and

[7] Although he read the February 3, 2009 x-ray as positive for pneumoconiosis, Dr. Rasmussen also stated that he could not rule out the effects of pulmonary fibrosis, congestive heart failure, or uremia on the lungs.

[8] Employer's argument regarding the credibility of the opinions of Drs. Zaldivar and Castle rests on their interpretations of claimant's x-rays. Employer does not make any other arguments concerning the credibility of these opinions pursuant to Section 718.202(a)(4).

medical opinion evidence together support a finding of clinical pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Disability Causation
20 C.F.R. §718.204(c)

In finding disability causation established pursuant to Section 718.204(c), the administrative law judge credited the opinion of Dr. Gaziano, who attributed claimant's total disability to clinical pneumoconiosis, over the opinions of Drs. Zaldivar and Castle, who did not. Employer contends, however, that the administrative law judge erred in rejecting the opinions of Drs. Zaldivar and Castle, that claimant's disability was not due to clinical pneumoconiosis, because they failed to find, contrary to his own finding, the existence of clinical pneumoconiosis. Contrary to employer's contention, however, the administrative law judge could properly accord little weight to these opinions on this ground. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(en banc). Employer's argument in this regard is, therefore, rejected.

Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Gaziano because it is unreasoned. Specifically, employer contends that the administrative law judge should have found the opinion unreasoned because Dr. Gaziano relied on an inadmissible x-ray to find the existence of pneumoconiosis and because he relied on fourteen years of coal mine employment when employer, the district director, and claimant had either stipulated to, found, or alleged, only twelve to thirteen years and four months of coal mine employment. Additionally, employer contends that the administrative law judge erred in relying on Dr. Gaziano's opinion because the doctor failed to explain why claimant's cardiac and renal conditions did not cause claimant's "entire disability." Employer's Brief at 31.

Contrary to employer's contentions, the administrative law judge acknowledged that Dr. Gaziano based his finding of pneumoconiosis, in part, on an inadmissible x-ray, but nonetheless permissibly credited that portion of the opinion that was based on other factors. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(en banc). Further, contrary to employer's contention, the administrative law judge, as fact-finder, permissibly credited the opinion of Dr. Gaziano, attributing claimant's total disability to pneumoconiosis, even though Dr. Gaziano found that claimant had fourteen years of coal mine employment while the record established no more than thirteen. The administrative law judge permissibly inferred that the difference between fourteen years of coal mine employment and the twelve to thirteen years of coal mine employment reflected in the record was not significant. *See Long v. Director, OWCP*, 7 BLR 1-254 (1984); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *Baker*, 7 BLR at 1-80. Additionally, contrary to

employer's contention, the administrative law judge was not required to reject Dr. Gaziano's opinion because the doctor did not explain why claimant's "severe cardiac condition and renal condition could not account for his entire disability." Decision and Order at 13. Rather, the administrative law judge properly credited the opinion of Dr. Gaziano who attributed claimant's total disability to pneumoconiosis. *See generally Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003)(apportionment among multiple causes of disability not required). As employer has not otherwise challenged the administrative law judge's decision to credit Dr. Gaziano's opinion, the administrative law judge's finding that it is reasoned and establishes disability causation is affirmed. *See Skrack*, 6 BLR at 1-711.

Based on the foregoing, we affirm the administrative law judge's finding that the x-ray and medical opinion evidence together established the existence of clinical pneumoconiosis pursuant to Section 718.202(a) and that the medical opinion evidence established disability causation pursuant to Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge