BRB No. 02-0808 BLA

ROY JOHNSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY,	)	DATE ISSUED: 08/29/2003
		INCORPORATED
		)
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
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 J. Roketenetz, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0067) of Administrative Law Judge Daniel J. Roketenetz 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).[1] The administrative law judge credited claimant with thirteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. 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). Although the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. '718.204(b)(2)(i) and (b)(2)(iv), he found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c).[2] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge=s finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4). Claimant also challenges the administrative law judge=s finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. '718.204(c). 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]

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[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. '718.204(c), is now found at 20 C.F.R. '718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. '718.204(b), is now found at 20 C.F.R. '718.204(c).

[3]Since the administrative law judge=s length of coal mine employment finding and

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).

Claimant 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 relevant medical opinions of Drs. Baker, Branscomb, Fino, Lane, Lockey and Wright. Dr. Baker, in a report dated March 13, 2000, diagnosed coal workers= pneumoconiosis and opined that claimant suffers from chronic obstructive pulmonary disease and chronic bronchitis related to coal dust exposure and cigarette smoking. Director=s Exhibit 12. In a subsequent report dated May 23, 2000, Dr. Baker diagnosed chronic obstructive airway disease and stated that A[i]f a definition of pneumoconiosis is used as defined above, [claimant] would be deemed to have pneumoconiosis as it is thought to play a role in his obstructive airway disease.@ Director=s Exhibit 16. At a deposition on January 17, 2001, Dr. Baker opined that the etiology of claimant=s obstructive airways disease is coal dust exposure and possibly cigarette smoking. Claimant=s Exhibit 1 at 7, 21. In contrast, Drs. Branscomb opined that claimant does not suffer from coal workers= pneumoconiosis or a pulmonary disease related to coal dust exposure. Employer=s Exhibit 11. Further, Dr. Lane diagnosed chronic obstructive lung disease related to cigarette smoking and opined that claimant does not suffer from coal workers= pneumoconiosis or a pulmonary disease related to coal dust exposure. Employer=s Exhibit 4 at 12-13. In addition, Dr. Wright diagnosed chronic bronchitis and opined that claimant does not suffer from coal workers= pneumoconiosis or a pulmonary disease related to coal dust exposure. Employer=s Exhibit 1 at 13. Dr. Fino diagnosed disabling asthma not related to coal dust exposure and opined that claimant does not suffer from coal workers= pneumoconiosis. Employer=s Exhibit 4. Similarly, Dr. Lockey diagnosed severe asthma not related to coal dust exposure. Director=s Exhibit 28; Employer=s Exhibit 3.

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his findings at 20 C.F.R. ''718.202(a)(1)-(3) and 718.204(b)(2)(i) and (b)(2)(iv) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant asserts that the administrative law judge erred in discrediting Dr. Baker=s opinion. Dr. Baker diagnosed both Aclinical pneumoconiosis@ and Alegal pneumoconiosis.@[4] Director=s Exhibits 12, 16; Claimant=s Exhibit 1 at 7, 21. Dr. Baker=s diagnosis of coal workers= pneumoconiosis was based in part upon his positive interpretation of claimant=s March 13, 2000 x-ray. Director=s Exhibit 12. The administrative law judge properly discredited Dr. Baker=s diagnosis of coal workers= pneumoconiosis because the x-ray that he relied upon to support his diagnosis was reread by better qualified physicians as negative for pneumoconiosis.[5] *Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984); Decision and Order at 13. The administrative law judge, therefore, properly discredited Dr. Baker=s finding of Aclinical pneumoconiosis.@

[4]A finding of either Aclinical pneumoconiosis,@ *see* 20 C.F.R. '718.201(a)(1), or Alegal 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).

[5]Dr. Baker, a B reader, read the March 13, 2000 x-ray as positive for pneumoconiosis, Director's Exhibit 12, while Drs. Barrett, Sargent, Scott, Shipley and Spitz, B readers and Board-certified radiologists, reread the same x-ray as negative, Director's Exhibits 14, 15, 25, 29; Employer=s Exhibit 5.

However, Dr. Baker also opined that claimant suffers from chronic obstructive pulmonary disease and chronic bronchitis, each of which he attributed to claimant=s coal dust exposure. Director=s Exhibits 12, 16; Claimant=s Exhibit 1. Thus, Dr. Baker diagnosed Alegal pneumoconiosis.@[6] In his consideration of the conflicting medical opinions, the administrative law judge noted that ADrs. Fino, Lockey, Branscomb, Wright, and Lane all opined that the [c]laimant=s pulmonary condition is the result of some factor other than occupational dust exposure.@ Decision and Order at 13. The administrative law judge stated, AI rely primarily on the medical opinions of Dr[s]. Lockey, Branscomb and Fino whose reports I find to be well-reasoned, well-documented and based upon the objective laboratory data of record.@ *Id*. at 12-13. The administrative law judge further stated that A[a]ll three physicians considered the test result data and the [c]laimant=s pertinent occupational, medical and social histories in reaching their conclusions.@[7] *Id*. at 13. However, the administrative law judge did not provide a basis for finding the opinions of these doctors better reasoned than Dr. Baker=s contrary opinion nor is it apparent from the face of the doctors= reports. The Administrative Procedure Act, 5 U.S.C. '557(c)(3)(A), as incorporated into the Act by 5 U.S.C. '554(c)(2), 33 U.S.C. '919(d) and 30 U.S.C. '932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, we vacate the administrative law judge=s finding pursuant to 20 C.F.R. '718.202(a)(4), and remand the case for further consideration.[8] On remand, the

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[6]A >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).

[7]The administrative law judge stated, A[a]s the regulations permit a diagnosis of pneumoconiosis to be made by a physician exercising sound medical judgment, notwithstanding a negative x-ray, I find the overall opinions of Drs. Lane and Wright entitled to less weight.@ Decision and Order at 13. The administrative law judge noted that Drs. Lane and Wright indicated that there should be x-ray evidence of pneumoconiosis before the disease can be present in a symptomatic form. *Id*.

[8]Claimant=s also contends that Dr. Lane diagnosed Alegal@ pneumoconiosis since the doctor Astated that chronic obstructive pulmonary disease was most often caused by cigarette smoking but exposure to coal dust could make it worse.@ Claimant=s Brief at 4. We disagree. Dr. Lane=s testimony was in response to a hypothetical question that was not about claimant=s condition. Specifically, at the April 30, 1994 deposition, on cross-examination, claimant's counsel asked Dr. Lane the following:

> Okay. And I believe that you arrived at your diagnosis of obstructive lung disease which was related to cigarette smoking. Isn=t it true that some doctors

administrative law judge must reconsider the relevant medical opinion evidence of record and provide a valid basis for all of his findings at 20 C.F.R. ' 718.202(a)(4), specifically addressing the definition of Alegal pneumoconiosis@ at 20 C.F.R. ' 718.201(a)(2). *Wojtowicz*, 12 BLR at 1-165.

In light of our decision to vacate the administrative law judge=s finding pursuant to 20 C.F.R. ' 718.202(a)(4), we also vacate the administrative law judge=s finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c) and remand the case for further consideration of the evidence thereunder, if reached. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order denying benefits is

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> note an effect between smoking and inhalation of coal dust such that even if the person has an obstructive defect that the exposure to coal dust could have made it worse?

Employer=s Exhibit 4 at 16. Dr. Lane responded, AWell, I think that certainly may happen.@ *Id*. Contrary to claimant=s assertion, the administrative law judge correctly noted that A[Dr. Lane] found no evidence of coal workers= pneumoconiosis or occupational lung disease.@ Decision and Order at 8; Employer=s Exhibit 4 at 12.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge