BRB No. 04-0880 BLA

HERMAN MARLOW	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
ROBERT CLEAR COAL CORPORATION	)	DATE ISSUED: 08/18/2005
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-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 Richard Avery, Administrative Law Judge, United States Department of Labor.

Herbert B. Williams (Stokes, Rutherford, Williams, Sharp & Davies, PLLC), Knoxville, Tennessee, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-05012) of Administrative Law Judge Richard Avery (the administrative law judge) 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 found that the newly submitted evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an element of entitlement previously adjudicated against claimant, and thereby, established a change in a condition of entitlement pursuant to

20 C.F.R. §725.309(d).[1] The administrative law judge then found, after considering all of the evidence of record, that, in addition to establishing the existence of pneumoconiosis, claimant had established that pneumoconiosis arose out of coal mine employment, and that pneumoconiosis was totally disabling. 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c). Accordingly, the administrative law judge awarded benefits on this subsequent claim.

On appeal, employer argues that the administrative law judge erred in finding the existence of both clinical and legal pneumoconiosis established by medical opinion evidence. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, is not participating 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).

Employer contends that a physician's finding of medical pneumoconiosis cannot stand in light of the administrative law judge's finding that the preponderance of the x-ray evidence is negative for clinical pneumoconiosis. Thus, employer contends that given that the preponderance of the x-ray evidence was found to be negative, the administrative law judge erred in accepting Dr. Kelly's diagnosis of pneumoconiosis which was based on only one visit, one pulmonary function study, and one blood gas study, while Dr. Dahhan reviewed all of claimant's pulmonary function and blood gas studies, and performed post bronchodilation tests which supported his opinion that claimant did not have pneumoconiosis and that his pulmonary obstruction was not due to coal mine employment. Thus, employer contends that, contrary to the administrative law judge's finding, Dr. Dahhan was not using pulmonary function study results to establish the existence or nonexistence of pneumoconiosis, but was using the test results to show that claimant's pulmonary disability was due to bronchial asthma instead of coal dust exposure.

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[1] Claimant filed his first claim with the Department of Labor (DOL) on December 11, 1995. Employer's Exhibit 1. The claim was informally denied by DOL because the evidence failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id*. No further action was taken on this claim and the denial became final. Claimant filed the instant, subsequent claim with the DOL on September 30, 2002.

Section 718.202(a)(1)-(4) sets forth separate and distinct methods for establishing the existence of pneumoconiosis: a finding that the x-ray evidence does not establish the existence of clinical pneumoconiosis does not preclude an administrative law judge from finding that the medical opinion evidence establishes either the existence of legal or clinical pneumoconiosis. *See Cornett v. Benham Coal Co., Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Thus, contrary to employer's argument, the administrative law judge was not precluded from finding the existence of clinical pneumoconiosis established based on doctors' opinions even though he had found that the preponderance of the x-ray evidence does not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4); *Cornett*, 227 F.3d 569, 575, 22 BLR 2-107, 2-119; *U.S. Steel Mining Co., LLC v. Director, OWCP [Jones]*, 386 F.3d 977, 982-83, 23 BLR 2-213, 2-222-23 (11th Cir. 2004)(although some x-rays are read negative for pneumoconiosis, the disease could be present even if not apparent from a reading of the x-rays; presence of negative x-rays does not rule out a diagnosis of pneumoconiosis); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Additionally, the administrative law judge's finding that Dr. Kelly's opinion supported a finding of coal workers' pneumoconiosis was rational because the administrative law judge found that, in addition to a positive x-ray, it was based on examination, history, symptoms, blood gas study, pulmonary function study and electrocardiogram. *See Trumbo v. ReadingAnthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-155. Likewise, the administrative law judge permissibly found that Dr. Kelly's diagnosis of coal workers' pneumoconiosis was bolstered by the opinion of Dr. Kabir, claimant's treating physician, who diagnosed the existence of coal workers' pneumoconiosis based on, in addition to x-ray, examination, history and pulmonary function study. *See* 20 C.F.R. §718.104(d)(1)-(5).

The administrative law judge's review of Dr. Dahhan's opinion is, however, as employer argues, flawed. In considering Dr. Dahhan's opinion, the administrative law judge recognized that Dr. Dahhan had a broader base of information from which to assess claimant's condition than had Dr. Kelly because Dr. Dahhan had reviewed more extensive medical data. Nonetheless, the administrative law judge found questionable Dr. Dahhan's conclusion that the evidence was insufficient to justify a diagnosis of pneumoconiosis, since Dr. Dahhan had reviewed some positive x-ray readings by well-qualified readers which would have justified a diagnosis of pneumoconiosis. Also, the administrative law judge rejected Dr. Dahhan's opinion because he relied on pulmonary function studies, showing evidence of an obstructive airway disease with significant response to bronchodilation; the administrative law judge stated that pulmonary function studies results are not diagnostic of the presence or absence of pneumoconiosis. Decision and Order at 13.

Employer contends, however, that if the administrative law judge used the fact that pulmonary function studies are not diagnostic of the existence of pneumoconiosis to reject

Dr. Dahhan's opinion, he also should have rejected the opinions of Drs. Kelly and Kabir for the same reasons. Moreover, employer contends that Dr. Dahhan was not using the pulmonary function studies to diagnose the existence or nonexistence of pneumoconiosis but was using them to determine the cause of claimant's pulmonary impairment. We agree with employer that the administrative law judge erred in rejecting Dr. Dahhan's opinion. As employer contends Dr. Dahhan used the results of claimant's pulmonary function studies to find that claimant's respiratory impairment did not arise out of coal mine employment. *See Jones*, 386 F.3d at 982, 23 BLR at 2-222 (court affirmed an administrative law judge's award of benefits because doctor was able to unambiguously diagnose coal worker's pneumoconiosis by using x-ray evidence, as well as the impairment evident in claimant's pulmonary function study test).[2]

Further, contrary to the administrative law judge's finding, the fact that some of the x-rays reviewed by Dr. Dahhan were read positive for the existence of pneumoconiosis does not detract from Dr. Dahhan's finding that the evidence he reviewed, including his own negative x-ray reading, did not support a finding of pneumoconiosis. *Trumbo*, 17 BLR at 1-89 n. 4. Furthermore, after finding that claimant had established the existence of pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge considered together the medical opinion evidence and positive x-rays and concluded that claimant had established the existence of pneumoconiosis at Section 718.202(a). This was error. In the Sixth Circuit, pneumoconiosis is established at each subsection of Section 718.202(a). *Cornett*, 227 F.3d at 575, 23 BLR at 2-119. The administrative law judge therefore erred in purporting to weigh together the medical opinion and x-ray evidence.[3] In light of these errors, therefore, the administrative law judge must reconsider Dr. Dahhan's opinion, on remand, along with the other medical opinions of record to determine if they establish the existence of pneumoconiosis as defined by the Act.

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[2] Employer asserts in a footnote, Employer's Brief at 11 n.6, that in spite of the fact the administrative law judge noted that Drs. Kelly, Kabir, and Dahhan had the same credentials, Decision and Order at 12, only the Curriculum Vitae of Drs. Dahhan and Kabir appear in the record. Employer does not, however, specifically assert that Dr. Kelly is not similarly qualified.

[3] The administrative law judge also erred in relying upon the positive x-ray readings since he had previously determined that the positive x-ray readings were insufficient to establish the existence of pneumoconiosis.

Further, in reconsidering the medical opinion evidence, the administrative law judge must explain how Drs. Kelly's and Kabir's opinions are more persuasive than Dr. Dahhan's. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003). Likewise, on remand, in determining whether legal pneumoconiosis is established, the administrative law judge must assess the opinions in light of the inconsistencies in the smoking histories given by claimant and consider the medical opinion evidence relevant to the cause of pulmonary impairment in light of claimant's accurate smoking history. *See* 20 C.F.R. §718.201; *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-309 (1985).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part, vacated in part,and the case is remanded for further consideration 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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JUDITH S. BOGGS
Administrative Appeals Judge