

BRB No. 05-0317 BLA

LEROY BOWMAN)	
)	
Claimant-Petitioner)	
v.)	
)	
U.S. STEEL MINING COMPANY)	DATE ISSUED: 08/22/2005
)	
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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

William B. Talty, Tazewell, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney, PLLC), Charleston West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order On Remand (2002-BLA-05414) of Administrative Law Judge Mollie W. Neal (the administrative law judge) 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). When this case was previously before the Board, the Board affirmed the administrative law judge's refusal to consider the report of the West Virginia Occupational Pneumoconiosis Board on the basis that it did not contain the specific x-ray referred to in the report, but the Board vacated the administrative law judge's finding of no pneumoconiosis at 20 C.F.R. §718.202(a)(1) due to other errors made in evaluating the x-ray evidence. Further, as the administrative law judge's findings regarding the x-ray evidence affected the administrative law judge's analysis of the medical opinion evidence, the Board also vacated the administrative law judge's finding of no

pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remanded the case for the administrative law judge to reconsider the evidence at both Section 718.202(a)(1) and (4). The Board further instructed that, should the administrative law judge find the existence of pneumoconiosis established, she must then consider whether total disability and causation were established at 20 C.F.R. §718.204(b), (c). *Bowman V. U.S. Steel Mining Co.*, BRB No. 03-0728 BLA (Apr. 30, 2001) (unpub.).

On remand, the administrative law judge, addressing the Board's concerns, found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Because she found the x-ray evidence insufficient to establish the existence of pneumoconiosis, she did not again consider whether the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), but incorporated the remainder of her previous decision regarding the medical opinion evidence into her decision on remand and denied benefits.

On appeal, claimant asserts that the administrative law judge erred when she found that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant also asserts that the administrative law judge erred in failing to consider the medical opinion evidence to determine whether it established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as instructed by the Board. Employer responds, urging affirmance of the administrative law judge's denial of benefits. In reply, claimant again asserts that the administrative law judge did not properly consider the x-ray evidence or consider the medical opinion evidence relevant to the existence of pneumoconiosis. Claimant states that the administrative law judge's failure to reconsider the medical opinion evidence is particularly troublesome since Dr. Mullins did not base her diagnosis of pneumoconiosis primarily on positive x-rays, as the administrative law judge found in her previous decision, but she stated that her diagnosis of pneumoconiosis was independent of the x-ray evidence and was based instead on claimant's work history of significant coal dust exposure and the ventilatory impairment established by testing. 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).

Claimant first contends that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant raises three challenges to the administrative law judge's weighing

of the x-ray evidence.

First, claimant contends that the administrative law judge erred by failing to consider Dr. Leef's positive interpretation of the December 16, 1999 film. We disagree. Claimant cites to a reference of a positive x-ray reading contained in the decision of the West Virginia Occupational Pneumoconiosis Board (WVOPB) in his state claim. Director's Exhibit 7. The Board, in its previous Decision and Order, rejected this argument, however, holding that the administrative law judge was not required to consider the report of WVOPB because "WVOPB report does not contain the actual x-ray interpretation, nor is that interpretation specified in the record." *Bowman*, slip op. at 3. Accordingly, we will not revisit this contention. See *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Second, claimant contends that the administrative law judge erred in considering Dr. Forehand's negative reading of the September 26, 2001 x-ray, in light of Dr. Navani's assessment that this film was only category 2. Claimant asserts that because Dr. Navani, a better qualified reader, interpreted the same film as category 2 for quality which was interpreted by Dr. Forehand as only category 1 for quality, the administrative law judge should have found that doubt was cast on the credibility of Dr. Forehand's negative reading and the administrative law judge erred in not taking the discrepancy in quality into account in weighing the x-ray evidence. We disagree.

The regulations require only that x-ray films be of suitable quality for interpretation, optimal quality is not required. See 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-1229 (1984). Thus, the administrative law judge did not abuse her discretion in crediting Dr. Forehand's negative x-ray interpretation, despite the fact that Dr. Navani, a better qualified reader found the film to be quality 2 as opposed to quality 1. Neither physician found the x-ray to be unreadable. Accordingly, the administrative law judge properly considered Dr. Forehand's negative x-ray reading. 20 C.F.R. §718.102(a); *Preston*, 6 BLR 1-1229.

Third, claimant argues that the administrative law judge erred in considering the x-ray evidence seriatim rather than as a whole and failed to consider the weight of the x-ray evidence in finding that it failed to establish the existence of pneumoconiosis. Contrary to claimant's contention, the administrative law judge correctly considered all of the x-ray evidence of record. She rationally concluded that an x-ray read by more highly qualified physicians is more probative than one read by less qualified physicians. See 20 C.F.R. §718.202(a)(1); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc recon.*). She also reasonably concluded that an x-ray read the same by two highly qualified physicians would be more probative than an x-ray read differently by two highly qualified readers. Thus,

having considered all the x-ray evidence, we conclude that the administrative law judge reasonably found that the x-ray evidence did not establish the existence of pneumoconiosis because x-rays read by dually qualified physicians resulted in both positive and negative readings. Claimant's Exhibits 5, 6; Employer's Exhibits 1, 2; 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Cranor*, 22 BLR 1-1; *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986); *Isaacs v. Bailey Mining Co.*, 7 BLR 1-62 (1984).

Claimant next contends that the administrative law judge erred by failing to reconsider whether the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as instructed by the Board. Claimant contends that it is particularly important that the medical opinion evidence be readdressed as Dr. Mullins opined that her diagnosis of pneumoconiosis was not based on a positive x-ray and was independent of the x-ray evidence, but was based on claimant's work record of significant coal dust exposure and testing showing ventilatory impairment.

In remanding the case, the Board held that the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis must be vacated because that finding was affected by her findings regarding the x-ray evidence, *i.e.*, the administrative law judge found the opinions of Drs. Mullins and Rasmussen entitled to little weight because they were based on positive x-ray readings which were contrary to her findings at Section 718.202(a)(1). *Bowman*, slip op. at 4.

On remand, the administrative law judge reconsidered the x-ray evidence and found that it did not establish the existence of pneumoconiosis, and as a result adopted and incorporated the remainder of her 2003 decision regarding the medical opinion evidence. In that decision, the administrative law judge discredited Dr. Mullin's opinion, in part, because it was based on positive x-ray readings. As claimant contends, however, Dr. Mullins went on to find that, even without positive x-rays, she found the existence of pneumoconiosis established by a work history of significant coal dust exposure and a pulmonary function study showing a mild to moderate impairment. Thus, Dr. Mullins diagnosed the existence of pneumoconiosis even without x-ray evidence. Employer's Exhibit 3. Accordingly, since, as claimant contends, Dr. Mullins did not base her finding of pneumoconiosis solely on x-ray findings, we must vacate her finding that the medical opinion evidence does not establish the existence of pneumoconiosis and remand the case for the administrative law judge to reconsider Dr. Mullins' opinion in its entirety and to weigh it along with the other medical opinions at Section 718.202(a)(4), *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge must also consider the medical opinion evidence together with the x-ray evidence to determine whether the existence of pneumoconiosis is established.

Compton v. Island Creek Coal Co., 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Finally, if on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), she must then determine whether the evidence establishes that the pneumoconiosis arose out of coal mine employment and that the pneumoconiosis is totally disabling pursuant to Sections 718.203(b) and 718.204(b), (c). 20 C.F.R. §§718.203(b), 718.204(b), (c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge