BRB No. 05-0970 BLA

JAMES T. SAUM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OXFORD MINING COMPANY, INCORPORATED	)	DATE ISSUED: 08/22/2006
	)	
and	)	
	)	
OHIO BUREAU OF WORKERS' COMPENSATION	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Erik A. Schramm (Hanlon, Duff, Estadt, McCormick & Schramm Co., LPA), St. Clairsville, Ohio, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-5811) of Administrative Law Judge Daniel L. Leland 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). The administrative law judge found that claimant established a coal mine employment history of twenty years and the presence of a totally disabling respiratory

impairment pursuant to 20 C.F.R. §718.204(b), but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding: that the x-ray evidence failed to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1); that the medical opinion evidence failed to establish the existence of "legal pneumoconiosis" pursuant to Section 718.202(a)(4); and that the evidence failed to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis (disability causation) pursuant to Section 718.204(c). Employer responds and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief 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 asserts that the administrative law judge erred in his weighing of the x-ray evidence and erred in finding that such evidence failed to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). Claimant argues that the administrative law judge's accordance of greater weight to the preponderance of negative x-ray interpretations constitutes mere "head counting," which is impermissible; and that the administrative law judge failed to recognize that Dr. Cappiello, who rendered positive x-ray interpretations, was, as both a B-reader and board-certified radiologist,[1] the most qualified of the x-ray interpreters in this case, as well as the only physician who interpreted all five of the x-ray films, including the two most recent x-rays (more recent than the third most recent film by sixteen and ten months, respectively), which were uniformly interpreted as positive for the existence of pneumoconiosis. Claimant's Brief at 29-32. Thus, claimant argues that remand of the case is necessary for the administrative law judge to fully explain why the recency of

[1] A B-reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

the two most recent x-rays, both interpreted as positive is not important, particularly given the fact that findings on prior x-rays suggests a progression in the opacities seen on x-rays. Moreover, claimant argues, that the administrative law judge should consider the fact that Dr. Cappiello is dually qualified and that he read all of the x-rays from 2002 to 2004 in his assessment of the x-ray evidence.

In determining that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge found that the record consisted of five x-rays interpretations. The administrative law judge observed that while Dr. Cappiello was the best-qualified physician based on his status as a B-reader and board-certified radiologist, the physician's positive readings were outweighed by the negative readings of Drs. Haas and Altmeyer, who were B-readers, and by the reading of Dr. Boyse, a board-certified radiologist, who stated an x-ray was negative for the existence of pneumoconiosis. Claimant's Exhibits 4, 6, 7, 8, 12; Director's Exhibits 15-18; Employer's Exhibit 1. The administrative law judge further found that even though Dr. Cappiello was the only physician who read the most recent x-rays, those of June 22, 2004 and December 9, 2004, and that he rendered positive readings of those films, because those films were only ten and sixteen months more recent than the August 13, 2003 x-ray, which was read 0/1 by Dr. Altmeyer, Employer's Exhibit 1, Dr. Cappiello's positive interpretations were not entitled to superior weight on the basis of their recency.

The x-ray evidence consists of the following: a December 20, 2001 x-ray read negative by Dr. Haas, a B-reader, for quality only by Dr. Sargent, a board-certified, B-reader, and positive by Dr. Cappiello, a board-certified, B-reader; a June 18, 2002 x-ray read negative by Dr. Boyse, a board-certified reader, and positive by Dr. Cappiello, a board-certified, B-reader; an August 13, 2003 x-ray read negative (0/1) by Dr. Altmeyer, a B-reader, and positive by Dr. Cappiello, a board-certified, B-reader, and x-rays dated June 22, 2004 and December 9, 2004, read positive by Dr. Cappiello, a board-certified, B-reader.

We agree with claimant that the administrative law judge's decision indicates that he engaged in an impermissible "head counting" of the x-ray evidence when he found that a preponderance of the x-ray evidence was negative for the existence of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 66 (4th Cir. 1992). As claimant contends, the administrative law judge failed to address the fact that Dr. Cappiello, who he acknowledged to be the best qualified physician-reader, interpreted all the x-rays he read from 2002 through 2004 as positive, and that Dr. Cappiello was, in fact, the only physician to read so many x-rays. Although the administrative law judge observes that the most recent x-rays, which were read positive, were only ten to sixteen months more recent than an x-ray read negative (0/1), the administrative law judge's decision does not show that he considered that pneumoconiosis was a progressive disease. 20 C.F.R. §718.201(c); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge did not consider

the progression in opacities seen on the series of x-rays taken. On remand, the administrative law judge should explain why the two most recent x-rays, which uncontradicted evidence establishes were positive for the existence of pneumoconiosis and which were read by the most highly qualified radiologist of record, should not outweigh the three older x-rays, read by radiologists with lesser qualifications. Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis is vacated and the case is remanded for the administrative law judge to reconsider the x-ray evidence in light of the discussion above. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk and Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward*, 991 F.2d 314, 17 BLR 2-77; *Lawson v. Secretary of Health and Human Services*, 688 F.2d 436, 439 (6th Cir. 1982); *Adkins*, 958 F.2d 49, 52; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Co.*, 7 BLR 1-128 (1984).

Claimant also contends that the administrative law judge erred in failing to find the existence of legal pneumoconiosis, *i.e.* a chronic respiratory or pulmonary disease arising out of coal mine employment, 20 C.F.R. §718.201(a)(2), established by the medical opinion evidence pursuant to Section 718.202(a)(4). Specifically, claimant asserts that the administrative law judge erred in rejecting the opinions of Drs. Cohen, Hinkamp and Kahn, who opined that claimant suffered from the existence of legal pneumoconiosis, Claimant's Exhibits 1, 2, 10, in favor of the opinion of Dr. Altmeyer, who opined that claimant suffered from emphysema unrelated to coal mine dust exposure, Employer's Exhibit 1. Claimant argues that the administrative law judge's findings are internally inconsistent because; on the one hand, the administrative law judge found that Dr. Cohen provided a clinical foundation for his findings, but then the administrative law judge found that only Dr. Altmeyer based his conclusions on the facts of this case. Claimant also contends that the administrative law judge failed to take into account the special qualifications of Dr. Cohen and the fact that courts have regularly relied upon his medical conclusions, *e.g.*, *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 482, 22 BLR 2-266, 2-280-281 (7th Cir. 2001)("It was rational to give greater weight to Dr. Cohen's views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research."); *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 893, 22 BLR 2-409, 2-426 (7th Cir. 2002) (same). In addition, claimant contends that, contrary to the administrative law judge's finding, Dr. Cohen did provide a well-reasoned medical opinion focused on the facts of the instant case, *i.e.*, Dr. Cohen considered claimant's eighteen year coal mine history, non-coal mine work history, smoking history of thirty to forty-five pack years, symptoms, pulmonary function studies, x-rays, other evidence, scientific literature, and the particulars of claimant's occupational exposure. Thus, claimant contends that Dr. Cohen provided a clear, direct, and concise basis for his finding of legal pneumoconiosis. Regarding the opinions of Drs. Kahn and Hinkamp, claimant argues that these physicians found the presence of legal pneumoconiosis based on objective studies and a review of literature. Additionally, claimant contends that the administrative law judge should have considered the superior qualifications of Dr. Hinkamp, *i.e*. that he was board certified in both Occupational Medicine and General

Preventive Medicine. Thus, claimant contends that these physicians' opinions support the conclusions of Dr. Cohen.

In contrast, claimant argues that the administrative law judge erred in crediting the opinion of Dr. Altmeyer as that opinion was both unreasoned and in conflict with scientific consensus and the revised regulations on legal pneumoconiosis. Claimant asserts that the administrative law judge erred in relying on the opinion of Dr. Altmeyer because the doctor wrongly assumed that, absent the existence of complicated pneumoconiosis, no functionally significant chronic obstructive pulmonary disease could ever be caused by coal dust exposure. Further, claimant contends that the administrative law judge did not compare the findings of Drs. Cohen and Altmeyer. Thus, claimant avers that Dr. Altmeyer provided no support for his conclusion that claimant did not suffer from legal pneumoconiosis.

In finding that claimant failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Cohen, Kahn, Hinkamp and Altmeyer, but accorded the opinion of Dr. Altmeyer greater weight because he found it was based on the evidence in this case, *i.e.*, a negative biopsy, a pattern of pulmonary function studies showing obstruction, no bronchoreversability and a reduced diffusing capacity and therefore more reasoned than the opinions of Drs. Cohen, Kahn, and Hinkamp which were based on "theoretical possibilities." The administrative law judge observed that while Drs. Cohen and Hinkamp cited numerous medical studies showing that coal dust exposure could cause emphysema, the studies the physicians relied upon did not demonstrate that in all cases in which the miner has emphysema the disease arose from coal mine dust exposure. Decision and Order at 7. Additionally, the administrative law judge found that Drs. Cohen, Kahn, and Hinkamp failed to explain why this particular claimant's emphysema was related to his coal dust exposure.

We agree with claimant. The administrative law judge's accordance of greater weight to the opinion of Dr. Altmeyer than to the opinions of Drs. Cohen, Kahn, and Hinkamp for the reasons given is not supported by the record. As claimant contends, Dr. Cohen's opinion was based on as much factual information in the record as the opinion of Dr. Altmeyer. Dr. Cohen stated that his opinion was based on claimant's history, examination, x-ray, pulmonary function study, and review of several other physicians' reports. He noted that claimant had a thirty-five to forty pack year cigarette smoking history and an eighteen year history of underground coal mine employment. Dr. Cohen interpreted an x-ray as positive (1/0) for pneumoconiosis and found that the pulmonary function study showed a moderate obstructive defect, with no clear response to bronchodilator and a severe diffusion impairment. In addition, Dr. Cohen discussed extensively several scientific studies linking occupational exposure to coal dust and obstructive lung disease. Dr. Cohen concluded that the sum of the medical evidence indicated that claimant's coal mine employment and cigarette smoking history were significantly contributory to the development of his moderate to severe obstructive lung disease with diffusion impairment and that this degree of

impairment clearly renders claimant disabled for the duties of his last coal mine employment. Responding to Dr. Altmeyer's opinion that x-ray, biopsy, and physiologic testing showed that claimant had cigarette induced emphysema and past granulomatous infections, and that this evidence established the absence of any coal dust induced respiratory disease, Dr. Cohen disagreed. Dr. Cohen stated that there was no way that Dr. Altmeyer could exclude the component of coal mine dust in causing claimant's impairment. Dr. Cohen observed that the biopsy Dr. Altmeyer relied on was not an adequate sample of lung tissue, that Dr. Altmeyer must be aware of the extensive medical literature linking coal mine employment and obstructive lung disease, and Dr. Altmeyer erroneously concluded that claimant did not even have a respiratory disability which would preclude him from performing his usual coal mine employment. Claimant's Exhibit 1. Accordingly, because Dr. Cohen's opinion appears to be fully explained and focused on the evidence and particulars of claimant's case, we must reject the administrative law judge's finding that it was not and remand the case for further consideration of Dr. Cohen's opinion in its totality and for further consideration of this opinion in comparison to Dr. Altmeryer's. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Specifically, the administrative law judge should consider Dr. Cohen's response rebutting Dr. Altmeyer's finding. In addition, as the administrative law judge did not fully address all relative qualifications of the physicians, he must do so on remand, giving particular attention to the qualifications of Dr. Cohen. *Summers*, 272 F.3d 473, 482, 22 BLR 2-266, 2-280-81 ("It was rational to give great weight to Dr. Cohen's views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research"); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Turning to Dr. Altmeyer's opinion, claimant contends that Dr. Altmeyer misunderstood the clear scientific consensus set forth in the revised regulations, *i.e.*, that an obstructive impairment can arise from coal mine employment, and that Dr. Altmeyer incorrectly assumed that, absent complicated clinical coal workers' pneumoconiosis, no functionally significant chronic obstructive pulmonary disease can be caused by coal dust. Further, claimant contends that the administrative law judge failed to adequately discuss Dr. Cohen's opinions which addressed Dr. Altmeyer's opinion, finding that, contrary to Dr. Altmeyer's opinion, the pattern of "classic" emphysema alluded to by Dr. Altmeyer can be caused by smoking or coal mine employment. Additionally, claimant asserts that Dr. Altmeyer opined that the absence of bronchoreversibility and the presence of reduced diffusion capacity support his finding that claimant's chronic obstructive pulmonary disease is due to smoking, not coal mine employment and that the administrative law judge relied, *inter alia*, on these factors in crediting Dr. Altmeyer's opinion. Claimant contends, however, that the administrative law judge did not explain why Dr. Altmeyer's opinion addressing these variables made his opinion more reasoned since both Drs. Cohen and Hinkamp also considered these variables when they attributed claimant's obstructive impairment to coal mine employment.

We agree with claimant. Review of Dr. Altmeyer's opinion shows that, in addition to his examination and review of numerous medical data, Dr. Altmeyer read an x-ray as negative (0/1), specifically stating that claimant did not have changes to suggest silicosis or coal workers' pneumoconiosis. Dr. Altmeyer further opined that while claimant had a mild to moderate degree of airflow obstruction associated with gas exchange impairment, he believed that it was directly related to pulmonary emphysema. Dr. Altmeyer opined that claimant had a classic chest x-ray of emphysema and that the pattern of pulmonary function studies with airways obstruction, with no significant bronchoreversibility and reduction in diffusing capacity, was classic for cigarette induced emphysema, and that claimant's biopsy showed bullous emphysema not coal workers' pneumoconiosis. In response to the question of whether claimant had a coal mine related disease resulting in disability, Dr. Altmeyer answered, "[n]ot applicable as [claimant] does not have pneumoconiosis either in the legal sense or in the medical sense." Employer's Exhibit at 10. Dr. Altmeyer pointed out that as the pulmonary function study showed only a mild to moderate degree of airflow obstruction, no restriction, only a mild reduction in specific diffusing capacity and normal gas exchange on blood gases, claimant could perform mild to moderate exertion in a coal mine but probably not heavy repetitive manual labor. Employer's Exhibit at 11. Dr. Altmeyer further opined that there is "no acute bronchoreversibility in patients with chronic obstructive lung diseases from smoking[.]" Employer's Exhibit 11. As claimant contends, the administrative law judge did not adequately explain why the factors Dr. Altmeyer relied on rendered his opinion more reliable since Drs. Cohen and Hinkamp relied on the same factors and Dr. Cohen's opinion was more in accord with the concensus of the scientific literature adopted in the revised regulations. Remand for reconsideration of Dr. Altmeyer's opinion, in light of claimant's arguments, is, accordingly, required. *See Shores*, 358 F.3d 486, 23 BLR 2-18.

Accordingly, we vacate the administrative law judge's finding that the existence of legal pneumoconiosis was not established and we remand the case for further consideration of the medical opinion evidence on the issue of legal pneumoconiosis. *See* 20 C.F.R. §718.201(c); *Shores*, 358 F.3d 486, 23 BLR 2-18; *Summers*, 272 F.3d 473, 483, 22 BLR 2-266; *Blakeley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 2001); *see also Hicks*, 138 F.3d 524, 21 BLR 2-323; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-25 (4th Cir. 1993); *Black Diamond Coal Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); *Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350 (1985); *Hoffman v. B&G Construction Co.*, 8 BLR 1-65 (1985). Because we must remand this case for reconsideration of the evidence on the issue of pneumoconiosis at Section 718.202(a)(1), (4), we likewise remand the case for reconsideration of the evidence relevant to disability causation at Section 718.204(c), if reached. *See* 20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order-Denying 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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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