BRB No. 06-0862 BLA

RONALD McCRAE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	DATE ISSUED: 08/30/2007
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ronald McCrae, Donora, Pennsylvania, *pro* se.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (05-BLA-5503) of Administrative Law Judge Richard A. Morgan 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). Claimant filed an application for benefits on November 21, 2003. Director's Exhibit 3. The administrative law judge accepted the parties' stipulation to 19.99 years of coal mine employment and found that although the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or total disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has indicated he will not file a substantive response unless specifically requested to do so.[1]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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, 363 (1965).

Regarding the issue of the existence of pneumoconiosis, the administrative law judge initially considered whether the x-ray evidence was sufficient to demonstrate the presence of the disease pursuant to Section 718.202(a)(1). The administrative law judge admitted twelve interpretations of five x-rays obtained between February 2, 2004 and November 7, 2005. Director's Exhibits 18, 19-21; Claimant's Exhibits 1-3, 5, 7-9; Employer's Exhibits 1, 2, 7, 8, 10. Claimant submitted five positive interpretations, consisting of four readings by Dr. Gohel, a dually-qualified Board-certified radiologist and B reader, and one by Dr. Cohen, a B reader. Employer submitted seven negative interpretations of the five x-rays from Drs. Hayes and Thomeier, dually-qualified physicians, and Drs. Fino, Pickerill, and Abrahams, who are B readers. Director's Exhibit 22; Employer's Exhibits 1, 2, 7, 8, 10. After considering the conflicting interpretations provided by similarly qualified physicians, the administrative law judge acted within his discretion as fact-finder in determining that the x-ray evidence neither precluded nor established the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries* [*Onderko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).[2]

[1] We affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), as this determination is not adverse to claimant and has not been challenged on appeal. Decision and Order at 17; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] A review of the record reveals that the negative x-ray interpretation by Dr. Pickerill, submitted by the employer post-hearing, exceeded the number of x-ray readings permitted under 20 C.F.R. §725.414(a)(3)(i), (ii). This error is harmless, however, as excluding this interpretation does not alter the administrative law judge's conclusion that

With respect to Section 718.202(a)(2), the administrative law judge correctly found that the record contained no autopsy or biopsy evidence. Decision and Order at 14. As the record was also devoid of evidence to establish that claimant suffers from complicated pneumoconiosis, and the presumptions set forth at 20 C.F.R. §§718.305 and 718.306 are unavailable to claimant, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). *Id*. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

The administrative law judge then considered the CT scan evidence at Section 718.202(a)(4). The record contains two interpretations of a CT scan performed on February 21, 2005. Dr. Hayes stated that the scan was negative for occupational pneumoconiosis. Employer's Exhibit 9. Dr. Gohel indicated that the scan was of no use in diagnosing the presence of pneumoconiosis, as it was not performed in accordance with a high resolution protocol. Claimant's Exhibit 9. The administrative law judge rationally determined that this evidence did not affirmatively establish the presence of pneumoconiosis. Decision and Order at 7; *see Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

The medical opinion evidence relevant to Section 718.202(a)(4) consists of the reports and deposition testimony provided by Drs. Celko, Bobak, Cohen, Fino, and Pickerill. Dr. Celko, who is Board-certified in internal medicine, examined claimant on February 9, 2004. Director's Exhibit 15. Dr. Celko diagnosed chronic obstructive pulmonary disease (COPD)/chronic respiratory failure and stated that claimant's cigarette smoking and/or occupational dust exposure contributed to claimant's pulmonary function test abnormalities and symptoms. Claimant's Exhibit 15; Employer's Exhibit 5 at 10.

Dr. Bobak, who is Board-certified in internal medicine, issued an undated letter in support of claimant's application for benefits in which he stated that he had been treating claimant for about fifteen years. Claimant's Exhibit 6. Dr. Bobak opined that claimant's breathing impairment was due to both smoking and coal mine employment. *Id*. In his deposition testimony, Dr. Bobak stated that Dr. Celko treated claimant's pulmonary disease. Employer's Exhibit 11 at 27.

Dr. Cohen is Board-certified in internal medicine and pulmonary disease, and examined claimant on January 25, 2005. Claimant's Exhibit 1. Dr. Cohen opined that claimant has pneumoconiosis and is suffering from a totally disabling pulmonary impairment to which coal dust was a significant contributor. Claimant's Exhibit 1;

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the x-ray evidence neither established nor precluded the existence of pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer's Exhibit 11 at 29. In his deposition testimony, Dr. Cohen acknowledged that claimant had significant exposure to coal dust and cigarette smoke, but explained that research indicates that people who are sensitive to one substance are likely sensitive to both exposures. Employer's Exhibit 11 at 16, 25-28. Dr. Cohen further indicated that these exposures cause a very similar impairment, and stated that there is no test for determining which of the two exposures caused the damage. Employer's Exhibit 11 at 27-28. Dr. Cohen responded in the affirmative to the question raised by employer's counsel as to whether claimant "could have had this exact same impairment and disability had he never been in the coal mines." Employer's Exhibit 11 at 60. Dr. Cohen also discussed at length how the objective evidence and medical literature supported his determination that coal dust significantly contributed to claimant's impairment. Claimant's Exhibit 1 at 7-11; Employer's Exhibit 11 at 38-43.

Dr. Fino, who is Board-certified in internal medicine and pulmonary disease, examined claimant on August 31, 2004 and reviewed claimant's medical records. Employer's Exhibit 1. Dr. Fino diagnosed emphysema, moderately severe COPD, and chronic bronchitis. *Id.* Dr. Fino noted at his deposition that the amount of emphysema due to coal dust exposure is directly proportional to the amount of coal dust in the lungs that appears on biopsy or x-ray. Employer's Exhibit 6 at 16-18. Dr. Fino further explained that a negative x-ray implies a "clinically insignificant" amount of emphysema due to coal dust when evaluating a functional abnormality, although he acknowledged that one does not rule out pneumoconiosis with a negative x-ray. Employer's Exhibit 6 at 17. Dr. Fino also stated that even if the 1/1 classifications of claimant's chest x-rays were accurate, he would still conclude that coal dust exposure was not a clinically significant cause of claimant's pulmonary impairment. Employer's Exhibit 6 at 14-21. Dr. Fino opined that a 1/1 x-ray indicates an insignificant amount of pneumoconiosis for causing clinically significant emphysema or airways obstruction. Employer's Exhibit 6 at 19-20.

Dr. Pickerill, who is Board-certified in internal medicine, pulmonary disease, and critical care medicine, examined claimant on November 7, 2005. Employer's Exhibits 7, 13. Dr. Pickerill diagnosed claimant with moderate COPD and emphysema. Employer's Exhibit 7. Although he attributed claimant's emphysema and COPD primarily to smoking, Dr. Pickerill said he "cannot completely exclude the possibility that coal dust exposure has contributed to his lung disease," because claimant's calcified lymph nodes and granulomas could be attributed to coal dust. Employer's Exhibits 7, 13 at 23-24. Dr. Pickerill stated that if claimant's lung abnormalities were established to be due to coal dust by biopsy or other means, he would revise his opinion as to the etiology of claimant's impairment. Employer's Exhibit 13 at 23-24.

The administrative law judge compared the physicians' credentials and determined that Drs. Cohen, Fino, and Pickerill, who are Board-certified in pulmonary medicine, had qualifications superior to those of Drs. Bobak and Celko, who are Board-certified in internal medicine. Decision and Order at 15. Although Drs. Celko and Bobak had

treated claimant, the administrative law judge found that their status as treating physicians did not entitle their opinions to greater weight. *Id*. The administrative law judge then considered the opinions of Drs. Cohen, Fino, and Pickerill, and determined that the three physicians agreed that claimant suffers from a totally disabling pulmonary or respiratory impairment, "which is, at least, primarily due" to claimant's "extensive smoking history." *Id*. The administrative law judge indicated that the question remaining was whether coal dust exposure played a role in claimant's impairment. *Id*. The administrative law judge stated that:

> In summary, Dr. Cohen estimated that coal mine dust exposure is a 10% to 25% contributing factor in claimant's impairment or disability. Dr. Fino opined that coal dust exposure is a non-factor, and, that the medical literature established that any potential loss due to coal mine dust exposure is not clinically significant. Finally, Dr. Pickerill stated that, although he could not completely exclude a minor contribution from coal dust exposure based strictly upon claimant's history, there were no objective findings to support such a causal connection. Therefore, Dr. Pickerill could not attribute a substantial cause or contribution from coal dust exposure.

Decision and Order at 16. The administrative law judge found that the opinions of Drs. Cohen, Fino, and Pickerill were all reasoned and documented, and noted that:

> [E]ven Dr. Cohen acknowledged that claimant could have had the exact same impairment and disability had he never been in the coal mines. Taken as a whole, I find that the credible medical opinion evidence establishes that claimant suffers from a total pulmonary disability attributable primarily, if not exclusively, to cigarette smoking; and that the role of coal dust exposure, if any, is clinically insignificant.

Decision and Order at 16. Without further elaboration, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Id*.

Regarding the administrative law judge's weighing of the opinions of Drs. Celko and Bobak, we affirm his determination that their diagnoses were not entitled to additional weight based upon their status as treating physicians. The administrative law judge properly found that he could not discern the degree to which Dr. Celko's relationship with, or treatment of, claimant may have provided him with an advantage over the other physicians of record, as Dr. Celko's opinion focused on the examination that he performed at the request of the Department of Labor. Decision and Order at 15; Director's Exhibit 15; 20 C.F.R. §718.104(d); *see Lango v. Director, OWCP*, 104 F.3d

573, 21 BLR 2-12 (3d Cir. 1997).[3] In addition, the administrative law judge rationally determined that because Dr. Bobak stated that he did not treat claimant's pulmonary condition, his opinion, that claimant has pneumoconiosis, was not entitled to controlling weight. Decision and Order at 15; Employer's Exhibit 11 at 27; 20 C.F.R. §718.104(d); *see Lango*, 104 F.3d at 577, 21 BLR at 2-20-21.

The administrative law judge did not, however, fully address Dr. Cohen's opinion. The administrative law judge credited a portion of Dr. Cohen's deposition testimony to support a conclusion that was contrary both to the remainder of the physician's testimony and to the conclusion expressed in his written reports. The administrative law judge relied upon Dr. Cohen's affirmative response to the query posited by employer's counsel as to whether "claimant could have had the exact same impairment and disability had he never been in the coal mines." Decision and Order at 10. From this response, the administrative law judge determined that Dr. Cohen agreed with Drs. Fino and Pickerill, that coal dust exposure did not play a significant role in claimant's obstructive lung disease. Decision and Order at 10; Employer's Exhibit 11 at 60. However, the administrative law judge did not acknowledge Dr. Cohen's deposition testimony that he would have attributed claimant's impairment to coal dust exposure had claimant never smoked, nor did the administrative law judge address Dr. Cohen's detailed explanation, in his written report and at his deposition, of how the objective evidence and medical literature supports a determination that coal dust exposure significantly contributed to claimant's impairment. Claimant's Exhibit 1 at 7-11; Employer's Exhibit 11 at 38-43.

The administrative law judge's omission of this evidence from discussion and the absence of a complete explanation of the administrative law judge's rationale for accepting or rejecting this evidence, require remand. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also Mancia v. Director, OWCP*, 130 F.3d 579, 593, 21 BLR 2-215, 243 (3d Cir. 1997). Thus, we vacate the administrative law judge's determination that Dr. Cohen's opinion does not support a finding that coal dust exposure is a substantially contributing cause of claimant's impairment pursuant to Section 718.202(a)(4) and remand the case to the administrative law judge for reconsideration of Dr. Cohen's opinion in its entirety.

A review of the record also indicates that the administrative law judge did not perform the requisite consideration of whether Dr. Fino's opinion was based upon a premise that is inconsistent with Section 718.202(a)(4) and the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Dr. Fino observed that he does not rule out the presence of pneumoconiosis based upon a negative chest x-ray and that,

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as claimant was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 202 (1989)(*en banc*); Director's Exhibits 4-6.

in this case, he was called upon to "assess how significant the coal mine dust can be in the development of emphysema." Employer's Exhibit 6 at 17. Dr. Fino stated:

> So in this particular case, here I have a guy who did work in the mines and he smoked relatively a lot more, but he has no clinical signs radiographically that he had more than an average amount of coal mine dust retained within his lungs. So it would be very difficult to say that any emphysema that this man has has been contributed to by coal mine dust. It's all consistent with smoking.

Employer's Exhibit 6 at 17-18. Dr. Fino also referred to an article by Dr. Leigh, who "carefully looked at emphysema due to coal mine dust in the lungs which correlated with either chest x-ray abnormality or what you see pathologically." Employer's Exhibit 6 at 18. Dr. Fino further noted, however, that although Drs. Cohen and Gohel interpreted one of claimant's x-rays as 1/1, this did not change his opinion as to the non-existent effect of coal dust on claimant's impairment. Instead, Dr. Fino opined that such a reading indicated an "insignificant amount of pneumoconiosis to cause clinically significant emphysema or airways obstruction." Employer's Exhibit 6 at 19-20.

Because the administrative law judge did not consider whether Dr. Fino's statements are consistent with the regulations as they relate to the diagnosis of legal pneumoconiosis, we must vacate the administrative law judge's findings with respect to Dr. Fino's opinion under Section 718.202(a)(4). Section 718.202(a)(4) provides that "[a] determination of the existence of pneumoconiosis may …be made if a physician, exercising sound medical judgment, *notwithstanding a negative x-ray*, finds that the miner suffers or suffered from pneumoconiosis as defined in Sec. 718.201." 20 C.F.R. §718.202(a)(4)(emphasis added). In addition, 20 C.F.R. §718.201(a)(2), in which legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment" and provides that "[t]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). On remand, the administrative law judge must determine whether Dr. Fino adequately considered the possibility that claimant has legal pneumoconiosis as defined in Section 718.201(a)(2), without premising his opinion upon the absence of x-ray evidence of clinical pneumoconiosis. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 222 BLR 2-265 (7th Cir. 2001).

If the administrative law judge finds, on remand, that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he must then weigh all of the evidence relevant to the existence of pneumoconiosis together to determine whether the presence of the disease has been established at Section 718.202(a) by a preponderance

of the evidence. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24, 21 BLR 2-104, 2-111 (3d Cir. 1997). In the event that the administrative law judge finds that claimant has satisfied his burden of proof under Section 718.202(a), the administrative law judge must address the issue of whether claimant has established that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

With respect to the administrative law judge's finding under Section 718.204(c), the administrative law judge relied upon his weighing of the medical opinion evidence under Section 718.202(a)(4) to conclude that pneumoconiosis is not a contributing cause of claimant's totally disabling pulmonary impairment. In light of our decision to vacate the administrative law judge's findings with respect to the opinions of Drs. Cohen and Fino pursuant to Section 718.202(a)(4), we must also vacate the administrative law judge's finding at Section 718.204(c). If, on remand, the administrative law judge determines that the existence of pneumoconiosis arising out of coal mine employment has been established pursuant to Sections 718.202(a) and 718.203, he must determine whether claimant has proven that pneumoconiosis is a substantially contributing cause of his total disability under Section 718.204(c). 20 C.F.R. §718.204(c); *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge