BRB No. 07-0909 BLA

T. S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BOONE ENERGY CORPORATION	)	DATE ISSUED: 08/25/2008
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2006-BLA-5313) of Administrative Law Judge Michael P. Lesniak rendered 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 credited claimant with at least eighteen years of qualifying coal mine employment and adjudicated this claim, filed on December 29, 2004, as a subsequent claim subject to the provisions at 20 C.F.R. §725.309(d). The administrative law judge found that the newly submitted evidence of record was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and therefore found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). With respect to the merits of entitlement, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding pneumoconiosis established at Section 718.202(a)(1) and (4). Specifically, employer challenges the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1) and his weighing of the medical opinion evidence pursuant to Section 718.202(a)(4). Employer further contends that the administrative law judge erred in finding disability causation established pursuant to Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter brief challenging employer's assertions pursuant to Section 718.202(a)(1).[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, the finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3), the finding that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and the finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 2-4.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's most recent claim was denied because he failed to establish a totally disabling respiratory impairment. Director's Exhibit 5. Consequently, claimant had to submit new evidence of a totally disabling respiratory impairment in order to obtain a review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

20 C.F.R. §718.202(a)(1)

Employer contends that the administrative law judge erred in finding simple pneumoconiosis established pursuant to Section 718.202(a)(1) based on the x-ray evidence. Specifically, employer argues: 1) the administrative law judge erred in relying on Dr. Miller's x-ray reading of simple pneumoconiosis when he rejected Dr. Miller's reading of complicated pneumoconiosis; 2) the administrative law judge erred in failing to accord greater weight to the negative x-ray readings of Dr. Wiot, as his credentials were superior to those of the other physicians who rendered x-ray interpretations; 3) the administrative law judge erred in crediting the weight of the positive x-ray evidence

without considering the substantial disparity in those readings[3]; and 4) the administrative law judge erred in crediting the positive x-ray readings because of the long history of positive readings taken over the twenty-year period during which claimant has been pursuing claims.[4] Employer claims that it did not have the opportunity to respond to, or rebut, the evidence submitted in the prior claims, given the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i), (ii).

In considering the x-ray evidence, which spanned the years from 1986 through 2006, pursuant to Section 718.202(a)(1),[5] the administrative law judge found that the

[3] Specifically, employer asserts that in interpreting the February 3, 2005 x-ray as 2/1, Dr. Gaziano "identified almost twice as great a profusion of coal workers' pneumoconiosis" as Dr. Miller found in interpreting the same x-ray as 1/1. Employer's Brief at 18. Employer further asserts that, in his interpretation of the same x-ray, Dr. Gaziano noted no changes of emphysema, but that in his interpretation of a 1995 film, Director's Exhibit 3, he noted the presence of the disease. Employer argues that these differences undermine the positive x-ray interpretations rendered by the physicians and, consequently, the administrative law judge's finding that the weight of the positive x-ray evidence supported a finding of pneumoconiosis. Employer's Brief at 18.

[4] Claimant filed a total of five claims, in 1973, 1988, 1995, 1997, and 1999, before filing the instant 2004 claim. Those previous claims were denied.

[5] The administrative law judge found that the x-ray evidence consisted of the following: the September 9, 1986 x-ray was read as positive by Dr. Hayes, a B reader and Board-certified radiologist, Director's Exhibit 2; the x-ray of August 3, 1988 was read as positive by both Dr. Subramaniam, whose qualifications are not in the record, and Dr. Gaziano, a B reader, Director's Exhibit 2; the x-ray of March 24, 1995 was read as positive by both Dr. Ranavaya, a B reader, and Dr. Gaziano, a B reader, Director's Exhibit 3; the x-ray of July 11, 1997 was read as positive by both Dr. Ranavaya and Dr. Gaziano, B readers; the x-ray of July 30, 1999 was read as positive by both Dr. Navani, a B reader and Board-certified radiologist, and Dr. Ranavaya, a B reader, Director's Exhibit 5; the x-ray of September 29, 2002 was read as negative by Dr. Wiot, a B reader and Board-certified radiologist, Employer's Exhibit 8; the x-ray of February 3, 2005 was read as positive by Dr. Gaziano, a B reader, Dr. Abramowitz, a B reader and Board-certified radiologist and Dr. Miller, a B reader and Board-certified radiologist, but negative by Dr Wiot, a B reader and Board-certified radiologist, Director's Exhibits 16, 17, 19, Employer's Exhibit 1; the x-ray of June 29, 2005 was read as positive by Dr. Miller, a B reader and Board-certified radiologist, and negative by Dr. Wheeler, a B reader and Board-certified radiologist, Claimant's Exhibit 1; Employer's Exhibit 4; and the x-ray of July 27, 2006 was read as positive for simple and complicated pneumoconiosis by Dr. Miller, a B reader and Board-certified radiologist, but as negative by Dr. Jarboe, a B reader. Decision and Order at 6.

"pattern of positive x-ray readings…over a twenty-year period to be persuasive." Decision and Order at 7. Further, the administrative law judge noted that the "consistently positive x-ray reports lend strong support to the more recent positive x-ray readings submitted by [c]laimant, specifically the positive readings by Dr. Miller." Decision and Order at 7. Consequently, the administrative law judge found that the x-ray evidence established simple pneumoconiosis pursuant to Section 718.202(a)(1).

We reject employer's assertion that the administrative law judge acted inconsistently when he credited Dr. Miller's readings of simple pneumoconiosis on the June 29, 2005 and July 27, 2006 x-rays, but rejected Dr. Miller's additional reading of complicated pneumoconiosis on the July 27, 2006 x-ray. The administrative law judge is not required to dismiss a doctor's finding of simple pneumoconiosis because he has rejected the same physician's finding of complicated pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984)(administrative law judge has broad discretion to assess evidence of record and determine whether party has met its burden of proof). Moreover, the administrative law judge properly found that Dr. Miller's reading of the most recent x-ray as showing simple pneumoconiosis was buttressed by the weight of the x-rays that were read as positive for simple pneumoconiosis.

Further, contrary to employer's assertion, the administrative law judge was not required to give Dr. Wiot's negative x-ray interpretations dispositive weight because of the physician's additional credentials. Employer contends that Dr. Wiot's negative x-ray readings are entitled to greatest weight because, in addition to his status as a B reader and Board-certified radiologist, Dr. Wiot is also "recognized as a C-reader, a designation assigned to only a few radiologists who have eminent familiarity with the ILO classification scheme," and Dr. Wiot is "internationally recognized in the field of radiology and is especially qualified for the interpretation of chest x-rays." Employer's Brief at 17.

The administrative law judge noted that while Dr. Wiot was a B reader and Board-certified radiologist,[6] who read two x-rays as negative, similarly qualified physicians read x-rays as positive and the most recent x-rays were read as positive by physicians who were both B readers and Board-certified radiologists. The administrative law judge was

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[6] 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 Co., Inc. of Va. 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.

not required to accord greater weight to Dr. Wiot because of his additional qualifications. *See Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Alley v. Riley Hall Coal Co.*, 6 BLR 1-376 (1983). Instead, the administrative law judge properly accorded greater weight to the majority of the positive readings by B readers and readers who were both B readers and Board-certified radiologists. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Additionally, the administrative law judge properly credited as positive, x-ray interpretations that were so classified under the ILO classification system. 20 C.F.R. §718.102(e); *see Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(J. Boggs, concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting). Contrary to employer's assertion, the administrative law judge was not required to further evaluate positive readings because they contained differing numerical classifications, *i.e.*, a 2/1 interpretation, rather than a 1/1 interpretation, or additional information not bearing on the positive classification, *i.e.*, a finding of emphysema in addition to the positive classification for pneumoconiosis. 20 C.F.R. §718.102(a), (b); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *see generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-55 (1988); *Alley*, 6 BLR at 1-377.

Lastly, we reject employer's assertion that the administrative law judge's consideration and crediting of x-ray evidence submitted in claimant's prior claims deprived employer of the ability to mount a defense. The regulation at 20 C.F.R. §725.309(d)(1) provides that:

> [a]ny evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

20 C.F.R. §725.309(d)(1).

While we recognize that, as employer argues, the evidentiary limitations at Section 725.414 preclude employer from submitting additional evidence in rebuttal of the previously submitted x-ray evidence, employer may have sought admission of such evidence under the "good cause exception" at 20 C.F.R. §725.456(b)(1). Moreover, notwithstanding its assertions that it was not necessary to respond to evidence in the previous claims because "all five prior claims were denied," Employer's Brief at 21, employer had the opportunity to develop such evidence, but chose not to do so. Thus, under the facts of this case, as employer had ample notice of the evidence claimant was submitting, and had an opportunity to rebut such evidence, the administrative law judge did not abuse his discretion, or deprive employer of due process, by considering the earlier x-ray evidence *See Hodges v. Bethenergy Mines Inc.*, 18 BLR 1-84 (1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192-3; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*); *see also Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991).

We therefore affirm the administrative law judge's determination that the x-ray evidence of record established the existence of simple pneumoconiosis pursuant to Section 718.202(a)(1).

20 C.F.R. §718.202(a)(4)

In challenging the administrative law judge's finding that pneumoconiosis was established pursuant to Section 718.202(a)(4), employer argues that the administrative law judge erred in rejecting the opinion of Dr. Jarboe, that claimant suffered from emphysema, but not pneumoconiosis. Employer contends that Dr. Jarboe's opinion should have been credited because the doctor thoroughly explained his conclusions. Employer also contends that the administrative law judge erred in "completely dismiss[ing]" Dr. Zaldivar's opinion, that claimant did not suffer from pneumoconiosis, because he found it based on an x-ray that was not part of the record when Dr. Zaldivar's opinion was based on other factors.

In finding that the medical opinion evidence supported a finding of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered all of the medical opinion evidence of record and found that Dr. Gaziano's medical opinion, diagnosing pneumoconiosis, was entitled to the greatest weight because it was the best reasoned opinion of record. The administrative law judge accorded less weight to the opinion of Dr. Jarboe, that claimant had emphysema, and not pneumoconiosis, because he found that Dr. Jarboe relied on x-ray and CT scan findings he found to be negative for pneumoconiosis and because he failed to explain why both pneumoconiosis and emphysema could not be present. The administrative law judge rejected Dr. Jarboe's opinion because he found the doctor's opinion, that claimant's x-ray and CT scan did not show pneumoconiosis, conflicted with readings of pneumoconiosis by highly-qualified B readers and Board-certified radiologists over a twenty-year period.

Regarding Dr. Zaldivar's opinion, the administrative law judge accorded it little weight because he found it based on an analysis of an x-ray reading that had been withdrawn by employer.

We reject employer's assertions pursuant to Section 718.202(a)(4). In finding that the medical opinion evidence established pneumoconiosis, the administrative law judge permissibly found the positive opinion of Dr. Gaziano to be entitled to the greatest weight, as it was supported by the weight of the x-ray evidence and Dr. Miller's CT scan. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark*, 12 BLR at 1-155. Contrary to employer's assertion, the administrative law judge properly found that Dr. Jarboe's opinion was entitled to less weight because Dr. Jarboe's findings, that pneumoconiosis was not established, based on his review of an x-ray and CT scan, were contradicted by the weight of the positive x-ray evidence spanning twenty years, and Dr. Miller's finding of pneumoconiosis on a 2006 CT scan. *See Compton*, 211 F.3d at 213, 22 BLR at 2-178; *Stiltner*, 86 F.3d at 343, 20 BLR at 2-259. Further, the administrative law judge reasonably accorded less weight to Dr. Jarboe's opinion because Dr. Jarboe did not sufficiently explain, in light of the evidence, why claimant could not have had pneumoconiosis in addition to emphysema. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003). Additionally, contrary to employer's assertion, we hold that the administrative law judge rationally accorded less weight to the opinion of Dr. Zaldivar as it was based primarily on an x-ray that was not part of the record and because the administrative law judge found that he could not differentiate the parts of Dr. Zaldivar's opinion that were based on the missing x-ray evidence from those that were not.[7] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*); *Brasher v. Pleasant View Mining Co., Inc.*, 23 BLR 1-141 (2006); *Harris*, 23 BLR at 1-109.

We, therefore, affirm the administrative law judge's determination that the medical opinion evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We further affirm the administrative law judge's determination that the weight of all of the relevant evidence, when considered together, supports a finding of pneumoconiosis pursuant to Section 718.202(a). *Compton*, 211 F.3d at 213, 22 BLR at 2-178.

[7] Employer acknowledges it withdrew the x-ray interpretation upon which Dr. Zaldivar relied.

20 C.F.R. §718.204(c)

Employer next challenges the administrative law judge's finding of disability causation pursuant to Section 718.204(c). Specifically, employer argues that the administrative law judge erred in according greater weight to the disability causation opinion of Dr. Gaziano rather than that of Dr. Jarboe, because it was better reasoned. Employer also asserts that the administrative law judge failed to consider evidence from claimant's prior claims that did not find claimant's pneumoconiosis to be totally disabling.

In finding disability causation established at Section 718.204(c), the administrative law judge credited the opinion of Dr. Gaziano, attributing claimant's total disability to both clinical and legal pneumoconiosis, for the same reasons he gave when the medical opinion evidence pursuant to Section 718.202(a)(4), *i.e.*, the opinion of Dr. Gaziano was "better reasoned and better supported." Decision and Order at 11.

The regulation at Section 718.204(c) states that a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause of disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii); *see Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Claimant must demonstrate that pneumoconiosis is a necessary condition of disability; it must play more than a *de minimis* role in claimant's disabling respiratory impairment. *See Gross* 23 BLR at 1-18.

Contrary to employer's contention, the administrative law judge properly found that Dr. Gaziano's opinion attributing claimant's disability to both clinical and legal pneumoconiosis entitled to greater weight as Dr. Gaziano's opinion was supported by evidence showing claimant had clinical and legal pneumoconiosis while Dr. Jarboe's contrary opinion was not supported. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-374 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Moreover, a physician need not specify relative degrees of causal contribution to a totally disabling lung impairment in order to establish that pneumoconiosis was a significant cause of total disability. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-351, 2-372-373 (4th Cir. 2006); *see also Gross* 23 BLR at 1-18.

Further, we reject employer's assertion that the administrative law judge erred in finding disability causation established because the evidence in the prior claims did not find claimant disabled from pneumoconiosis. The administrative law judge properly relied on the more recent evidence, which showed that claimant was disabled from pneumoconiosis. *See Underwood* 105 F.3d at 951, 21 BLR at 2-31-32; *see generally* 20 C.F.R. §725.309(d) (4); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988)

We, therefore, reject employer's assertions and affirm the administrative law judge's determination that claimant established disability causation pursuant to Section 718.204(c), as substantial evidence supports that determination. *See* 20 C.F.R. §718.204(c) (1)(i), (ii); *Robinson*, 914 F.2d at 40, 14 BLR at 2-76.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed.

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