BRB No. 07-0997 BLA

J.D.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/28/2008
RED BARON, INCORPORATED	)	
	)	
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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart and Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05123) of Administrative Law Judge Daniel F. Solomon 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).[1] The administrative law judge accepted the parties'

[1] Claimant filed his claim for benefits on December 19, 2005. Director's Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on June 26, 2006. Director's Exhibit 30. Employer requested a formal hearing, which was held on April 25, 2007. Thereafter, the administrative law judge issued a Decision and Order Denying Benefits on August 28, 2007, which is the subject of this appeal.

stipulation that claimant had twenty-eight years of coal mine employment but found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find that he suffers from both clinical and legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to respond to claimant's appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge erred in failing to find that he established the existence of clinical pneumoconiosis based on the x-ray evidence at Section 718.202(a)(1). We disagree. The administrative law judge considered eight readings of five x-rays dated March 14, 2006, May 24, 2006, June 30, 2006, September 15, 2006 and February 20, 2007. Decision and Order at 3, 8. The March 14, 2006 x-ray was interpreted by Dr. Rasmussen, a B reader, as positive for pneumoconiosis, and by Dr. Scott, a Board-certified radiologist and B reader (dually qualified radiologist) as negative for pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 5. There is one reading of the May 24, 2006 x-ray by Dr. Wheeler, a dually qualified radiologist, as negative for

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

pneumoconiosis. Employer's Exhibit 1. There is also one reading of the June 30, 2006 x-ray by Dr. Hippensteel, a B reader, as negative for pneumoconiosis. Employer's Exhibit 2. The September 15, 2006 x-ray has one positive reading by Dr. De Ponte, a dually qualified radiologist, and one negative reading by Dr. Scott. Claimant's Exhibit 4; Employer's Exhibit 15. Lastly, the February 20, 2007 x-ray has one positive reading by Dr. Rasmussen and one negative reading by Dr. Scott. Claimant's Exhibit 1; Employer's Exhibit 14.

In weighing the conflicting x-ray readings at Section 718.202(a)(1), the administrative law judge permissibly assigned greatest weight to the readings by the dually-qualified radiologists. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*). In so doing, the administrative law judge correctly found that none of claimant's individual x-rays was positive for pneumoconiosis.[4] Decision and Order at 8. The administrative law judge also properly found that of the eight readings by physicians who were either dually qualified radiologists or B readers, there were five positive and three negative readings for pneumoconiosis. *Id*. Because the administrative law judge examined the conflicting x-ray readings in light of both the quantity of evidence and the relevant qualifications of the x-ray readers, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-441, 21 BLR 2-269, 2-274 (4th Cir. 1997), and explained why he found the x-ray evidence to be insufficient to establish the existence of pneumoconiosis, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998), we affirm the administrative law judge's finding that claimant failed to meet his burden of proof pursuant to Section 718.202(a)(1).[5]

Claimant also challenges the administrative law judge's finding that he failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The record contains three medical opinions relevant to whether claimant has either clinical or legal

[4] Based on the administrative law judge's decision to credit the readings by dually qualified radiologists, the March 14, 2006, May 24, 2006 and February 20, 2007 x-rays are considered to be negative for pneumoconiosis, while the September 15, 2006 x-ray is in equipoise. Director's Exhibit 13; Claimant's Exhibits 1, 4; Employer's Exhibits 1, 15. The June 30, 2006 x-ray is also negative for pneumoconiosis as it has only one reading, which is a negative reading by a B reader. Employer's Exhibit 2.

[5] Claimant asserts that the administrative law judge erred in failing to weigh the x-ray readings included with his treatment records. Director's Exhibit 11. Because those x-rays do not include a diagnosis of pneumoconiosis, but were read as showing infectious pneumonia, pneumonitis, hypoxemia, and pleurisy, any error committed by the administrative law judge in failing to address the treatment x-rays at Section 718.202(a)(1) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

pneumoconiosis by Drs. Rasmussen, Dahhan and Hippensteel. The administrative law judge did not render any findings at Section 718.202(a)(4) as to whether claimant established the existence of clinical pneumoconiosis. Rather, the administrative law judge limited his analysis to whether claimant had proven the existence of legal pneumoconiosis. Although the administrative law judge acknowledged that Dr. Rasmussen read claimant's x-rays as positive for pneumoconiosis and opined that claimant had a disabling respiratory condition due to both smoking and coal dust exposure, the administrative law judge found that Dr. Rasmussen did not provide a "full discussion of legal as opposed to clinical pneumoconiosis." Decision and Order at 9. The administrative law judge further stated that "[t]here is noting in the report [of Dr. Rasmussen] that persuades me that coal mine dust exposure provided a basis for legal pneumoconiosis *given that I do not accept that Dr. Rasmussen's x-ray readings were dispositive*." *Id*. (emphasis added).

Claimant asserts that the administrative law judge erred in his characterization of Dr. Rasmussen's opinion. Claimant maintains that Dr. Rasmussen did not rely on his x-ray findings to diagnose legal pneumoconiosis. Claimant's Brief at 8. We agree.

Dr. Rasmussen conducted the Department of Labor evaluation on March 14, 2006 and also examined claimant on February 20, 2007. Director's Exhibit 13; Claimant's Exhibit 1. Dr. Rasmussen specifically reported that his diagnosis of clinical pneumoconiosis was based on claimant's length of coal mine employment and his own positive reading of claimant's chest x-rays, taken in conjunction with both examinations. Director's Exhibit 13. Dr. Rasmussen also diagnosed legal pneumoconiosis in the form of emphysema and interstitial fibrosis, which he attributed to both coal dust exposure and smoking. *Id*. In support of his diagnosis of legal pneumoconiosis, Dr. Rasmussen cited to claimant's reduction in diffusion capacity during pulmonary function testing and impairment in oxygen transfer during arterial blood gas testing. *Id*. Dr. Rasmussen explained that he was unable to differentiate between the effects of smoking and coal dust exposure because they cause identical forms of emphysema and airway obstruction as demonstrated by the objective evidence in this case.[6] Director's Exhibit 13; Claimant's Exhibit 1.

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[6] Dr. Rasmussen also explained:

> Coal mine dust also causes interstitial fibrosis, which usually accompanies the emphysema and is felt by some authorities to result in significant impairment in oxygen transfer during exercise absent or in excess of ventilatory impairment. A pattern seen commonly in impaired coal miners and which is clearly observed in [claimant].

Claimant's Exhibit 1.

Based on our review of Dr. Rasmussen's opinion, we conclude that Dr. Rasmussen clearly delineated the bases for his diagnoses of both clinical pneumoconiosis and legal pneumoconiosis. Thus, we are unable to affirm, as supported by substantial evidence, the administrative law judge's decision to reject Dr. Rasmussen's opinion at Section 718.202(a)(4) on the ground that the doctor failed to fully discuss the issue of legal versus clinical pneumoconiosis.

Furthermore, we agree with claimant that the administrative law judge erred in rejecting Dr. Rasmussen's opinion at Section 718.202(a)(4) because he did "not accept that Dr. Rasmussen's [positive] x-rays [were] dispositive" for pneumoconiosis. Decision and Order at 9. The absence of x-ray evidence for clinical pneumoconiosis does not preclude a finding of legal pneumoconiosis, which, by definition, encompasses a larger class of respiratory diseases that are due, in part, to coal dust exposure. *See* 20 C.F.R. §718.201. Thus, insofar as the administrative law judge has not give proper consideration to Dr. Rasmussen's opinion at Section 718.202(a)(4), we vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis.

We note that the administrative law judge did not render any findings as to the weight he accorded the opinions of Drs. Dahhan and Hippensteel, that claimant does not have either clinical or legal pneumoconiosis. On remand, the administrative law judge must resolve the conflict in the medical opinion evidence between Drs. Hippensteel, Dahhan and Rasmussen as to whether claimant has either clinical or legal pneumoconiosis (emphysema and interstitial fibrosis due to coal dust exposure).[7] *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.[8] In resolving the conflict in the evidence, the administrative law judge is instructed to set forth the basis for his findings, and the rationale underlying his conclusions, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33

[7] There is a conflict in the medical record as to whether Dr. Rasmussen accurately diagnosed hypoxemia, which he identified as a basis for his finding of legal pneumoconiosis. Although the administrative law judge noted that Drs. Dahhan and Hippensteel had "challenge[d] the findings [of Dr. Rasmussen] as to [the presence of] hypoxemia [based on] the altitude differentials at the site of Dr. Rasmussen's two examinations" the administrative law judge did not address whose opinion he found to be more credible on this issue. Decision and Order at 9.

[8] The administrative law judge should also address on remand whether the treatment records, which include x-ray readings for chronic obstructive pulmonary disease and interstitial fibrosis, support Dr. Rasmussen's opinion that the miner has legal pneumoconiosis in the form of interstitial fibrosis and emphysema due to coal dust exposure at Section 718.202(a)(4). Director's Exhibit 13.

U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). If the administrative law judge finds that claimant established the existence of pneumoconiosis at Section 718.202(a)(4), he must further consider whether claimant has satisfied his burden to establish, based on all of the evidence, that he has pneumoconiosis. *Island Creek Coal Co. v Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000). If claimant is found to have pneumoconiosis, the administrative law judge must then consider whether claimant has established the remaining elements of entitlement. 20 C.F.R. §§718.203, 204(b), (c); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-382-3 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded for 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