BRB No. 98-1166 BLA

ROBERT E. MASSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 8/4/99
	)	
PEABODY COAL COMPANY	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Perry D. McDaniel (Crandall, Pyles, Haviland & Turner, LLP), Charleston, West Virginia, for claimant.

Terri L. Bowman (Arter & Hadden, L.L.P.), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-BLA-0853) of Administrative Law Judge Richard A. Morgan 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 found that claimant established the existence of pneumoconiosis arising

[1]This claim was filed on May 7, 1996. Director's Exhibit 1.

out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(c) and (b). Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings under Sections 718.202(a)(1), (a)(4), 718.204(c)(4), and 718.204(b).[2] In response, claimant argues that the administrative law judge's decision and order awarding benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal. Employer subsequently filed a reply brief reiterating its challenge to the administrative law judge's findings under Sections 718.202(a)(1), (a) (4), 718.204(c)(4) and 718.204(b).

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(c)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Under Section 718.202(a)(1), the administrative law judge found that because the three most recent x-rays, taken on July 8, 1996, November 27, 1996 and November 21, 1997, were positive for pneumoconiosis, and considering the credentials of the physicians, the preponderance of the evidence establishes the existence of pneumoconiosis.[3] Decision and Order Awarding Benefits at 16; Director's Exhibits 11-15; Claimant's Exhibits 3, 5; Employer's Exhibits 1, 2, 6. The administrative law judge found that although the negative interpretation by Dr. Francke, a Board-certified radiologist and B reader, of the x-ray taken on July 8, 1996 was entitled to the most weight, the x-ray was also read as positive for pneumoconiosis by Dr. Patel, a Board-certified radiologist, and by two B readers, Drs. Gaziano and Ranavaya. Decision and Order Awarding Benefits at 16; Director's Exhibits 11-15. Employer correctly argues, however, that the administrative law judge did not consider the negative interpretation of Dr. Zaldivar, a B reader, Employer's Exhibit 1, in finding that the preponderance of the evidence "suggests" that the x-ray taken on July 8, 1996 is positive for pneumoconiosis. Decision and Order Awarding Benefits at 16. Similarly, the administrative law judge did not consider the negative interpretations by Dr. Fino, Employer's Exhibit 5, in determining that the x-rays taken on November 27, 1996 and November 21, 1997 are positive for pneumoconiosis. In addition, the administrative law judge relied upon his defective evaluation of the x-ray taken on July 8, 1996 in finding the x-ray taken on November 27, 1996 positive for pneumoconiosis. Decision and Order Awarding Benefits at 16.

Inasmuch as the administrative law judge did not consider all of the relevant x-ray evidence of record, we vacate his finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(1). *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must consider all of the x-ray evidence and the physicians' respective qualifications in determining whether claimant has established the existence of

[3]Because the administrative law judge found the x-rays taken on May 14, 1991, May 31, 1995 and July 21, 1995 negative for the existence of pneumoconiosis, and the parties did not contest these findings, the administrative law judge's error in not considering Dr. Fino's negative interpretation, Employer's Exhibit 5, with respect to these x-rays is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Employer's allegation that the administrative law judge did not consider Dr. Rasmussen positive interpretation for pneumoconiosis of the x-ray taken on July 8, 1996 has no merit because Dr. Rasmussen did not interpret the x-ray; Dr. Rasmussen used Dr. Patel's interpretation to support his finding of pneumoconiosis in his medical report. Director's Exhibit 8.

pneumoconiosis by a preponderance of the x-ray evidence. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992)*; see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir.1997). In weighing the x-ray evidence, the CT scans are not to be considered at Section 718.202(a)(1), but must be evaluated under Section 718.202(a)(4), together with any evidence or testimony which bears on the reliability and utility of CT scans. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc).*

Under Section 718.202(a)(4), based on Dr. Alexander's dual qualifications as a Board-certified radiologist and B reader, the administrative law judge found his positive interpretation of an x-ray and a CT scan most probative in establishing the existence of pneumoconiosis. Decision and Order Awarding Benefits at 17. Employer correctly argues that the administrative law judge ignored the numerous negative interpretations of the CT scans of record, particularly of the CT scan taken on July 21, 1995 that was interpreted as positive for pneumoconiosis by Dr. Alexander, and negative by Drs. Scott and Wheeler, both dually qualified as Board-certified radiologists and B readers and by Drs. Fino and Renn, who are B readers. Employer's Exhibit 2-5. In addition, Dr. Renn in his report makes reference to two CT scans taken on November 28, 1995 and July 1, 1996 that were interpreted as negative for pneumoconiosis by Drs. Bassali and Kim. Employer's Exhibit 4. In view of the fact that the administrative law judge did not explain why Dr. Alexander's positive interpretation is more probative, despite the numerous other negative interpretations of record, including two interpretations by physicians with similar qualifications, we vacate his finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4). *Tackett, supra.* If, on remand, the administrative law judge finds the x-ray evidence under Section 718.202(a)(1) insufficient to establish the existence of pneumoconiosis, then he must consider all of the medical opinion evidence and CT scan interpretations of record to determine whether the existence of pneumoconiosis is established under Section 718.202(a)(4). *Melnick, supra.*

Employer next argues that the administrative law judge only found that claimant is unable to return to his coal mine employment, instead of determining whether claimant is totally disabled by a respiratory impairment under Section 718.204(c). In addition, employer argues that the administrative law judge applied a lower standard of proof by citing *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988), for the proposition that "once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party

opposing entitlement." Decision and Order Awarding Benefits at 18. Finally, employer argues that the administrative law judge did not discuss under Section 718.204(c)(4) on what basis he concluded that claimant's coal mine employment required heavy manual labor and did not discuss whether the physicians that opined that claimant was not able to return to his last coal mine employment knew the exertional requirements of that employment.

Employer's arguments have no merit. The administrative law judge rationally determined, based upon claimant's hearing testimony, that claimant's usual coal mine work was as a belt foreman and that such work constituted heavy manual labor, as claimant was required to shovel coal, hang curtains, and walk approximately three and one-half miles at the end of each shift. Decision and Order Awarding Benefits at 3, 19; Hearing Transcript at 17-18; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge noted correctly that all of the physicians who offered an opinion relevant to the issue of total disability concluded that claimant is unable to perform his usual coal mine employment of record. Decision and Order Awarding Benefits at 19; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 4. The administrative law judge also indicated correctly that each of these physicians - Drs. Renn, Fino, Rasmussen, and Zaldivar - included information concerning the nature of claimant's usual coal mine work in their respective medical reports. *Id.* The administrative law judge properly found, therefore, that claimant established that he is suffering from a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). Decision and Order Awarding Benefits at 19, 20; Claimant's Exhibit 1; Employer's Exhibit 1, 3,4.[4] Further, after determining that claimant did not establish total disability under Section 718.204(c)(1)-(3), the administrative law judge within, a proper exercise of his discretion, gave greatest weight to the medical opinions because they are based on physical examinations and a review of claimant's medical records, including pulmonary function studies and arterial blood gas studies. Decision and Order at 19-20; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987).

Under Section 718.204(b), employer argues that the evidence establishes that claimant's total disability is due to colon cancer and knee problems, conditions which are not compensable under the Act. Employer asserts specifically that the administrative law judge erred in rejecting the opinions of

[4]All the doctors, except Dr. Rasmussen, agreed that claimant's disabling respiratory impairment was not related to coal mine dust exposure.

Drs. Zaldivar, Fino, and Renn, that claimant's total disability was not due to pneumoconiosis, because they did not diagnose pneumoconiosis. We agree. The administrative law judge accorded little weight to the opinions of Drs. Zaldivar, Renn and Fino because they did not find that claimant suffered from pneumoconiosis. Decision and Order Awarding Benefits at 21. The administrative law judge overlooked the fact that both Drs. Fino and Renn determined that, even assuming that claimant suffered from pneumoconiosis, there would be no impairment from it. Employer's Exhibit 3, 4. Moreover, because Drs. Zaldivar, Fino and Renn acknowledged claimant's disabling respiratory impairment, but nevertheless concluded that it was caused by smoking, their opinions directly rebut claimant's evidence that pneumoconiosis contributed to his disability. *See Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Dehue Coal Co. v. Ballard,* 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Therefore, if , on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis, he must then reweigh the evidence regarding disability causation under Section 718.204(b) and make findings consistent with controlling circuit court case law. *See Hicks*; *supra*; *Ballard*, *supra*; *Hobbs*, *supra*; *see also Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge