BRB No. 98 - 1449 BLA

WILLIAM R. SHADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (97-BLA-0859) of Administrative Law Judge Ainsworth H. Brown 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). Accepting the stipulation of at least ten years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, the administrative law judge denied benefits.

[1] Claimant is William R. Shade, the miner, who filed a claim with the Department of Labor (DOL) on September 23, 1996. Director's Exhibit 1.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1). Claimant asserts that the administrative law judge erred by failing to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Claimant also challenges the administrative law judge's determination that the evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), contending that the medical opinion evidence of record establishes the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), in response, has filed a motion to remand, wherein he argues that the administrative law judge failed to properly weigh the evidence at Sections 718.202(a)(1) and (a)(4), and he urges that the case be remanded.[2]

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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Initially, claimant contends that the administrative law judge erred when he found that the evidence fails to establish the existence of pneumoconiosis pursuant to Section

[2] Inasmuch as no party challenges the administrative law judge's findings that claimant established at least ten years of qualifying coal mine employment, that there was no evidence establishing entitlement under Section 718.202(a)(2), (3), and that the Director is the party responsible for any benefits that claimant is found entitled to are unchallenged on appeal, they are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.202(a)(1). Claimant asserts that the administrative law judge abrogated his duty to weigh the conflicting evidence when he found the evidence equally probative and in equipoise, and thus, determined that claimant had failed to carry his burden. The Director agrees with claimant's position, and argues that, contrary to the administrative law judge's finding, the x-ray evidence is not equally probative and in equipoise. Rather, the Director contends that the administrative law judge did not adequately consider the differences in the readers' qualifications in weighing the x-ray evidence, and asserts that the case must be remanded for the administrative law judge to consider and account for these differences. Further, the Director contends that the administrative law judge erred in finding Dr. Lippman's July 30, 1997 interpretation positive when it was classified unreadable.

Claimant has not carried his burden and may not be awarded benefits where the administrative law judge finds the evidence equally probative and in equipoise, *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In the instant case, however, the administrative law judge made no effort to resolve the conflict in the evidence. Further, as the Director contends, the positive and negative x-ray interpretations are not evenly divided between readers with the same credentials as the administrative law judge found, *see* Director's Exhibits 14, 15, 16, 25, 26, 37, 38, 40, 41; Claimant's Exhibits 4, 7, 10, 11, 12, and as the Director also correctly notes, the administrative law judge mischaracterized Dr. Lippman's interpretation dated July 30, 1997 by finding that it was positive, when in fact, Dr. Lippman found the x-ray to be unreadable. Director's Exhibit 41; Decision and Order at 4.[3] We vacate, therefore, the administrative law judge's finding that the x-ray evidence fails to establish to establish the existence of pneumoconiosis at Section 718.202(a)(1), and remand the case to him in order to comply with the instructions as set forth above. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[3] Claimant indicates that this administrative law judge has a practice of limiting each party to three x-ray readings and asserts that this practice is violative of due process. We decline to address this contention and hold that since the administrative law judge did not adhere to this practice in the instant case, this argument is not germane to this appeal. *See generally Warman v. Pittsburg and Midway Coal Co.*, 8 BLR 1-390 (1985); *Rematta v. Director, OWCP*, 8 BLR 1-214 (1985).

Turning to the administrative law judge's evaluation of the evidence at Section 718.202(a)(4), in considering the physicians' opinions, claimant and the Director contend that the administrative law judge impermissibly substituted his own expertise for that of the physicians of record and selectively analyzed the physicians' opinions when he concluded that the results of pulmonary function studies performed by Dr. Kraynak in November 1997, which were not reviewed by other physicians, must be invalid and affected the credibility of Dr. Kraynak's November 1997 deposition testimony because Drs. Ranavaya and Spagnolo had found that the results of pulmonary function studies performed by Dr. Kraynak in October 1996 and July and August 1997 were invalid, *see* Decision and Order at 5. Decision and Order at 6. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). We agree. On remand, therefore the administrative law judge must reconsider the credibility of the medical opinion evidence, must base his findings only upon evidence which is of record, and may not substitute his own expertise or selectively analyze the evidence.

Next, as claimant correctly indicates, the administrative law judge erred when he discounted Dr. Kraynak's opinion, in part, because he found a discrepancy between his deposition testimony and his written report. Dr. Kraynak noted in his written report that claimant had "normal color" in his extremities and not simply "normal color" as the administrative law judge states. Decision and Order at 6. Thus, we agree with claimant that Dr. Kraynak's testimony at deposition that claimant's lips were cyanotic and his written report noting normal color of the extremities is not on its face inconsistent. *See Justice, supra*. Finally, with respect to claimant's contention that Dr. Kraynak's opinion should be accorded greater weight because he was claimant's treating physician, as the Director correctly points out, there is no requirement that a treating physician's opinion be credited solely on the basis of his being the treating physician, *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Schaaf v. Mathews*, 574 F.2d 157 (3d Cir. 1978); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The length of time a physician has treated claimant and his familiarity with claimant's condition are, however, factors relevant to determining the credibility of a physician's opinion, as claimant contends. *Revnak v. Director, OWCP*, 7 BLR 1-771 (1985). On remand, therefore, these are factors along with the thoroughness of the reports, *Hall v. Director, OWCP*, 8 BLR 1-193 (1985), that must be considered in assessing the credibility of the medical opinions. Thus, because of the administrative law judge's selective analysis and mischaracterization of the evidence and its effect on his consideration of the evidence as a whole, this case must be remanded for reconsideration of the x-ray evidence and the physicians' opinions pursuant to Section 718.202(a). *Penn Allegheny Coal Co. v. Williams*, 111 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

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