BRB No 00-0168 BLA

ROBERT JACKSON BROWN	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	
PEABODY COAL COMPANY	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Fairmont, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (99-BLA-0629) of Administrative Law Judge Daniel F. Sutton 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 accepted the parties' stipulation to "at least" thirteen years of coal mine employment, Decision and Order at 3, and found that the medical evidence established that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence pursuant to Sections 718.202(a) and 718.204. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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 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 (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).

Pursuant to Section 718.202(a)(1), the administrative law judge considered ten of the thirteen readings of four chest x-rays. The March 8, 1992 x-ray was read by Dr. Daniels as indicating arteriosclerotic vascular disease, but Dr. Daniels did not classify the x-ray for the presence or absence of pneumoconiosis. Employer's Exhibit 3. The March 9, 1998 x-ray was classified as "1/0" for pneumoconiosis by Dr. Patel, a Board-certified radiologist and B-reader (BCR/B), and as completely negative by Drs. McFarland and Sargent, also BCR/B-readers. Director's Exhibits 12-14. The October 14, 1998 x-ray was read as completely negative by Dr. Zaldivar, a B-reader, and also by Drs. Wheeler and Scott, BCR/B-readers. Director's Exhibit 23; Employer's Exhibit 1. Finally, the March 8, 1999 x-ray was read as "1/2" for pneumoconiosis by B-readers Drs. Pathak, Aycoth, and Miller, and as completely negative by BCR/B-readers Drs. Gayler, Scott, and Wheeler. Claimant's Exhibit 1; Employer's Exhibit 4.

In finding that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge accorded "greatest weight" to what he found were the "unanimously positive interpretations of the March 8, 1999 x-ray . . . ." Decision and Order at 7. The administrative law judge reasoned that uncontradicted positive readings of claimant's most recent x-ray would be consistent with the progressive nature of pneumoconiosis. *Id.*; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Employer correctly notes that in so doing, however, the administrative law judge overlooked the three negative readings of the most recent x-ray, which were proffered and received into evidence at the hearing. Employer's Brief at 10; Tr. at 6. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand the case for him to weigh all of the x-ray readings in light of the readers' radiological credentials to determine whether the weight of the x-ray evidence supports a finding of the existence of pneumoconiosis. *Adkins, supra*.

Subsequent to the issuance of the administrative law judge's Decision and Order Awarding Benefits, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the administrative law judge must weigh together all types of evidence to determine whether the existence of pneumoconiosis is established pursuant to Section 718.202(a).

Island Creek Coal Co. v. Compton, 211 F.3d 203, BLR (4th Cir. 2000). Here, the administrative law judge weighed the x-ray readings with the medical opinions pursuant to Section 718.202(a)(4) when he accorded less weight to Dr. Zaldivar's opinion that claimant does not have pneumoconiosis because Zaldivar "assum[ed] that the x-ray evidence is negative for pneumoconiosis which, as I have determined above, is contrary to the weight of evidence under Section 718.202(a)(1)." Decision and Order at 11. Because we have vacated the administrative law judge's finding regarding the weight of the x-ray evidence pursuant to Section 718.202(a)(1), we also vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for him to weigh together all of the relevant evidence in light of *Compton* after he has considered all of the x-ray readings. In weighing the medical opinions, the administrative law judge must carefully assess their comparative quality in terms of documentation and reasoning. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Pursuant to Section 718.204(c), employer contends that the administrative law judge made several errors in finding that claimant is totally disabled. Claimant was examined and tested by Dr. Rasmussen on March 9, 1998. Director's Exhibit 9. The pulmonary function study administered by Dr. Rasmussen yielded non-qualifying values which Dr. Rasmussen interpreted as indicating a slight obstructive ventilatory impairment. According to Dr. Rasmussen, claimant's single breath carbon monoxide diffusing capacity was also moderately reduced. Dr. Rasmussen administered a resting and exercise blood gas study. Dr. Rasmussen reported that claimant's resting blood gases revealed minimal hypoxia, and that with exercise, claimant's oxygen transfer was markedly impaired. The values on this test were non-qualifying at rest, and qualifying with exercise. Dr. Rasmussen concluded that claimant's reduced diffusing capacity and his oxygen transfer impairment on exercise reflected a moderately severe loss of respiratory function that prevented claimant from performing the heavy manual labor required by his job as a roof bolter.

Seven months later, claimant was examined and tested by Dr. Zaldivar. Director's Exhibit 23. The pulmonary function study administered by Dr. Zaldivar yielded non-qualifying values which Dr. Zaldivar interpreted as indicating a mild obstruction. Dr. Zaldivar reported that the diffusing capacity test he administered was invalid because of claimant's high level of carboxyhemoglobin. Dr. Zaldivar also administered a resting and exercise blood gas study. Dr.

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[1] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[2] Dr. Rasmussen noted that claimant's job required him to work in low coal, to carry roof bolt bundles, to install 100 bolts per day, to bend the bolts (exerting the equivalent of lifting 100 pounds), to carry 50-pound bags of rock dust, and to do clean-up shoveling. Dr. Rasmussen viewed these tasks as "considerable heavy manual labor." Director's Exhibit 9.

Zaldivar reported that when exercised, claimant experienced a mild drop in blood oxygenation. Both the resting and exercise values on this test were non-qualifying. Dr. Zaldivar concluded that claimant's mild obstruction and mild drop of oxygenation during exercise reflected a mild abnormality which was not sufficient to prevent claimant from performing his usual coal mine work.

Dr. Rasmussen reviewed Dr. Zaldivar's examination report and test data. Claimant's Exhibit 4. Dr. Rasmussen concluded that Dr. Zaldivar's exercise blood gas exchange value was abnormal and reflected an oxygen transfer impairment sufficient to prevent claimant from performing the heavy manual labor required by his job as a roof bolter.

Dr. Fino reviewed the medical evidence of record and concluded that claimant is not totally disabled. Employer's Exhibits 2, 6. Dr. Fino noted that Dr. Rasmussen's blood gas study revealed resting hypoxia and a "significant decrease in the blood oxygen level with exercise." Employer's Exhibit 6 at 9. Dr. Fino concluded that such a decrease "would make it difficult for someone to perform sustained heavy manual labor." *Id*. Dr. Fino noted, however, that Dr. Zaldivar's later test revealed only a mild drop in blood oxygenation which did not reflect "any impairment in oxygen transfer that would prevent labor . . . ." Employer's Exhibit 6 at 12. Dr. Fino concluded that overall, claimant had a mild, non-disabling respiratory impairment. In pronouncing claimant non-disabled, Dr. Fino stated that he took into account the exertional requirements reported by Drs. Rasmussen and Zaldivar.

The administrative law judge found initially that the pulmonary function and blood gas studies were "inconclusive and insufficient, standing alone, to establish total disability. . . ." Decision and Order at 14. Turning to the medical reports, the administrative law judge found that Dr. Rasmussen specifically discussed claimant's respiratory impairment in terms of his ability to perform his usual coal mine work as a roof bolter. The administrative law judge found that, by contrast, Drs. Zaldivar and Fino "paid lip service" to claimant's exertional requirements but did not specifically discuss his ability to meet his job demands. Decision and Order at 15. The administrative law judge also discounted Dr. Fino's non-disability opinion because he found that Dr. Fino gave undue weight to the highest results from claimant's blood gas studies. The administrative law judge additionally found that even if only Dr. Zaldivar's non-qualifying blood gas study were

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[3] Dr. Zaldivar noted that claimant's job required him to carry 25 to 30-pound bundles of roof bolts, which was more difficult when there was a low top. He also recorded that claimant was sometimes required to perform other tasks, such as dragging a cable or operating equipment. Director's Exhibit 23. Dr. Zaldivar also reviewed Dr. Rasmussen's description of claimant's work history.

accepted, its decreased exercise values did not support Dr. Fino's opinion that claimant is not disabled, in view of claimant's need to perform heavy labor. Consequently, the administrative law judge found that Dr. Rasmussen's opinion regarding the severity of claimant's impairment was better reasoned, and "outweigh[ed] the contrary opinions from Drs. Zaldivar and Fino." Decision and Order at 16.

Employer contends that because Drs. Zaldivar and Fino considered claimant's job requirements as a roof bolter, the administrative law judge erred in according less weight to their opinions that claimant is not disabled. Employer's Brief at 18-19. Based upon our review of the administrative law judge's analysis, we hold that he permissibly accorded their opinions less weight for not discussing claimant's job requirements as thoroughly as did Dr. Rasmussen. *See Hicks, supra*; *Akers, supra*. Dr. Rasmussen characterized claimant's various job duties as requiring heavy labor, and gave the example that claimant's job required "heavy arm work, bending roof bolts which is equivalent to lifting about 100 pounds," and which would require more oxygen than claimant's exercise blood gas studies show that he is able to obtain. Claimant's Exhibit 4. By contrast, Dr. Fino stated that he simply reviewed claimant's job duties in opining that claimant's mild impairment is not disabling. Employer's Exhibit 6 at 16. Similarly, Dr. Zaldivar used general terms, stating that claimant's mild impairment was not sufficient to prevent "arduous labor," or "his usual coal mining work." Director's Exhibit 23. The administrative law judge's insistence on a more detailed relation of claimant's specific job duties to his impairment is consistent with law. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997)("[I]nformation regarding the miner's exertional work requirements mandates careful consideration . . . where the physician must determine whether an impairment of a certain degree prevents the miner from performing his usual coal mine work."); *Walker v. Director, OWCP*, 927 F.2d 181, 184, 15 BLR 2-16, 2-22 (4th Cir. 1991)("[A]t a minimum, a physician asserting that his or her patient is physically able to perform assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment."). Consequently, we reject employer's allegation of error.

Employer argues further that the administrative law judge substituted his judgment for that of Dr. Fino when he faulted Dr. Fino for relying heavily on claimant's highest blood gas study scores. Employer's Brief at 21. In assessing Dr. Fino's reliance on claimant's more recent, non-qualifying blood gas study, the administrative law judge cited *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991), and noted that therein, the Fourth Circuit court questioned the practice of ascribing greatest weight to the highest results among valid studies. The court's rationale in *Greer*

was that because pneumoconiosis is a chronic condition, one's functional ability may vary, and thus could measure higher on any given day than its typical level.

Although *Greer* dealt with pulmonary function studies, employer presents no convincing reason why the same rationale, based on the chronic nature of pneumoconiosis, would not apply to the evaluation of exercise blood gas studies. Here, only seven months separated the two valid blood gas tests. Dr. Fino recognized a blood oxygen drop in the first test that was sufficiently significant to cause difficulty in performing heavy manual labor, but he relied on the second, higher blood gas study to conclude that claimant's impairment was only mild, and therefore non-disabling. Under these circumstances, the administrative law judge acted within his discretion in questioning Dr. Fino's reliance on the higher blood gas study value to conclude that claimant was not disabled. *Greer, supra*; *see also Thorn v. Itmann Coal Co*., 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993).

Employer asserts that the administrative law judge also engaged in medical reasoning when he found that Dr. Zaldivar's exercise blood gas study values did not support Dr. Fino's conclusion that claimant is not disabled by his mild impairment. Employer's Brief at 21. Contrary to employer's contention, the administrative law judge reasonably considered that claimant's job required heavy labor, and that Dr. Zaldivar's exercise blood gas study values, although non-qualifying, dropped to a near-qualifying level. Director's Exhibit 23; 20 C.F.R. Part 718, App. C; *see Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.,* 9 BLR 1-104 (1986)(*en banc*); *Hicks, supra*; *Akers, supra.* Finding no error in the administrative law judge's analysis, we reject employer's contention and affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

Employer contends that the administrative law judge did not adequately weigh the pulmonary function and blood gas studies against the medical opinions to determine whether

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[4] Dr. Fino was assessing claimant's objective studies under the assumption that claimant's x-rays indicated the presence of pneumoconiosis.

[5] Because we affirm the administrative law judge's analysis of total disability on these grounds, we find it unnecessary to address employer's argument that a disagreement between Dr. Rasmussen and Dr. Zaldivar regarding the calculation of claimant's anaerobic threshold value should have affected the administrative law judge's weighing of the evidence. Employer's Brief at 17-18.

claimant is totally disabled. *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11, 1-14 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). This contention lacks merit. The objective studies, particularly the exercise blood gas studies, were at the heart of the physicians' competing assessments of claimant's respiratory or pulmonary capacity for his work as a roof bolter. As just discussed, the administrative law judge thoroughly analyzed those assessments in light of the test results. Additionally, the administrative law judge found that the medical opinion evidence establishing total disability was "not outweighed by any contrary evidence of greater probative value." Decision and Order at 16. This conclusion is consistent with the administrative law judge's earlier finding that the pulmonary function and blood gas studies were inconclusive standing alone. Therefore, we hold that the administrative law judge adequately weighed the contrary probative evidence pursuant to Section 718.204(c). *See Beatty, supra*; *Shedlock, supra*.

Pursuant to Section 718.204(b), employer challenges the administrative law judge's determination to accord little weight to the disability causation opinion of examining physician Dr. Zaldivar because he did not diagnose pneumoconiosis. Decision and Order at 16; Employer's Brief at 17. As noted above, the administrative law judge's finding that the existence of pneumoconiosis was established was not based upon a consideration of all relevant evidence. Additionally, where a physician acknowledges that a claimant has a respiratory or pulmonary impairment, but explains that an ailment other than pneumoconiosis caused the impairment, the physician's opinion is relevant to disability causation and should not be discounted merely because the physician did not diagnose pneumoconiosis. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193-94, 19 BLR 2-304, 2-315-16 (4th Cir. 1995). Here, Dr. Zaldivar concluded that claimant has a respiratory impairment, and explained why he believes that claimant's impairment is unrelated to pneumoconiosis, but is instead related to the effects of smoking. In view of the erroneous reason the administrative law judge provided for according this opinion little weight, and because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a), we vacate the administrative law judge's finding pursuant to Section 718.204(b) and remand the case for him to reweigh the medical opinions in light of *Ballard*, and also *Hicks* and *Akers*, to determine whether pneumoconiosis is at least a contributing cause of claimant's totally disabling respiratory impairment. *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990).

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[6] Dr. Fino diagnosed pneumoconiosis by x-ray, but similarly concluded that claimant's respiratory impairment is due to smoking. Employer's Exhibits 2, 6.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge