BRB No. 00-0210 BLA

ROBERT L. SPIVEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

Richard Davis and Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Edward Waldman (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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0749) of Administrative

Law Judge Linda S. Chapman awarding benefits on a duplicate 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 thirty years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), she found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge also found the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Further, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(4). Lastly, employer challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), also responds, contending that the Board need not consider employer's assertion that the June 18, 1998 pulmonary function study does not qualify under the Department of Labor regulations. Employer filed a brief in reply to the Director's

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[1]Claimant's initial claim was filed on May 13, 1991. Director's Exhibit 34. This claim was denied by the Department of Labor on October 16, 1991. *Id*. The bases of the Department of Labor's denial were claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. Claimant's most recent claim was filed on April 14, 1998. Director's Exhibit 1.

[2]Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[3]The Director, Office of Workers' Compensation Programs (the Director), asserts that since employer did not raise its argument below, that the June 18, 1998 pulmonary function study does not qualify under the Department of Labor regulations

response brief, reiterating its prior contention with regard to this issue.

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).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 34. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309, the newly submitted evidence must support a finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(c).

Employer contends that the administrative law judge erred in finding the newly submitted evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Drs. Baker, Kiser and Younes opined that claimant suffers from coal workers' pneumoconiosis, Director's Exhibits 9, 20, 30; Claimant's Exhibits 1-3, Drs. Branscomb, Broudy, Chandler, Fino and Wheeler opined that claimant does not suffer from coal workers' pneumoconiosis, Director's Exhibits 29, 31; Employer's Exhibits 1, 2, 9, 10. The administrative law judge permissibly discredited the opinion of Dr. Younes because he found it to be

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since claimant was seventy-three years old when he took the test and Appendix B of Part 718 only provides criteria for miners up to seventy-one years of age, this assertion is not properly before the Board on appeal. Alternatively, the Director asserts that the Board need not resolve this issue to dispose of the case.

[4]Inasmuch as the administrative law judge's length of coal mine employment finding and her findings pursuant to 20 C.F.R. §718.202(a)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

not well reasoned. *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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also permissibly discredited the opinions of Drs. Broudy, Chandler and Wheeler because he found the doctors' opinions that claimant does not suffer from pneumoconiosis to be restatements of x-ray readings. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see generally Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Thus, we reject employer's assertion that the administrative law judge erred by discrediting the opinions of Drs. Broudy, Chandler and Wheeler.

Employer further asserts that the administrative law judge erred in relying

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[5]The administrative law judge observed that "[a]lthough [Dr. Younes] concludes that the [c]laimant has pneumoconiosis based on the x-rays and pulmonary function study test results which show a restrictive impairment, as well as his 42 year exposure to coal dust, he does not indicate which x-rays or pulmonary function studies he relied on." Decision and Order at 20. The administrative law judge also observed that "the results of one recent valid pulmonary function study, on June 18, 1998, show that the [c]laimant has an obstructive defect." *Id*.

[6]The administrative law judge stated, "as I have already found that the x-ray evidence is insufficient, by itself, to establish the existence of pneumoconiosis, Dr. Broudy's opinion, which appears to rely *solely* on his interpretation of the x-ray evidence, does not offer much assistance on the issue of whether the [c]laimant has established the existence of pneumoconiosis by medical opinion evidence." Decision and Order at 19 (emphasis added). In a report dated May 28, 1998, Dr. Broudy stated that "[t]he evidence does not indicate that [claimant] had coal workers' pneumoconiosis." Employer's Exhibit 9. Dr. Broudy observed that "[a]lthough there were some positive interpretations, there were numerous negative interpretations of multiple films by well-qualified B readers." *Id*. Further, the administrative law judge stated that "Dr. Chandler's opinion appears to be based *solely* on his assessment of the x-ray evidence, which is not helpful, as I have already determined that the x-ray evidence alone does not establish the existence of pneumoconiosis." Decision and Order at 18 (emphasis added). In addition, the administrative law judge stated that "Dr. Wheeler's testimony is not particularly helpful in determining whether the [c]laimant has established the existence of pneumoconiosis by means other than x-ray evidence." Decision and Order at 19. The administrative law judge observed that although "Dr. Wheeler discussed his credentials and experience, and his general knowledge of pneumoconiosis and its appearance on x-rays..., he did not relate any of his experience or knowledge to the [c]laimant's particular fact situation, or review any of the [c]laimant's medical records, other than the x-rays discussed above." *Id*.

on Dr. Kiser's diagnosis of coal workers' pneumoconiosis since it was based solely on an x-ray reading. Contrary to employer's assertion, the administrative law judge rationally found that Dr. Kiser's diagnosis was based on the May 28, 1998 x-ray and the June 18, 1998 pulmonary function study. Decision and Order at 20; Claimant's Exhibit 2. In addition, employer asserts that the administrative law judge erred in mechanically according greater weight to the opinion of Dr. Kiser than to the contrary opinions of record based on Dr. Kiser's status as claimant's treating physician. Contrary to employer's assertion, the administrative law judge, within her discretion, provided a reasoned basis which indicates that she reflected on her determination to accord greater weight to the treating physician's opinion than to some of the other medical opinions of record. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge stated, "[a]s the [c]laimant's treating physician for approximately the last five years, Dr. Kiser is familiar with the [c]laimant's history and his symptoms over time." Decision and Order at 20. In addition, the administrative law judge stated that Dr. Kiser's "conclusions are based on an examination of the [c]laimant, and consideration of his clinical symptoms, in conjunction with objective laboratory results." *Id*.

We also reject employer's assertion that the administrative law judge erred in relying on the opinion of Dr. Baker since Dr. Baker's opinion is based on a positive x-ray reading which the administrative law judge found to be outweighed by the contrary x-ray evidence of record. An administrative law judge must consider a medical report as a whole, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and may not discredit an opinion merely because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor, supra*; *cf. Anderson, supra*.

Employer, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), additionally asserts that Dr. Baker's opinion is not a reasoned opinion because Dr. Baker's diagnosis of pneumoconiosis is based on claimant's coal mine employment history. In *Hicks*, the United States Court of Appeals for the Fourth Circuit held that "the length of a miner's coal mine employment does not compel the conclusion that the miner's disability was solely respiratory."

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[7]The administrative law judge observed that "Dr. Kiser, the [c]laimant's treating physician, has stated that the [c]laimant has coal workers' pneumoconiosis, based on Dr. Alexander's interpretation of the May 28, 1998 x-ray, and the results of the June 18, 1998 pulmonary function tests." Decision and Order at 20.

Hicks, 138 F.3d at 533, 21 BLR at 2-366. Further, the United States Court of Appeals for the Seventh Circuit declared that "[o]ccupational exposure is not evidence of pneumoconiosis, but merely a reason to expect that evidence might be found." *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 783, 18 BLR 2-384, 2-387 (7th Cir. 1994). In the instant case, however, Dr. Baker's opinion is based on a physical examination, x-ray evidence and claimant's coal mine employment history. Director's Exhibits 9, 20. Thus, we reject employer's assertion that Dr. Baker's opinion is not well reasoned.

However, we hold that employer's assertion that the administrative law judge erred in discrediting Dr. Branscomb's opinion because it was based solely on x-ray evidence has merit. The administrative law judge stated that "Dr. Branscomb concluded that the [c]laimant does not have pneumoconiosis on the basis of the x-ray evidence." Decision and Order at 18. Contrary to the administrative law judge's finding, Dr. Branscomb's opinion that claimant does not suffer from pneumoconiosis was based on a comprehensive review of medical evidence. Dr. Branscomb considered coal mine employment and smoking histories, physical examinations, x-rays, pulmonary function studies and arterial blood gas studies. Employer's Exhibit 1.

Further, as employer argues, although the administrative law judge noted that "Dr. Fino stated that there was insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis," Decision and Order at 14, the administrative law judge did not provide any explanation for his rejection of Dr. Fino's opinion with regard to his analysis of the evidence under 20 C.F.R. §718.202(a)(4). *Id*. at 19-20. An administrative law judge must not reject relevant evidence without an explanation. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Thus, we vacate the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R.

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[8]The administrative law judge observed that Dr. Branscomb's "review of the x-ray evidence was incomplete." Decision and Order at 18.

[9]In a report dated March 19, 1999, Dr. Branscomb observed that "Dr. Baker diagnosed CWP and moderate obstructive pulmonary disease based on his interpretation of the chest x-ray, exposure, and pulmonary function studies." Employer's Exhibit 1. Dr. Branscomb stated, "[a]s I have mentioned above, [claimant's] function studies were invalid." *Id*. Further, Dr. Branscomb stated that claimant's "x-ray interpretation represented the lowest scorable [*sic*] level of the type of change which is least likely to be CWP (streaky changes in the lower chest)." *Id*.

§718.202(a)(4), and remand the case for further consideration of all of the relevant newly submitted evidence thereunder. Moreover, we vacate the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309, and remand for further consideration. *See Ross, supra*.

If reached, on remand, the administrative law judge must reconsider whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) on the merits. Further, the administrative law judge must reconsider whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c) on the merits, if reached. Finally, the administrative law judge must reconsider whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) on the merits, if reached. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

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 proceedings consistent with this opinion.

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[10]Inasmuch as the administrative law judge's reconsideration of the newly submitted medical evidence at 20 C.F.R. §718.202(a)(4), on remand, may affect her prior findings on the merits at 20 C.F.R. §§718.203(b), 718.204(c) and 718.204(b), if reached, remand for reconsideration of these findings on remand is also necessary.

[11]In view our disposition of the case at 20 C.F.R. §725.309, we decline to address employer's contentions with regard to 20 C.F.R. §§718.204(c)(1), (c)(4) and 718.204(b).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge