BRB No. 01-0309 BLA

GROVER MUNCY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Grover Muncy, Warfield, Kentucky, *pro se*.

Tab R. Turano, Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Timothy S. Williams (Howard M. Radzely, Acting 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, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Remand Denying Benefits (95-BLA-1447) of Administrative Law Judge Paul H. Teitler 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).[2] This case is before the Board for the second time. In his Decision and Order - Awarding of Benefits issued on January 10, 1997, the administrative law judge credited claimant with twenty-nine years of coal mine employment. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000), but found the medical opinion evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) (2000). The administrative law judge further found that claimant established total disability due to pneumoconiosis pursuant to

[1] Claimant's appeal was filed on claimant's behalf by Susie Davis, President of the Kentucky Black Lung Association of Pikeville, Kentucky. In a letter to Ms. Davis dated June 19, 2001, the Clerk of the Board indicated that claimant would be deemed *pro se* and, therefore, that the appeal would be reviewed based on the general standard of review. *See* Board's Letter of June 19, 2001.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao,* 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

20 C.F.R. §718.204(b), (c) (2000). Accordingly, benefits were awarded.

On employer's appeal, the Board held that the administrative law judge erred by failing to consider all of the evidence of record. The Board vacated the administrative law judge's findings pursuant to Section 718.202(a)(4), 718.203(b), and 718.204(b) and (c) (2000). The Board, however, affirmed as unchallenged, the administrative law judge's findings pursuant to Section 718.202(a)(1)-(3) (2000). The case was remanded to the administrative law judge for further consideration. *Muncy v. Wolf Creek Collieries,* BRB No. 97-0690 BLA (Dec. 22, 1997)(unpub.).

On November 7, 2000, the administrative law judge issued his Decision and Order on Remand Denying Benefits, which is the subject of the instant appeal. The administrative law judge found the evidence insufficient to establish that claimant is totally disabled due to pneumoconiosis. Therefore, the administrative law judge denied benefits.

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. Employer notes that the administrative law judge neglected to consider numerous x-ray interpretations. Employer objects to the administrative law judge's taking of judicial notice of Dr. Guberman's credentials, and notes that the administrative law judge, at one point, inaccurately considered Dr. Guberman to be a Board-certified pulmonologist. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a brief in this appeal.[3]

[3] We affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000). *See* 20 C.F.R. §718.202(a)(1)-(3). The administrative law judge was not required to address these subsections, as his earlier findings at these subsections were affirmed and constitute the law of the case on this issue. *Muncy v. Wolf Creek Collieries,* BRB No. 97-0690 BLA, slip op. at 4, n.4

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

(Dec. 22, 1997)(unpub.); *see Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting); *see also Bridges v. Director, OWCP,* 6 BLR 1-988 (1984). Therefore, the administrative law judge's failure to consider all of the x-ray evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge's findings in his Decision and Order on Remand concerning the existence of pneumoconiosis, total disability and disability causation are intertwined. The administrative law judge summarized the medical opinion evidence[4] and stated that he did not credit the opinions of Drs. Clarke and Wells because four of the six physicians whose opinions are contained in the record opined that claimant does not have pneumoconiosis, and all of the physicians who opined that claimant does not have pneumoconiosis have credentials superior to those of Drs. Clarke and Wells. In addition, the administrative law judge discredited Dr. Wells' diagnosis of pneumoconiosis, noting

[4] The record contains the medical opinions of six physicians. Dr. Wells diagnosed a moderate restrictive lung disease from claimant's coal mine employment. Dr. Wells opined that from a pulmonary standpoint, claimant is unable to perform his usual coal mine employment, and explained that further dust exposure would compromise claimant's respiratory system. Director's Exhibit 15. Dr. Clarke opined that claimant is totally and permanently disabled for all manual labor due to coal workers' pneumoconiosis. Director's Exhibit 15. Dr. Broudy examined claimant and diagnosed probable atrial fibrillation, diabetes and hypertension. Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis or any significant pulmonary disease or respiratory impairment arising from his coal mine employment. Further, Dr. Broudy stated that claimant retains the respiratory capacity to perform the work of an underground coal miner. Dr. Broudy noted that the results of the pulmonary function study and blood gas study "suggest that the dyspnea is non-pulmonary in origin." Employer's Exhibit 1. Dr. Younes diagnosed hypoxemia and noted that there is no evidence of pulmonary disease. Dr. Younes opined that claimant is disabled based on his blood gas study results. He did not provide an opinion regarding the cause of claimant's impairment. Director's Exhibit 10. Dr. Dahhan concluded that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis or any pulmonary impairment or disability. He diagnosed coronary artery disease, angina pectoris and cardiac arrhythmia, not related to coal mine employment. Dr. Dahhan opined that from a respiratory standpoint, claimant retains the capacity to perform his previous coal mine work. Dr. Dahhan also questioned the results of the blood gas study administered by Dr. Younes. Further, Dr. Dahhan indicated that he did not find hypoxemia during his examination of claimant. Employer's Exhibit 3. Dr. Guberman diagnosed probable chronic obstructive pulmonary disease, and resting hypoxemia, chronic venous insufficiency, history of hypertension, chronic atrial fibrillation and diabetes, and checked the box indicating that the diagnosed conditions are related to claimant's coal mine employment. In addressing claimant's disability, Dr. Guberman stated "due to chronic obstructive pulmonary disease, hypoxemia, atrial fibrillation, hypertension, diabetes mellitus and also orthopedic problems, the patient is considered disabled for all types of employment." Administrative Law Judge Exhibit 1.

that Dr. Wells read claimant's chest x-ray as positive for pneumoconiosis however, "the majority of B-readers and/or Board Certified Radiologists who read Claimant's x-rays did not find them to show pneumoconiosis." 2000 Decision and Order at 10. The administrative law judge credited Dr. Broudy's opinion that claimant does not suffer from pneumoconiosis, based on Dr. Broudy's credentials and because "two of the three doctors who like Dr. Broudy concluded that Claimant does not have pneumoconiosis did conclude that he suffers from hypoxemia." 2000 Decision and Order at 10. The administrative law judge credited the opinions of Drs. Younes and Guberman on the same basis. 2000 Decision and Order at 10-11. Based on his superior credentials, the administrative law judge credited Dr. Dahhan's opinion that claimant does not have pneumoconiosis, however, he did not credit Dr. Dahhan's opinion regarding hypoxemia. 2000 Decision and Order at 10-11. The administrative law judge concluded:

> Although the evidence shows that Claimant suffers from hypoxemia, Claimant has failed to show by a preponderance of the evidence that he is totally disabled by pneumoconiosis as required by the Act. Although Dr. Younes, Dr. Guberman, Dr. Clarke, and Dr. Wells have found that Claimant is totally disabled and is not able to return to work in a coal mine or perform a similar job, this disability is the result of hypoxemia and not pneumoconiosis. Therefore, Claimant is not entitled to benefits because he has not shown that his total disability is "due at least in part" to pneumoconiosis as required by the 6th Circuit.

2000 Decision and Order at 11.

In evaluating the medical opinion evidence, the administrative law judge stated that Dr. Guberman "did not find that Claimant has coal miner[s'] pneumoconiosis." 2000 Decision and Order at 11. However, in his opinion, Dr. Guberman diagnosed "probable chronic obstructive pulmonary disease" related to claimant's coal mine employment and later referred to chronic obstructive pulmonary disease, Administrative Law Judge Exhibit 1. Therefore, we vacate the administrative law judge's findings regarding Dr. Guberman's opinion. On remand, the administrative law judge is instructed to determine whether Dr. Guberman's diagnosis satisfies the statutory definition of pneumoconiosis. *See* 20 C.F.R. §718.201.

Further, we vacate the administrative law judge's findings regarding the qualifications of Dr. Broudy and Dr. Guberman. The administrative law judge noted that Broudy is Board-certified in Internal Medicine and Pulmonary Disease. 2000 Decision and Order at 6, 10. The administrative law judge noted that Dr. Guberman is Board-certified in Internal Medicine and Cardiovascular Disease. 2000 Decision and Order at 7, 10. However, later in his Decision and Order, the administrative law judge described Dr.

Guberman as Board-certified in Internal Medicine and Pulmonary Disease, 2000 Decision and Order at 11. The credentials of Dr. Broudy and Dr. Guberman are not contained in the record and the administrative law judge has provided no indication as to his source in identifying the qualifications of these physicians. We, therefore, vacate the administrative law judge's findings regarding the credentials of Drs. Broudy and Guberman as well as the administrative law judge's reliance upon the physicians' relative credentials in weighing the medical opinion evidence. If, on remand, the administrative law judge intends to take judicial notice of the qualifications of physicians, he may, provided he does so in accord with the general principles concerning judicial notice. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

We now turn to the administrative law judge's decision to accord no weight to Dr. Wells' diagnosis of pneumoconiosis "because even though his positive x-ray reading was confirmed by Dr. Sklonick, the majority of B-Readers and/or Board Certified Radiologists who read Claimant's x-rays did not find them to show pneumoconiosis." 2000 Decision and Order at 10. The administrative law judge may not discredit a medical opinion merely because the physician's diagnosis of pneumoconiosis was based, in part, on a positive x-ray interpretation, where the administrative law judge has found the x-ray evidence to be negative for the existence of pneumoconiosis. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Accordingly, we vacate the administrative law judge's consideration of Dr. Wells' opinion.

In light of the foregoing, we vacate the administrative law judge's finding that claimant failed to establish that he is totally disabled due to pneumoconiosis. On remand, the administrative law judge must first determine whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). If the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis, he must then determine whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. If the administrative law judge determines that claimant suffers from pneumoconiosis arising out of his coal mine employment, the administrative law judge must then determine whether claimant is totally disabled from a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). In making this determination, the administrative law judge must evaluate the pulmonary function study evidence, the blood gas study evidence and the medical opinion evidence, and weigh this evidence, like and unlike, to determine whether claimant has carried his burden of establishing total disability by a preponderance of the evidence. *See* 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). If the administrative law

judge finds that claimant is totally disabled from a respiratory or pulmonary impairment, the administrative law judge must determine whether claimant has established that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Moreover, in evaluating the evidence pursuant to Sections 718.202(a)(4) and 718.204(b), the administrative law judge is instructed to consider the medical opinions in light of the recent opinion of the United States Court of Appeals for the Sixth Circuit in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).[5]

[5] In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, provided direction for determining whether a medical opinion is sufficient to meet claimant's burden of establishing the existence of pneumoconiosis. The court held that when determining the credibility of medical opinions regarding the presence or absence of pneumoconiosis, the administrative law judge must consider not only whether the opinions address the medical definition of pneumoconiosis, but also the broader statutory definition of pneumoconiosis provided by the Act. When making findings on the existence of pneumoconiosis, the court advised that the administrative law judge must determine whether a physician has provided an explanation for excluding coal dust as an aggravating factor in a claimant's respiratory problems. Moreover, the court noted that under the statutory definition of pneumoconiosis, a claimant is not required to demonstrate that coal dust is the only cause of his respiratory problem, rather, he must

show that he has a chronic respiratory or pulmonary impairment significantly related to or substantially aggravated by dust exposure in coal mine employment. *Cornett*, *supra*. In addition, with regard to total disability, the court indicated that the administrative law judge must consider whether a physician who finds that claimant is not totally disabled had knowledge of the exertional requirements of claimant's coal mine job.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is vacated and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge