BRB No. 09-0277 BLA

CHARLES BISTARKEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 12/02/2009
	)	
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 – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2007-BLA-5437) of Administrative Law Judge Michael P. Lesniak rendered on a miner's 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). Based upon the stipulation of the parties, the administrative law judge credited the miner with at least twenty-five years of coal mine employment, and adjudicated the claim, filed on April 3, 2006, pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of both clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b),

and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c).[1] Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a), 718.203(b), and disability causation at Section 718.203(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case. Employer has filed a reply brief in support of its position.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Employer first contends that the evidentiary limitations at 20 C.F.R. §725.414 violate employer's due process rights by allowing claimant both to select a physician for the pulmonary evaluation sponsored by the Department of Labor (DOL) and to submit an x-ray interpretation in rebuttal to the x-ray obtained by DOL. Employer asserts that because claimant was able to obtain two favorable interpretations of this x-ray, while employer was not allowed to submit any responsive evidence to claimant's "rebuttal," Section 725.414 is invalid as it precludes employer from responding to all of the medical evidence submitted by claimant. Employer's Brief at 8. Employer's arguments are without merit.

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[1] At the hearing, employer withdrew the issue of responsible operator. Decision and Order at 2; Transcript at 7.

[2] The administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) is affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Third Circuit is applicable, as the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

In promulgating the regulation, the Department of Labor exercised its authority to, "as a matter of policy . . . provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence," 5 U.S.C. §556(d), and replaced the *ad hoc* determinations of administrative law judges with a bright-line rule in Section 725.414, including a "good cause" exception at 20 C.F.R. §725.456(b)(1). As the validity of Section 725.414 has been upheld, *see Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001), and as employer did not ask to submit additional x-ray evidence before the administrative law judge or offer a "good cause" exception to the evidentiary limitations, employer has waived any due process argument before the Board.

Employer next contends that the administrative law judge erred in concluding that the x-ray evidence supports a finding of pneumoconiosis at Section 718.202(a)(1). Employer asserts that the administrative law judge failed to consider the shape and location of the opacities seen on the x-rays; failed to consider the June 2, 2006, interpretation of Dr. Wiot; and mischaracterized Dr. Fino's interpretation as positive for pneumoconiosis, when the physician indicated that the abnormalities were unrelated to coal dust exposure. Employer's Brief at 7-10; Reply Brief at 2. Employer's arguments lack merit.

In finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge accurately summarized the x-ray evidence of record, consisting of eight interpretations of three x-rays dated June 2, 2006, January 17, 2007, and May 10, 2007. Decision and Order at 3; *see* 20 C.F.R. §718.202(a). The administrative law judge determined that the film dated June 2, 2006 was read as "t/t, 1/2, all zones except the upper 1/3," by Dr. Gohel, and as "t/s, 2/1, all zones" by Dr. Colella, both dually-qualified Board-certified radiologists and B readers,[4] Director's Exhibit 10, Claimant's Exhibit 1, and as negative by Dr. Wiot, another dually qualified physician. Employer's Exhibit 6; Decision and Order at 3. The administrative law judge further determined that the film dated January 17, 2007 was interpreted as "t/u, 2/2, mid and

[4] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

lower lung zones" by Dr. Fino,[5] a B reader, and as "s/t, 1/2, all zones" by Dr. Gohel, Employer's Exhibit 1, Claimant's Exhibit 3, while Dr. Wiot interpreted this film as negative for pneumoconiosis. Employer's Exhibit 5; Decision and Order at 3. The administrative law judge determined that the film dated May 10, 2007, was read as "s/t, 1/2, all zones except upper 1/3," by Dr. Gohel, Claimant's Exhibit 2, and as negative by Dr. Wiot. Employer's Exhibit 7; Decision and Order at 3. According greater weight to the interpretations by dually qualified readers,[6] the administrative law judge determined that the June 2, 2006 x-ray was positive for pneumoconiosis, while the January 17, 2007 and May 10, 2007 x-rays were in equipoise. Thus, the administrative law judge acted within his discretion in finding that the weight of the x-ray evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on a preponderance of positive interpretations by the best qualified readers. Decision and Order at 14; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4 (1990). As substantial evidence supports the administrative law judge's findings at Section 718.202(a)(1), they are affirmed.

Regarding the issues of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c), employer challenges the administrative law judge's consideration of the medical opinion evidence, arguing that the administrative law judge's analysis does not comport 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), 30 U.S.C. §932(a). Specifically, employer maintains that

[5] Dr. Fino diagnosed pneumoconiosis Category 2/2, and further indicated that "the abnormalities are not due to coal workers' pneumoconiosis or coal mine dust exposure. This man has a significant interstitial pulmonary fibrosis unrelated to the inhalation of coal mine dust." Employer's Exhibit 1. The Board has held that a doctor's comment, that an x-ray is not indicative of coal workers' pneumoconiosis, addresses the cause of the pneumoconiosis diagnosed, not its existence under the ILO-UC system that classifies all types of pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999). At 20 C.F.R. §718.202(a)(1), the administrative law judge accorded greater weight to the interpretations of dually qualified physicians and less weight to Dr. Fino's interpretation based on his qualifications as a B reader. The administrative law judge subsequently found that Dr. Fino's rationale for concluding that claimant's x-ray abnormalities were unrelated to coal dust exposure was outweighed by the contrary medical opinions of Drs. Rasmussen and Cohen.

[6] Section 718.202(a)(1) provides that where two or more x-ray reports are in conflict, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

the administrative law judge failed to consider the CT scan evidence with the medical opinion evidence, and failed to explain his reasons for crediting the opinions of Drs. Cohen and Rasmussen over the contrary opinions of Drs. Fino and Tuteur.[7] Employer also asserts that the administrative law judge mischaracterized the x-ray interpretations contained in the treatment records to bolster his credibility determinations in weighing the conflicting medical opinions. Employer's Brief at 10-17. Employer's arguments lack merit.

Dr. Rasmussen diagnosed claimant with a totally disabling diffuse interstitial lung disease, likely the consequence of a combination of smoking, coal dust exposure, and idiopathic interstitial fibrosis aggravated by coal dust exposure, based on claimant's reduced single-breath diffusing capacity and his severe hypoxia. He noted that the three causes cannot be separated out. Decision and Order at 10-11; Claimant's Exhibits 7, 12 at 10-12, 20. While Dr. Rasmussen did not make a specific diagnosis of clinical pneumoconiosis, he stated that the radiographic findings of irregular opacities do not in any way exclude the possibility of coal workers' pneumoconiosis, as coal dust may cause primarily irregular opacities over time. Decision and Order at 10-11; Claimant's Exhibits 7, 12 at 19. Dr. Cohen diagnosed clinical and legal pneumoconiosis, noting a marked diffusion impairment from pulmonary scarring, pulmonary fibrosis, and emphysema due to claimant's smoking and coal dust exposure, based on the results of multiple pulmonary function tests since 1998. Decision and Order at 11-13; Claimant's Exhibits 8, 13 at 15-16. Dr. Cohen acknowledged that irregular opacities found predominantly in the lower lobes are not the most common type associated with pneumoconiosis, but opined that coal dust exposure could not be ruled out as a cause of such opacities. Decision and Order at 13; Claimant's Exhibits 8, 13 at 19, 32, 40-43. Dr. Cohen additionally noted that idiopathic pulmonary fibrosis generally develops rapidly, whereas claimant's pulmonary fibrosis developed slowly and progressively over a long period of time, consistent with an occupational contribution. Claimant's Exhibit 13 at 18. By contrast, Dr. Fino did not diagnose either clinical or legal pneumoconiosis, noting that while claimant is totally disabled due to diffuse interstitial pulmonary fibrosis, it was not a fibrosis associated with coal dust because claimant had no rounded opacities, and none of the opacities were located in the upper lung zones. Decision and Order at 6-8; Employer's Exhibits 1, 2, 15 at 8-9. Similarly, Dr. Tutuer diagnosed a totally disabling respiratory impairment due to idiopathic pulmonary fibrosis, usual interstitial

[7] No party challenges the administrative law judge's determination that the opinion of Dr. Celko was unreasoned and entitled to little weight. Decision and Order at 16. Dr. Celko opined that claimant had mild obstructive lung disease due to smoking and coal dust exposure; interstitial lung disease due to idiopathic fibrosis and coal dust; and chronic respiratory failure due to smoking, dust exposure and pulmonary fibrosis. Director's Exhibit 10.

pneumonitis, or post-inflammatory scarring from pneumonia. Dr. Tutuer further diagnosed emphysema due to smoking, coronary artery disease, and hypertension. He stated that a lower lung field interstitial process without upper lung field changes is inconsistent with a diagnosis of coal workers' pneumoconiosis. Decision and Order at 8-10; Employer's Exhibits 3, 4, 14 at 12-14, 20.

In evaluating the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge noted that, while Drs. Fino and Tuteur appeared to allow for the possibility that, in an unusual case, pneumoconiosis could be present with only irregular opacities, they, nonetheless, concluded that claimant's pulmonary disease was not derived from coal dust exposure because the opacities seen on x-ray were both irregular and located primarily in the lower lung zones. The administrative law judge found that their conclusions were not persuasive, as two of the x-ray readings of record noted fibrotic changes occurring in all but the upper right lung, Director's Exhibit 10, Claimant's Exhibit 2, and two other positive readings noted fibrosis in all lung zones. Decision and Order at 15-16; Claimant's Exhibits 1, 3. Moreover, in reviewing claimant's treatment records, the administrative law judge correctly noted that x-ray reports contained therein described fibrotic changes that were not uniformly limited to the lower lungs, and that one report noted changes throughout the lungs. Decision and Order at 4. Consequently, after considering the entirety of the medical opinion evidence, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Rasmussen and Cohen, as he found that they were better reasoned and more persuasive than the opinions of Drs. Fino and Tutuer. Decision and Order at 15-16; *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Weighing all of the medical evidence of record, the administrative law judge further determined that the better reasoned and documented medical opinions, along with the positive x-ray evidence, outweighed the negative CT scan evidence and the treatment record evidence, which the administrative law judge determined was inconclusive for pneumoconiosis. Claimant's Exhibit 4; Decision and Order at 4, 16; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25 (3d Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, as the administrative law judge's finding of pneumoconiosis, and his finding that employer failed to rebut the ten-year presumption of causality, are supported by substantial evidence, we affirm his findings at Sections 718.202(a), 718.203(b).

Similarly, regarding the issue of disability causation at Section 718.204(c), the administrative law judge permissibly accorded little weight to the opinions of Drs. Fino and Tuteur, that claimant's impairment was due to interstitial pulmonary fibrosis unrelated to coal dust, as the administrative law judge found their opinions to be unpersuasive and outweighed by the opinions of Drs. Cohen and Rasmussen, that pneumoconiosis was a substantial contributing cause of claimant's disability. Decision

and Order at 17-18; *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-395 (3d Cir. 2002); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984). It is also within the administrative law judge's discretion to determine whether an opinion is documented and reasoned. *See Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Because the administrative law judge addressed all relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for crediting the opinions of Drs. Cohen and Rasmussen over the contrary opinions of Dr. Fino and Tutuer, his Decision and Order comports with the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We affirm the administrative law judge's finding that the weight of the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a), 718.203(b), and disability causation at Section 718.204(c), as supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge