BRB Nos. 05-0235 BLA
and 05-0235 BLA-A

EARL ELLIOTT	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	DATE ISSUED: 02/15/2006
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Kathy L. Snyder and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Howard Radzely, Solicitor of Labor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (03-BLA-6192) of Administrative Law Judge Richard A. Morgan awarding benefits 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 found, in accordance with the parties' stipulation, that claimant had at least twelve years of coal mine employment.[1] Decision and Order at 2; Director's Exhibits 6, 7; Hearing Transcript at 11. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 1-2, 24. After determining that this claim is a subsequent claim,[2] the administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). The administrative law judge further found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). Accordingly, the administrative law judge awarded benefits as of August 1, 2001, the month in which the subsequent claim was filed.

On appeal, employer contends that the administrative law judge erred in excluding, pursuant to 20 C.F.R. §725.414, several exhibits that employer offered at the hearing. Employer also contends that the administrative law judge erred in his analysis of the x-ray evidence, computed tomography (CT scan) evidence, and medical opinion evidence when he found that claimant established the existence of pneumoconiosis. Additionally, employer argues that the administrative law judge erred in discounting medical opinions concerning the cause of claimant's total disability because the physicians did not diagnose pneumoconiosis. Finally, employer asserts that the administrative law judge erred in his onset date determination. Claimant responds, urging affirmance of the award of benefits. In a cross-appeal, claimant contends that the administrative law judge overlooked a positive x-ray reading submitted by claimant, and

---

[1] The record indicates that claimant's coal mine employment occurred in West Virginia. Decision and Order at 2; Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The current claim is claimant's fourth application for benefits. His three prior claims were denied because he did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 1-3. His third claim was denied on December 28, 1994 and again, after consideration of additional evidence, on a date not reflected by the record. Director's Exhibit 3. Claimant filed his current claim on August 15, 2001, a date that the parties agree is more than one year after the final denial of his previous claim. 20 C.F.R. §725.309(d).

erroneously concluded that the regulations did not limit the number of CT scan readings that the parties could submit. The Director, Office of Worker's Compensation Programs (the Director), has submitted a limited response urging rejection of employer's arguments that the evidentiary limits regulation, 20 C.F.R. §725.414, and the onset regulation, 20 C.F.R. §725.503(b), are invalid. Employer has filed a combined response to claimant's cross-appeal and a reply to claimant's and the Director's responses.[3]

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. 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).

Employer contends that the administrative law judge erred in excluding relevant x-ray readings and medical reports pursuant to Section 725.414(a)(3). Employer's Brief at 37. Specifically, employer argues that Section 725.414 violates Section 923(b) of the Act, Section 556(d) of the Administrative Procedure Act, and the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The Board has rejected these arguments and has held that Section 725.414 is a valid regulation. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*). We therefore reject employer's argument that the administrative law judge erred in applying the evidentiary limits of Section 725.414.[4]

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 a finding of 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 sixteen readings of six x-rays in light of the readers' radiological qualifications and found that the

[3] Employer does not challenge the administrative law judge's finding that claimant established that he is now totally disabled and has thus demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). The finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because we must remand this case for further consideration of the medical evidence, we will defer our discussion of the CT scan admissibility dispute raised by the parties until we address the administrative law judge's weighing of the CT scans.

more recent x-rays established the existence of simple pneumoconiosis. Employer asserts that the administrative law judge could not credit Dr. Miller's positive readings of the April 10, 2004 and October 23, 2001 x-rays for simple pneumoconiosis, because he declined to credit Dr. Miller's opinion that claimant's x-ray also showed complicated pneumoconiosis. Employer's Brief at 9. Employer's contention lacks merit, as the existence of complicated pneumoconiosis or simple pneumoconiosis are separate issues. *See* 20 C.F.R. §§718.304(a); 718.202(a)(1).

There is merit, however, in employer's contention that the administrative law judge did not adequately explain his rationale for crediting Dr. Miller's positive readings over the negative readings by Drs. Scott and Wiot of the April 10, 2004 and October 23, 2001 x-rays. Specifically, the administrative law judge credited Dr. Miller's positive readings because Dr. Miller, a Board-certified radiologist and B-reader, diagnosed not only pneumoconiosis but also noted the presence of emphysema and tuberculosis scarring. However, review of the record reflects that Drs. Scott and Wiot, who are Board-certified radiologists and B-readers, read these x-rays as negative for pneumoconiosis and also noted the presence of tuberculosis scarring and emphysema. Employer's Exhibits 2, 21. On this record, we agree with employer that the administrative law judge did not "explain why diagnosing two diseases rather than one ma[de] Dr. Miller more credible" as to the existence of pneumoconiosis. Employer's Brief at 9; *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We must therefore vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand this case for him to reconsider the x-ray evidence and explain the rationale for his conclusions.

However, we reject claimant's argument that the administrative law judge did not consider Dr. Baker's B-reading of claimant's April 10, 2004 x-ray. Claimant's Brief at 16. The administrative law judge listed Dr. Baker's positive reading on page six of his Decision and Order, and referred to it when weighing the x-rays, stating that "[a] B-reader also interpreted this X-ray as positive." Decision and Order at 6, 28.

Employer next contends that the administrative law judge erred in his analysis of the CT scan evidence regarding the existence of pneumoconiosis. We agree. The administrative law judge found that the conflicting readings of three CT scans submitted by the parties in the current claim and two readings of a CT scan submitted with claimant's prior claim were in equipoise and thus "neither establish[ed] nor preclude[d] the existence of pneumoconiosis." Decision and Order at 30. However, when weighing the CT scans along with the other medical evidence pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge found that "the positive CT scan readings support my finding of coal workers'

pneumoconiosis based on X-ray evidence." Decision and Order at 34. The administrative law judge's finding that the positive CT scans supported the positive x-rays is not rational, as he found that the CT scans as a whole were in equipoise. We must therefore vacate the administrative law judge's finding and instruct him to reconsider the CT scan evidence on remand.

Accordingly, we now address the parties' contentions concerning the number of CT scans the administrative law judge should have considered. Employer argues that the administrative law judge arbitrarily excluded as cumulative any more than two CT scan readings per party, while claimant contends that the administrative law judge should have limited each party to one reading of each CT scan. CT scans are admissible as "[o]ther medical evidence" under 20 C.F.R. §718.107(a), which provides for the submission of "[t]he results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis," its sequela, "or a respiratory or pulmonary impairment." 20 C.F.R. §718.107(a); *Dempsey*, 23 BLR at 1-59. The Board recently held that under revised Section 718.107 and Section 725.414(a)(2)(ii), (a)(3)(ii), each party may proffer only one reading of each CT scan in support of its affirmative case and one reading in rebuttal of each reading submitted by the opposing party in its affirmative case. *Webber v. Peabody Coal Co.*, --- BLR ---, BRB No. 05-0335 BLA, slip op. at 8-9 (Jan. 27, 2006)(*en banc*)(Boggs, J. concurring). Therefore, on remand, the administrative law judge should order the parties to designate one reading of each CT scan they want considered in their affirmative case and one reading of each CT scan considered on rebuttal of the CT scan evidence in their opposing party's affirmative case. Before considering the CT scan readings, the administrative law judge should render a decision as to their admissibility pursuant to 20 C.F.R. §718.107(b).[5] *Webber*, --- BLR at ---, slip op. at 9; *Harris v. Old Ben Coal Co.*, --- BLR ---, BRB No. 04-0812, slip op. at 10, 16 (Jan. 27, 2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *see also Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 890-94, 22 BLR 2-409, 2-418-24 (7th Cir. 2002).

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge erred in his weighing of the medical opinion evidence. Initially, we reject employer's allegation that the administrative law judge erred in considering the reports of Drs. Baker and Ranavaya, diagnosing claimant with pneumoconiosis, to be reasoned medical opinions. Substantial evidence supports the administrative law judge's finding that these opinions were based on physical examinations, medical testing, and consideration of relevant medical histories. Director's Exhibit 11; Claimant's Exhibit 2;

[5] The two CT scan readings contained in the record of claimant's prior claim are admissible in this subsequent claim pursuant to 20 C.F.R. §725.309(d)(1).

see Compton, 211 F.3d at 213, 22 BLR at 2-175-76 (requiring that "the totality" of a medical report indicate a reasoned medical judgment).

However, employer's argument is valid that the administrative law judge did not adequately explain his reasons for finding that Dr. Baker's opinion was *better* reasoned and more persuasive than the contrary opinions from Drs. Crisalli and Zaldivar that claimant does not have pneumoconiosis but has chronic obstructive pulmonary disease (COPD) due to smoking. Specifically, the administrative law judge credited Dr. Baker's opinion diagnosing COPD due to both smoking and coal dust exposure because "Dr. Baker explained the means by which Claimant's coal dust exposure and cigarette smoking caused portions of his pulmonary impairment," because he "consider[ed] all the factors in Claimant's history which could affect his pulmonary impairment," and because his etiology opinion was "more consistent with Claimant's history of coal mine employment and smoking history." Decision and Order at 34. Review of the record, however, reflects that Drs. Crisalli and Zaldivar considered the same sorts of examinations, tests, and medical histories as Dr. Baker, and that they provided written opinions and deposition testimony explaining in detail why they concluded that claimant's impairment is unrelated to coal mine dust exposure. Director's Exhibit 12; Employer's Exhibits 1, 17, 26. Thus, on this record, the administrative law judge has not adequately explained his basis for crediting Dr. Baker's opinion and for discrediting those of Drs. Crisalli and Zaldivar. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand this case to him for further consideration.

Employer also contends that the administrative law judge mechanically gave "controlling weight" to the opinion of Dr. Kowalti, claimant's treating physician. Employer's Brief at 25. The record reflects, however, that the administrative law judge declined to afford "controlling weight" to Dr. Kowalti's diagnosis of pneumoconiosis, because, although Dr. Kowalti is Board-certified in pulmonary disease and treats claimant for his pulmonary problems, the administrative law judge found that there was not "an extensive duration of the physician/patient relationship." Decision and Order at 33; *see* 20 C.F.R. §718.104(d)(1)-(d)(4). Nevertheless, in view of Dr. Kowalti's credentials, his treatment of claimant for pulmonary problems, and the "reasoned and detailed" nature of his treatment records, the administrative law judge accorded "special consideration" to Dr. Kowalti's opinion. Decision and Order at 33. Because the administrative law judge did not give "controlling weight" to Dr. Kowalti's opinion, but merely gave it special consideration based on its documentation, reasoning, and support from Dr. Kowalti's credentials and treatment for pulmonary disease, we reject employer's contention that the administrative law judge erred in his weighing of Dr. Kowalti's opinion. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564

(4th Cir. 2002); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

We likewise reject employer's contention that the administrative law judge erred in giving the opinion of the West Virginia Occupational Pneumoconiosis Board diagnosing claimant with occupational pneumoconiosis "some weight" as to the existence of pneumoconiosis. Decision and Order at 34. The administrative law judge correctly noted that such a determination by a state agency is not binding on the administrative law judge but is relevant and "shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim." Decision and Order at 34 n.35, quoting 20 C.F.R. §718.206. Under this standard, the administrative law judge merely gave the state report "some weight." The weight to be accorded such a determination is within the discretion of the administrative law judge, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989)(*en banc*), and in this case employer has not demonstrated how the administrative law judge abused that discretion because he gave the determination "some weight" as opposed to zero weight.

Therefore, on remand, the administrative law judge should reweigh the relevant and admissible x-ray readings, CT scan readings, and medical opinions to determine whether they support a finding of the existence of either clinical or legal pneumoconiosis. 20 C.F.R. §§718.202(a); 718.201. The administrative law judge should then weigh together all relevant evidence to determine whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a) under *Compton*.

Pursuant to Section 718.204(c)(1), employer argues that the administrative law judge erred in discounting the opinions of Drs. Crisalli and Zaldivar on the cause of claimant's total disability because the doctors did not diagnose pneumoconiosis. Because we have vacated the administrative law judge's findings that the existence of pneumoconiosis was established, we also vacate his disability causation finding pursuant to Section 718.204(c)(1) and instruct him to reweigh the medical opinions on that issue after he has reassessed the relevant evidence regarding the existence of pneumoconiosis.

Finally, employer contends that the administrative law judge erred in determining that August 1, 2001 is the date on which claimant's entitlement to benefits commenced. The administrative law judge found that the record did not reflect when claimant became totally disabled due to pneumoconiosis and selected August 1, 2001 as the date of onset. Decision and Order at 39. Because we have vacated the administrative law judge's finding that entitlement to benefits was established, we vacate the onset determination and hold that if benefits are awarded on remand, the administrative law judge must address the relevant evidence and make specific findings, if possible, regarding the date of onset. If such analysis does not establish the month of onset, then benefits will be payable beginning with the month during which the claim was filed. 20 C.F.R.

§725.503(b). We reject employer's argument that the default onset date provision of Section 725.503(b) violates Section 7(c) of the Administrative Procedure Act. *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 893, 22 BLR 2-514, 2-532-34 (7th Cir. 2002)(rejecting identical argument).

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

_____
BETTY JEAN HALL
Administrative Appeals Judge