BRB No. 05-0559 BLA

WILLIAM L. GROVES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/15/2006
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard M. 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 the Decision and Order Awarding Benefits (2004-BLA-5435) of Administrative Law Judge Janice K. Bullard (the administrative law judge) 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 found, based on Social Security Administration records, as well as other employment records, and the testimony of claimant, that claimant established a

coal mine employment history of 26.62 years. Decision and Order at 4-6. The administrative law judge also found that the x-ray evidence supported a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that claimant was unable to establish the existence of the disease pursuant to 20 C.F.R §718.202(a)(2) and (a)(3), and that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 6-14. Additionally, the administrative law judge found that, when weighed together, the entirety of the evidence of record supported a finding of legal pneumoconiosis pursuant to Section 718.202(a), and that claimant established that his pneumoconiosis had arisen out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 15. Lastly, the administrative law judge determined that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) (disability causation). Decision and Order at 15-19. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4) and in finding that the evidence established disability causation pursuant to Section 718.204(c). Employer further challenges the administrative law judge's decision to exclude certain exhibits as in excess of evidentiary limitations. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a limited brief in which he takes no position on the ultimate finding of entitlement, but instead, responds to some of employer's arguments[1], *i.e.*, the administrative law judge's consideration of the treating physician, the administrative law judge's finding on disability causation, and the administrative law judge's application of evidentiary limitations.

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).

[1] The administrative law judge's length of coal mine employment determination as well as her determination that claimant established a totally disabling respiratory impairment pursuant to Section 718.204(b) are unchallenged on appeal. Accordingly these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first contends that the administrative law judge erred in finding the x-ray evidence of record supportive of a finding of pneumoconiosis pursuant to Section 718.202(a)(1) as the administrative law judge's determination was inconsistent with the requirements of the Administrative Procedure Act (the APA), 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), that a claimant must establish the existence of pneumoconiosis through a preponderance of the evidence. Specifically, employer argues that the administrative law judge determined that the x-ray evidence was in equipoise and that, in finding the existence of pneumoconiosis established at this subsection, the administrative law judge impermissibly relied upon the "true doubt" rule. Employer avers that the administrative law judge erred in failing to consider additional qualifications of x-ray readers beyond those of B-reader and board-certified radiologist.[2] Employer argues that the administrative law judge should have considered the professorships of Drs. Wiot, Spitz and Wheeler, who rendered negative interpretations, as well as Dr. Wiot's "distinction as a preeminent radiologist." Employer's Brief at 8. Employer further contends that the administrative law judge failed to provide an adequate explanation for finding that the positive x-ray interpretations established the existence of pneumoconiosis.

In considering the x-ray readings, the administrative law judge found that the record contained ten interpretations of three x-rays. The initial x-ray, that of May 16, 1995, was interpreted as positive for the existence of pneumoconiosis by two readers and as negative for the existence of the disease by two readers. Claimant's Exhibits 6, 7; Employer's Exhibits 15, 16. The administrative law judge determined that the negative

[2] 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 Company, Inc. of Virginia 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 a particular expertise in the field of radiology.

readings were entitled to "slightly more weight" as both physicians rendering the negative interpretations were dually-qualified as B-readers and board-certified radiologists, while only one of the readers rendering a positive interpretation had the same dual qualifications. Decision and Order at 8. The administrative law judge found that the readings of the second x-ray, taken on December 19, 2002, were in "equipoise" as there was one positive reading of the x-ray, Director's Exhibit 18, and one negative reading of the x-ray, Director's Exhibit 17, by readers with the same dual qualifications. Decision and Order at 8. The most recent x-ray, taken on May 28, 2003, had two positive readings, Claimant's Exhibits 10, 11, and two negative readings, Employer's Exhibits 9, 19. The administrative law judge found the positive interpretations to be entitled to superior weight as both of the readings were performed by readers with dual qualifications, while only one of the negative readings was by a reader with the same qualifications. Considering the x-ray evidence as a whole, the administrative law judge determined that because the most recent x-ray evidence was positive for the existence pneumoconiosis and the readings of the next most recent x-ray were in equipoise, the x-ray evidence "tips in favor" of the existence of pneumoconiosis. Decision and Order at 8. In reaching this determination, the administrative law judge again noted that the most recent x-ray was taken eight years after the initial x-ray. *Id*.

We hold that the administrative law judge has given due consideration to the qualitative as well as quantitative aspects of the x-ray evidence, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), and has permissibly considered the recency of positive x-ray evidence in determining that the x-ray evidence supported a finding of the existence of pneumoconiosis. *See Adkins*, 958 F.2d 49, 16 BLR 2-61; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *see also Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). We further reject employer's assertion and hold that an administrative law judge may, but is not required to consider additional qualifications of a reader, such as professorships in radiology. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). We, therefore, affirm, as supported by substantial evidence, the administrative law judge's determination that the x-ray evidence supports a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Next, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, employer asserts that the administrative law judge erred in relying upon the treating physician status of Dr. Jarvis, who opined that claimant suffered from pneumoconiosis, Claimant's Exhibit 2, without specifically explaining why

that status afforded the physician superior knowledge of claimant's condition. Likewise, employer argues that the administrative law judge failed to adequately explain her reasons for giving the opinion of Dr. Rasmussen, that claimant suffered from pneumoconiosis, Director's Exhibit 12; Claimant's Exhibit 1, superior weight. In addition, employer contends that the administrative law judge erred in his rejection of the opinion of Dr. Zaldivar, that claimant did not have pneumoconiosis, Director's Exhibit 26; Employer's Exhibit 21, as the administrative law judge failed to fully consider the physician's opinion. Employer also argues that the administrative law judge erred in her consideration of the opinion of Dr. Crisalli, that the claimant suffered from no coal dust related disease, Employer's Exhibit 20, as the administrative law judge impermissibly placed the burden on the physician to "rule out" coal dust exposure as a factor in the miner's disease. Employer's Brief at 20.

In finding that the medical opinion evidence supported a finding of the existence of pneumoconiosis, the administrative law judge initially found that Dr. Jarvis was claimant's treating physician and proceeded to consider the physician's opinion in conjunction with the requirements at 20 C.F.R. §718.104(d).[3] The administrative law judge found that Dr. Jarvis treated claimant for a lengthy period of time, *i.e.*, over ten years, for specific respiratory problems and, while it was not clear how often the physician saw claimant, it "appear[ed]" that the physician treated claimant with "some regularity." Decision and Order at 13-14. Thus, applying the factors set forth at Section 718.104(d)(1)-(4), the administrative law judge accorded "significant weight" to Dr. Jarvis's opinion as claimant's treating physician. Decision and Order at 13-14. The administrative law judge further considered the opinion of Dr. Rasmussen and noted that the physician examined claimant on behalf of the Department of Labor, provided an explanation of claimant's work requirements, performed objective studies and considered other medical reports and data of record. Decision and Order at 10. The administrative

[3] Section 718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and shall consider the following factors in weighing the opinion of the treating physician:

1) Nature of relationship.
2) Duration of relationship.
3) Frequency of treatment.
4) Extent of treatment.

The regulation also requires the administrative law judge to consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

law judge concluded that Dr. Rasmussen's opinion was well-reasoned and entitled to significant weight as it was "detailed and supported." Decision and Order at 12. The administrative law judge found Dr. Zaldivar's position entitled to little weight as the physician's finding of no pneumoconiosis appeared to be based solely on x-ray evidence and the physician specifically testified that chronic obstructive pulmonary disease could not arise out of coal mine employment. While the administrative law judge acknowledges that Dr. Zaldivar specifically opined that claimant did not suffer from "legal" pneumoconiosis the opinion was "diminished by his view that there must be x-ray evidence of some damage caused by coal mine dust." Decision and Order at 14. Lastly, the administrative law judge discredited Dr. Crisalli's opinion, like Dr. Zaldivar's opinion, because Dr. Crisalli relied upon negative chest x-rays to support his conclusion that claimant did not establish legal pneumoconiosis. Moreover, the administrative law judge found that Dr. Crisalli's opinion that claimant had smoking-induced emphysema was entitled to little weight as the physician did not fully explain the effects, if any, of claimant's lengthy coal mine dust exposure on his condition. Decision and Order at 14.

In reviewing the administrative law judge's consideration of Dr. Jarvis's opinion, we are convinced by the assertions of employer and of the Director that the administrative law judge erred in her application of the treating physician rule of Section 718.104(d) to the physician's opinion. Specifically, while the administrative law judge properly addressed the factors found at Section 718.104(d), she erred in mechanically according superior weight to the physician's opinion based on his treating physician status without making a specific inquiry into whether the opinion was well-reasoned and well-documented and without explaining how the physician's status as claimant's treating physician afforded the physician superior understanding of claimant's condition. 20 C.F.R. §718.104(d).

Nevertheless, we conclude that such error is, ultimately, harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because the administrative law judge permissibly determined that the opinion of Dr. Jarvis in conjunction with that of Dr. Rasmussen supports a finding of legal pneumoconiosis pursuant to Section 718.202(a)(4). *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); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Contrary to employer's assertion, Dr. Rasmussen has provided a thorough examination of claimant, relied upon objective studies and pertinent history, and considered other medical evidence in rendering his conclusion that claimant suffered from legal pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 1. We conclude, therefore, that the administrative law judge permissibly found Dr. Rasmussen's finding of legal pneumoconiosis to be a reasoned opinion based on a number of factors, including

objective studies. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Clark*, 12 BLR at 1-155; *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985). Moreover, contrary to employer's assertion, the administrative law judge permissibly concluded that while both Drs. Zalidvar and Crisalli opined that claimant did not suffer from legal pneumoconiosis, the weight their opinions could be given was diminished inasmuch as they based their conclusions almost exclusively on negative x-ray evidence and did not fully account for claimant's lengthy coal mine employment history in considering claimant's impairment. *See Hicks*, 138 F.3d 524, 21 BLR 2-323 *Akers*, 131 F.3d 438, 21 BLR 2-269. Contrary to employer's assertion, therefore, the administrative law judge did not err in shifting the burden of proof to employer, but rather she properly considered the entirety of relevant evidence and rendered credibility determinations. *See Hicks*, 138 F.3d 524, 21 BLR 2-323 *Akers*, 131 F.3d 438, 21 BLR 2-269; *Underwood*, 105 F.3d 946, 21 BLR 2-23; *Clark*, 12 BLR at 1-155. Employer's assertions are, ultimately, tantamount to requests that the Board reweigh the medical opinion evidence of record, a role outside its scope of review. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We, therefore, affirm the administrative law judge's analysis of the medical opinions of record and affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established at Section 718.202(a)(4). We, therefore, affirm the administrative law judge's finding that the evidence, *i.e.*, x-rays, doctors opinions, and CT scans, when weighed together established the existence of pneumoconiosis.[4] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established disability causation pursuant to 20 C.F.R. §718.204(c). Specifically, employer contends that the administrative law judge erred in determining that the opinions of Drs. Zaldivar and Crisalli were entitled to little weight on the issue of disability causation. Employer argues that the mere fact that both physicians determined that claimant did not suffer from legal or clinical pneumoconiosis did not render their opinions on disability causation incredible since the physicians both opined that claimant suffered from a totally disabling respiratory impairment.

[4] Employer also argues that the administrative law judge failed to consider the entirety of CT scan evidence and that such evidence weighed against a finding of pneumoconiosis and reinforced the negative x-ray interpretations of record. Employer's Brief at 9-10. Contrary to employer's assertion, the administrative law judge weighed the CT scan evidence, acknowledged that the weight of such evidence was negative for the existence of pneumoconiosis and concluded that "although I place some weight on the opinions of the doctors who reviewed the CT scans," such evidence was outweighed by the evidence supportive of a finding of pneumoconiosis. Decision and Order at 14-15; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Contrary to employer's assertion, both Drs. Zaldivar and Crisalli specifically opined that claimant did not suffer from a disease related to coal mine employment. Accordingly, the administrative law judge permissibly concluded that these opinions were not credible on the issue of disability causation pursuant to Section 718.204(c). *Scott v. Mason Coal Co.*, 289 F.3d 416, 22 BLR 2-373 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Moreover, we reject employer's assertion that the administrative law judge failed to explain how the opinions of Drs. Jarvis and Rasmussen constituted credible opinions on the issue of disability causation. The administrative law judge found the opinions of Drs. Jarvis and Rasmussen to be well-reasoned and supported on the issue of disability causation. Decision and Order at 18. While the administrative law judge's determination was cursory, we, nevertheless, hold that the determination is supported by substantial evidence, particularly in light of the reasons given by the administrative law judge permissibly crediting the same opinions on the issue of the existence of pneumoconiosis. *See Hicks*, 138 F.3d 524, 21 BLR 2-323 *Akers*, 131 F.3d 438, 21 BLR 2-269; *Underwood*, 105 F.3d 946, 21 BLR 2-23; *Clark*, 12 BLR at 1-155.

Lastly, employer contends that the limitations on the admissibility of evidence in the revised regulations are invalid because they conflict with Section 413 of the Act, 30 U.S.C. §923(b); Section 7(c) of the APA, and the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, in *Underwood*, 105 F.3d 946, 21 BLR 2-23. Employer argues that the excluded evidence should be admitted under the "good cause" exception at 20 C.F.R. §725.456(b)(1) as such evidence is relevant and should therefore be addressed. Consequently, employer challenges the administrative law judge's exclusion of Employer's Exhibits 7, 10, 13-16, consisting of x-ray re-readings and consultative reports. We reject employer's argument regarding the validity of the evidentiary limitation, *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004), and, therefore, we also reject employer's assertion that the administrative law judge erred by excluding the aforementioned evidence.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge