BRB No. 06-0482 BLA

WAYNE O. STEWART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	DATE ISSUED: 02/28/2007
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.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-5841) of Administrative Law Judge Michael P. Lesniak rendered on 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). Claimant filed a claim for benefits on February 26, 2002. Director's Exhibit 2. On November 18, 2003, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 25. Employer requested a hearing, which was held on June 9, 2005. Based on the parties' stipulation, the administrative law judge credited claimant with twenty-one years of coal mine employment. The administrative law judge determined that claimant suffered from pneumoconiosis, arising out of coal mine employment, and that claimant was totally disabled by his disease. Accordingly, the administrative law judge awarded benefits.

Employer appeals, challenging the administrative law judge's findings under 20 C.F.R. §§718.202(a) and 718.204(c), relevant to the issues of the existence of pneumoconiosis and disability causation.[1] Employer asserts that the administrative law judge erred by not assigning controlling weight to the CT scan evidence, which was negative for the existence of pneumoconiosis. Employer requests that the Board reverse the administrative law judge's award of benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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.[2] 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).

In the instant case, the administrative law judge determined that the weight of the evidence established that claimant suffered from clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer argues that the administrative law judge erred in relying on the positive x-ray evidence to find that claimant established the existence of pneumoconiosis when the record includes probative CT scan evidence that clearly negates the existence of the disease. Employer contends that the administrative law judge's finding of pneumoconiosis is not supported by substantial evidence.

We disagree. When considering the evidence pursuant to Section 718.202(a)(1), the administrative law judge correctly stated that the record contains four interpretations of three x-rays dated April 3, 2002, August 19, 2003, and August 4, 2004. Director's Exhibits 15, 16; Claimant's Exhibit 1; Employer's Exhibits 1, 2; Decision and Order at 3, 9. Of these four interpretations, Dr. Patel, a Board-certified radiologist and B-reader, read the April 3, 2002 x-ray as positive for pneumoconiosis; Dr. Hippensteel, a B-reader, read the August 19, 2003 x-ray as negative for pneumoconiosis, and Dr. Miller, a Board-certified radiologist and B-reader, read the same film as positive for pneumoconiosis; and

[1] We affirm, as unchallenged on appeal, the administrative law judge's determination, under 20 C.F.R. §718.204(b)(2), that the miner has a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 12.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment occurred in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Dr. Zaldivar, a B-reader, read the August 4, 2004 x-ray as negative for pneumoconiosis. Decision and Order at 9.

Contrary to employer's assertion, in weighing the conflicting x-ray readings for the presence or absence of pneumoconiosis, the administrative law judge properly considered the radiological qualifications of the physicians, *see* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 65-66 (4th Cir. 1992), and he permissibly determined to credit those x-ray interpretations that were rendered by physicians who were dually qualified as Board-certified radiologists and B-readers, *see Worhach v. Director, OWCP*, 17 BLR 1-105, 108 (1993). The administrative law judge correctly determined that the April 3, 2002 x-ray was positive for pneumoconiosis based on the positive, and uncontradicted, reading of Dr. Patel, a dually-qualified physician. With respect to the remaining x-rays, the administrative law judge stated:

> I credit Dr. Miller's positive rereading of the August 19, 2003 x-ray over Dr. Hippensteel's negative reading because of Dr. Miller's extensive credentials [as a dually qualified physician and Assistant Clinical Professor of Radiology at the College of Physicians & Surgeons of Columbia University]. Dr. Zaldivar, a B-reader, determined that an August 4, 2004 x-ray was negative for pneumoconiosis…. Having credited Dr. Miller's positive rereading of the August 19, 2003 x-ray, the only negative x-ray is Dr. Zaldivar's August 4, 2004 x-ray. I find that the two positive readings of Drs. Patel and Miller outweigh Dr. Zaldivar's negative reading based both on the readers' credentials and numerically. The weight of the x-ray evidence preponderates a finding of clinical pneumoconiosis.

Decision and Order at 9.

We reject employer's assertion that the administrative law judge erred in resolving the conflict in the x-ray evidence. Because the administrative law judge properly performed both a qualitative and quantitative analysis of the x-ray evidence, *see Adkins* 958 F.2d at 49, 16 BLR at 2-66, we see no basis to reverse the administrative law judge's finding that claimant satisfied his burden of proving the existence of pneumoconiosis by a preponderance of the positive x-rays. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant established the existence of pneumoconiosis under Section 718.202(a)(1).

We also reject employer's assertion that the administrative law judge erred because he failed to assign controlling weight to the negative CT scan evidence which was negative for the existence of pneumoconiosis. As noted by the administrative law judge, CT scan evidence does not serve as a "wildcard that must trump all other

evidence." Decision and Order at 10, citing *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 892, 22 BLR 2-409, 422 (7th Cir. 2002). Rather, an administrative law judge must weigh the CT scan evidence, along with all of the relevant evidence, in reaching his determination as to whether pneumoconiosis has been established under Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 164 (4th Cir. 2000); Decision and Order at 10.

In this case, the administrative law judge considered a lung CT scan that had been taken in conjunction with Dr. Zaldivar's examination of claimant on August 4, 2004. Decision and Order at 10. The scan was interpreted by Dr. Willis, who opined that there were no findings consistent with coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Zaldivar also interpreted the CT scan as negative for pneumoconiosis and reported that it showed severe emphysema with parenchyma squeezed together between bullae, giving a false appearance of nodules. *Id*. Dr. Miller diagnosed that the CT scan showed evidence of both emphysema and interstitial lung disease, although he stated that he was unable to render an ILO classification of his findings since there were no CT scan standards for comparison. Claimant's Exhibit 1.

In considering the CT scan evidence, the administrative law judge assigned greater weight to the CT scan readings by Dr. Willis and Dr. Miller, then the readings by Dr. Zaldivar, since both Dr. Willis and Dr. Miller were dually qualified Board-certified radiologists and B-readers, and Dr. Zaldivar was only a B-reader.[3] Claimant's Exhibit 2; Employer's Exhibit 1, 2; Decision and Order at 10. Although Dr. Miller stated that he was unable to classify the CT scan in the same manner as an x-ray under the ILO classification system, the administrative law judge nonetheless considered Dr. Miller's interpretation to be consistent with a finding of pneumoconiosis.[4] Claimant's Exhibit 2;

[3] Subsequent to the formal hearing in this case, the Board issued *Webber v. Peabody Coal Co*., 23 BLR 1-123 (Jan. 27, 2006) (*en banc*) (J. Boggs, concurring), which addressed the interplay of 20 C.F.R. §§718.107 and 725.414 with respect to the admission and consideration of CT scan evidence. The Board held in *Webber* that the parties are permitted to submit, in support of their affirmative case, only one reading of each separate test or procedure undergone by a claimant, i.e., in this case, one interpretation of each CT scan, whether it be an original reading or a rereading. *Webber*, 23 BLR at 1-133-135. Although the administrative law judge acknowledged *Webber* in his Decision and Order, he declined to apply *Webber* since employer's two readings of the August 4, 2004 CT scan had already been admitted into the record at the hearing. Decision and Order at 4, n.4.

[4] The administrative law judge stated, "I find that Dr. Miller's interpretation, although not an explicitly positive reading for pneumoconiosis, should not be disregarded

Decision and Order at 10. Insofar as the administrative law judge found that there was one positive and one negative reading of the August 4, 2004 CT scan by a dually qualified physician, he viewed the CT scan evidence as being in equipoise. *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); Decision and Order at 10. The administrative law judge further noted, however, that even if he credited the two negative interpretations by Dr. Willis and Dr. Zaldivar, he was not persuaded that claimant did not suffer from clinical pneumoconiosis based on his review of all of the relevant evidence under Section 718.202(a). *See Compton*, 211 F.3d at 211, 22 BLR at 2-164; *Stein*, 294 F.3d at 892, 22 BLR at 2-422; Decision and Order at 10.

The administrative law judge specifically found that claimant established the existence of pneumoconiosis based on the a preponderance of the positive x-ray evidence, along with the opinion of Dr. Porterfield. Decision and Order at 11. The administrative law judge noted that Dr. Porterfield examined claimant on April 3, 2002, at which time the doctor diagnosed clinical pneumoconiosis and total respiratory disability due in part to coal dust exposure. The administrative law judge assigned Dr. Porterfield's opinion "considerable weight" because it was based on claimant's history of respiratory symptoms and Dr. Patel's positive reading of the April 3, 2002 x-ray, which had been credited at 20 C.F.R. §718.202(a)(1). We see no error in the administrative law judge's determination to credit Dr. Porterfield's diagnosis of clinical pneumoconiosis, as he found that Dr. Porterfield's opinion was more consistent with the evidence in the record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 155 (1989) (*en banc*); Decision and Order at 11.

In contrast to Dr. Porterfield, the administrative law judge permissibly assigned less weight to Dr. Hippensteel's opinion, that claimant did not suffer from clinical pneumoconiosis, since Dr. Hippensteel based his opinion, in part, on a negative x-ray, which had been reread by a better qualified physician as positive for pneumoconiosis. *See Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 10. The administrative law judge also permissibly assigned less weight to Dr. Zaldivar's opinion, that claimant did not have clinical pneumoconiosis, noting that Dr. Zaldivar's "report suggests that there must be radiological evidence for there to be pulmonary impairment due to [coal] dust[,]" which is "contrary to Department of Labor's position permitting a finding of pneumoconiosis in the presence of negative radiological evidence." *See* 20 C.F.R. §718.202(a)(4); *Black*

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completely solely [sic] because no classification system exists by which Dr. Miller could render a positive reading." Decision and Order at 10.

Diamond Coal Mining Co. v. Benefits Review Board [Raines], 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985); Decision and Order at 11. The administrative law judge further noted that Dr. Zaldivar failed to explain why he dismissed coal mine dust exposure as a possible aggravating or contributing cause of claimant's respiratory condition other than to cite to the negative radiological evidence.[5] Decision and Order at 11; *see Clark*, 12 BLR at 1-155 (an administrative law judge may reject an opinion if he or she finds that the doctor failed to adequately explain the diagnosis).

The credibility of the medical experts is a matter of discretion within the purview of the trier-of-fact. *See Mabe v. Bishop Coal Co*., 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Because the administrative law judge properly found, after weighing all of the evidence together, that claimant suffers from clinical pneumoconiosis, we affirm, as supported by substantial evidence, his finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 203, 22 BLR at 2-16.

Lastly, employer argues that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis under 20 C.F.R. §718.204(c). Employer's argument has no merit. In this case, because the administrative law judge found that claimant suffered from clinical pneumoconiosis, he permissibly assigned little weight to the opinions of Dr. Hippensteel and Dr. Zaldivar, who opined that claimant's disability was due to conditions other than coal mine employment, because whose opinions were premised, in part, on their belief that claimant did not suffer from pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 12. In contrast, the administrative law judge permissibly found Dr. Porterfield's opinion, that claimant's respiratory disability was due to a combination of smoking and coal dust exposure, to be sufficient to satisfy claimant's burden of establishing that pneumoconiosis was a substantially contributing factor to his total respiratory disability. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); Decision and Order at 12. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established disability causation pursuant to Section 718.204(c).

[5] The administrative law judge further noted that while Dr. Zaldivar attributed claimant's respiratory condition to either smoking or an alpha-I antitrypsin deficiency, his conclusion was based, in part, on inaccurate smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 11.

Employer's allegations of error in this appeal are tantamount to a request that the Board reweigh the evidence, a function that the Board is not empowered to perform. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's finding that claimant is totally disabled as a result of coal workers' pneumoconiosis, we affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge