BRB No. 07-0345 BLA

D.L.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/29/2008
	)	
WESTMORELAND COAL COMPANY	)	
	)	
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 – Award of Benefits and the Supplemental Decision and Order – Awarding Attorney's Fees of Daniel L. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits and the Supplemental Decision and Order – Awarding Attorney's Fees (2006-BLA-05308) of Administrative Law Judge Daniel L. Solomon (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 the instant case to be a subsequent claim filed on December 22, 2004.[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-four years of coal mine employment, and accepted the parties' stipulation of the existence of a totally disabling respiratory impairment. Weighing the evidence of record, the administrative law judge found the medical evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge further found the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits, commencing as of December 2004, the month in which claimant filed his current claim. In a supplemental Decision and Order, the administrative law judge awarded claimant's counsel a total attorney's fee of $8,212.50.

On appeal, employer contends that the administrative law judge erred in finding the x-ray and medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). In addition, employer contends that the administrative law judge erred in finding the medical evidence sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c).[2] In

[1] Claimant filed an initial claim for benefits, which was withdrawn. Director's Exhibit 1. A second application for benefits was filed on October 28, 2002, which was denied by the district director in a Proposed Decision and Order issued on September 30, 2003, finding that claimant established none of the requisite elements of entitlement pursuant to 20 C.F.R. Part 718. Director's Exhibit 1. No further action was taken on this claim. Claimant filed his current application for benefits on December 22, 2004. Director's Exhibit 3.

[2] Employer submitted a Notice of Appeal of the administrative law judge's Supplemental Decision and Order – Awarding Attorney's Fees challenging the administrative law judge's award of attorney's fees and requesting that the case be consolidated with its appeal of the award of benefits. By Order dated March 6, 2007, the Board acknowledged employer's appeal and granted its motion for consolidation, stating that employer had 30 days in which to file the consolidated Petition for Review and brief. [*D.L.S.*] *v. Westmoreland Coal Co.*, BRB Nos. 07-0345 BLA and 07-0345 BLA-S (Mar. 6, 2007)(Order)(unpub.).

Employer has requested in its Brief in Support of Petition for Review that its appeal concerning the attorney's fee, BRB No. 07-0345 BLA-S, be withdrawn. Employer's Brief at 2 n.3. The Board grants employer's request and dismisses the appeal pursuant to 20 C.F.R. §802.401.

response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not be responding on the merits of this claim.

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).

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 his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207, 22 BLR 2-162, 2-167-168 (4th Cir. 2000); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis based on the x-ray evidence. Under Section 718.202(a)(1), the administrative law judge considered eight readings of four x-rays. The record contains the positive reading of the March 15, 2005 x-ray by Dr. Rasmussen, a B reader, but a negative reading of the same film by Dr. Wiot, who is a B reader and Board-certified radiologist. Director's Exhibit 14; Employer's Exhibit 2. In addition, Dr. Rasmussen read the December 20, 2005 x-ray as positive for pneumoconiosis, whereas, Dr. Wiot found the x-ray to be negative. Claimant's Exhibit 1; Employer's Exhibit 5. Dr. Castle, a B reader, interpreted the July 20, 2005 x-ray to be negative for pneumoconiosis and Dr. Hippensteel, also a B reader, read the November 16, 2005 x-ray to be negative for pneumoconiosis. Employer's Exhibits 1, 3. However, both of these films were read by Dr. DePonte, a B reader and Board-certified radiologist as positive for pneumoconiosis. Claimant's Exhibits 2, 3.

The administrative law judge initially noted that based on the numerical weight of the evidence, claimant failed to satisfy his burden of establishing the existence of pneumoconiosis because the x-ray evidence was in equipoise, with each of the four x-rays of record dated March 15, 2005, July 20, 2005, November 16, 2005 and December 20, 2005 having been read once as positive and once as negative for pneumoconiosis.

[3] As claimant's coal mine employment occurred in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Decision and Order at 8. The administrative law judge also stated that, "[i]f I rely on physician qualifications, I will accept that Dr. Wiot is the best qualified reader in this record." *Id.* However, the administrative law judge next considered the deposition testimony of Dr. Hippensteel regarding his negative reading the November 16, 2005 x-ray. Decision and Order at 10. The administrative law judge found "that Dr. Hippensteel admitted through close cross examination . . . that his findings were compatible to and consistent with pneumoconiosis, although he did not mark the [ILO] form accordingly." Decision and Order at 11. Therefore, the administrative law judge determined that Dr. Hippensteel's negative reading was entitled to less weight.[4] *Id.* Although Dr. Wiot did not provide deposition testimony, the administrative law judge found that Dr. Hippensteel's testimony called into question the credibility of Dr. Wiot's negative x-ray reading. The administrative law judge found that Dr. Wiot diagnosed "prominent bullous changes in both upper lung fields with compression of normal vascular markings in both bases," and based on Dr. Hippensteel's testimony, stated that "I find that there is some question whether [Dr. Wiot]'s findings are consistent with or compatible with pneumoconiosis." Decision and Order at 11; Employer's Exhibits 2, 5. With regard to the remaining readings, the administrative law judge accorded determinative weight to the positive readings of Dr. DePonte, a B reader and Board-certified radiologist, over the contrary reading of Dr. Castle, a B reader, because Dr. Deponte was dually qualified. Decision and Order at 12; Claimant's Exhibits 2, 3; Employer's Exhibit 1. In addition, the administrative law judge accorded significant weight to the positive readings of Dr. Rasmussen, because they were consistent with Dr. DePonte's readings. Decision and Order at 12; Director's Exhibit 13; Claimant's Exhibits 1-3. Consequently, the administrative law judge found that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence at Section 718.202(a)(1). Decision and Order at 12.

On appeal, employer contends that the administrative law judge failed to provide a rational basis for discrediting the negative x-ray interpretations of Drs. Hippensteel and Wiot. Specifically, employer contends that the administrative law judge selectively analyzed Dr. Hippensteel's deposition testimony and failed to give proper consideration to the entirety of Dr. Hippensteel's opinion that claimant does not have radiographic evidence of pneumoconiosis. Employer's Brief at 6-10. Employer also contends that the administrative law judge has improperly substituted his own opinion for that of a medical expert, in concluding that neither Dr. Hippensteel nor Dr. Wiot intended to opine that

[4] The administrative law judge found that Dr. Hippensteel testified that pneumoconiosis can manifest itself as both rounded and irregular opacities, and that the ILO classification form requires a physician to mark both types of opacities because it requires a physician to mark "abnormalities consistent with pneumoconiosis." Decision and Order at 11; Employer's Exhibit 7 at 14-16, 29-34.

claimant had no opacities consistent with pneumoconiosis.[5] Employer's Brief at 10-12. Employer's assertions of error have merit.

We agree with employer that the administrative law judge selectively analyzed Dr. Hippensteel's testimony, ignoring the doctor's repeated statements that the irregular "markings" he identified on the ILO sheet were consistent with bullae emphysema and did not constitute coal workers' pneumoconiosis or any other kind of pneumoconiosis.[6]

---

[5] Initially, we reject employer's contention that the administrative law judge erred in according less weight to Dr. Castle's negative interpretation of the July 20, 2005 x-ray because Dr. Castle is only a B reader, and not a Board-certified radiologist. Employer's Brief at 13. Contrary to employer's contention, the administrative law judge may, within his discretion, accord greater weight to x-ray readings by doctors who are dually qualified as Board-certified radiologist and B readers, in comparison to doctors who are B-readers. Decision and Order at 12; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[6] Dr. Hippensteel, in explaining his November 16, 2005 x-ray interpretation states:

> I noted that he had increased basilar markings bilaterally that were irregular in character and not suggestive of coal workers' pneumoconiosis. I thought that he had minor plate atelectasis in his lung bases as well as bullae…
>
> Bullae are grossly enlarged air sacs in the lung that lose their functional capacity to transfer gases across the lung membrane because, with the loss of surface area, little tiny sacs are changed into one big sac that is greater than one centimeter in diameter, and that diameter is usually visible on chest x-ray when it is present, and I thought that it was present in this man's x-rays.

Employer's Exhibit 7 at 14. In addition, in response to a question by claimant's counsel regarding whether the ILO classification form requires a physician to mark any "opacities" that are compatible with pneumoconiosis, and not strictly coal workers' pneumoconiosis, Dr. Hippensteel stated:

> What I'm stating is that this – this reading by me found explanation for increased markings in the bases secondary to bullous disease, which makes – which gives me an explanation for them, not including pneumoconiosis as a cause for them….
>
> The circumstances about that make it so that there can be some statements about the fact that I don't think this is asbestosis on the basis of his history,

See Employer's Exhibit 7 at 14, 16, 29, 31-34. Contrary to the administrative law judge's evaluation of Dr. Hippensteel deposition testimony, we note that claimant's counsel began referencing Dr. Hippensteel's "markings" as "opacities" when he asked questions during cross-examination. Employer's Exhibit 7 at 29, 32, 34. Dr. Hippensteel did not diagnose irregular opacities on the ILO sheet, and when he referred to "irregular opacities" during his deposition, it was in the context of whether irregular opacities may be typical of coal workers' pneumoconiosis. Employer's Exhibit 7 at 31. Moreover, the administrative law judge ignored Dr. Hippensteel's classification on the ILO sheet that any opacities seen on claimant's x-rays, which are consistent with pneumoconiosis, have a profusion of 0/0. This is a negative reading. It is not merely sufficient for a physician to classify opacities as being consistent with pneumoconiosis. The physician must also determine that the opacities are of a sufficient profusion to be classified as 1/0 or higher in order to be considered a positive interpretation for pneumoconiosis. *See* 20 C.F.R. §§718.102, 718.202(a)(1). Because Dr. Hippensteel provided a negative reading for pneumoconiosis, the administrative law judge erred in rejecting that reading for the reasons provided in his analysis of the x-ray evidence at Section 718.202(a)(1).

Furthermore, it was irrational for the administrative law judge to initially determine that Dr. Wiot was the best qualified reader in this record, and then assign less weight to Dr. Wiot's negative x-ray readings, based on the administrative law judge's findings with regard to Dr. Hippensteel, a B-reader. The administrative law judge's rationale for rejecting Dr. Wiot's negative readings cannot be affirmed. Dr. Wiot did not offer any testimony to contradict his ILO classification of claimant's x-rays. Consequently, based on the administrative law judge's errors with regard to the opinions of Drs. Hippensteel and Wiot, we vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence at Section 718.202(a)(1).

Employer also challenges the administrative law judge's finding that claimant established the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4). In this case, the administrative law judge credited the opinion of Dr. Rasmussen, that claimant has a severe and irreversible obstructive respiratory condition due to a combination of smoking and coal dust exposure, over the contrary

---

> let alone on the basis of his x-ray findings. I think that his x-ray findings are abnormal because of his bullous disease compressing the lung bases…
>
> [b]ecause this man has a non-pneumoconiosis diagnosis that makes for those opacities in my opinion.
>
> Employer's Exhibit 7 at 32-33.

opinions of Drs. Castle and Hippensteel, that claimant has a severe, but partially reversible, obstructive respiratory condition that is due entirely to smoking and not coal dust exposure.

We agree with employer that, in rejecting Dr. Hippensteel's opinion as to the etiology of claimant's respiratory condition, the administrative law judge improperly concludes that Dr. Hippensteel "is reluctant to find legal pneumoconiosis even if he is not 'hostile to the Act.'" Decision and Order at 11. Contrary to the administrative law judge's finding, the mere fact that Dr. Hippensteel found insufficient objective evidence to support a diagnosis of a respiratory condition due to coal dust exposure, does not, in and of itself, demonstrate Dr. Hippensteel's "extreme reluctance" to diagnosis legal pneumoconiosis. Decision and Order at 12.

The administrative law judge also failed to offer any rational explanation for his finding that Dr. Hippensteel's belief that pneumoconiosis presents with a primarily fixed impairment, and not a reversible impairment, is "premised on a false assumption about the nature of pneumoconiosis."[7] Decision and Order at 11. Although an administrative law judge may assign less weight to a doctor's opinion if he determines that the opinion was premised on scientific evidence conflicting with the science credited by the Department of Labor in promulgating the revised regulations, *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001), the administrative law judge, in this case, has not shown why Dr. Hippensteel's opinion that pneumoconiosis primarily causes a fixed and irreversible respiratory impairment is at odds with scientific evidence as to the nature of pneumoconiosis.

Lastly, employer's assertion, that the administrative law judge improperly shifted the burden of proof at Section 718.202(a)(4), also has merit. Although the administrative law judge is correct that the regulations provide an expansive definition of legal pneumoconiosis, claimant is not permitted a presumption that he has legal pneumoconiosis simply because he has been diagnosed with either asthma, chronic bronchitis, industrial bronchitis, chronic obstructive pulmonary disease or emphysema. Decision and Order at 12. Claimant must establish the causal nexus between his respiratory condition and his coal dust exposure in order to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *See* 20 C.F.R. §718.201(b); 718.202(a).

[7] The administrative law judge also states, without explanation, that Dr. Hippensteel's opinion ignores that pneumoconiosis is latent and progressive. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); Decision and Order at 11.

Therefore, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and remand the case to the administrative law judge to reconsider the medical opinions as to whether claimant has a respiratory condition due, in part, to coal dust exposure. *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); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Because we vacate the administrative law judge's finding that claimant has pneumoconiosis, we also vacate his determination that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).[8]

On remand, the administrative law judge must reconsider all of the relevant evidence in determining the credibility of the x-ray evidence of record and discuss the specific rationale for his conclusions pursuant to Section 718.202(a)(1). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). The administrative law judge must further determine whether claimant established the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4).

If, on remand, the administrative law judge again finds the medical evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), he must reconsider the evidence relevant to disability causation under Section 718.204(c). *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). In considering the medical opinion evidence, the administrative law judge may credit an opinion regarding the issue of total disability causation if the physician's opinion is not in direct contradiction to the administrative law judge's finding that claimant suffers from pneumoconiosis arising out of his coal mine employment. *Scott v. Mason Coal Co.*, 289 F.3d 263, 289, 22 BLR 2-372, 2-383 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). If, however, a physician opines that claimant does not have legal or clinical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure, the administrative law judge must give specific and persuasive reasons for crediting that

[8] Employer contends that the administrative law judge erred in summarily rejecting the opinions of Drs. Hippensteel and Castle, that claimant is not totally disabled due to pneumoconiosis, in his analysis of the evidence at 20 C.F.R. §718.204(c) because the physicians did not diagnose pneumoconiosis. Employer also asserts that the administrative law judge's analysis of the evidence fails to comport with the Administrative Procedure Act (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). Employer's Brief at 29-32.

opinion, if he chooses to do so, on the issue of disability causation. *Scott*, 289 F.3d at 289; 22 BLR at 2-383. Consequently, in considering the conflicting evidence at Section 718.204(c), the administrative law judge must provide a detailed analysis of the relevant evidence and discuss the specific rationale for his conclusions. *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-589.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge