BRB No. 07-0438 BLA

D.R. Claimant-Respondent v. TROJAN MINING AND PROCESSING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/29/2008 DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, 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 (06-BLA-0027) of Administrative Law Judge Daniel F. Solomon 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).[1] This case involves claimant's request for

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

modification of a duplicate claim filed on July 29, 1997.[2] Initially, Administrative Law Judge Daniel J. Roketenetz denied benefits on April 26, 1999, because claimant did not establish the existence of pneumoconiosis or total disability, and thus did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Director's Exhibit 21 at 63.

Subsequently, claimant filed an appeal with the Board, and submitted new evidence. Director's Exhibits 21 at 19, 162. The Board construed claimant's submission of new evidence on appeal as a request for modification, dismissed claimant's appeal, and remanded the case to the district director for modification proceedings. [*D.R.*] *v. Trojan Mining Co.*, BRB No. 99-889 BLA (Oct. 27, 1999)(unpub. Order); *see* 20 C.F.R. §725.310(2000); Director's Exhibit 21 at 162. On April 17, 2002, Judge Roketenetz again denied benefits, because claimant did not establish the existence of pneumoconiosis, total disability, or total disability due to pneumoconiosis. Director's Exhibit 24 at 226. Subsequently, claimant appealed to the Board, and again submitted new evidence. Director's Exhibit 24 at 31. Thus, the Board again dismissed claimant's appeal and remanded the case to the district director for modification proceedings. [*D.R.*] *v. Trojan Mining & Processing*, BRB No. 02-651 BLA (Aug. 15, 2002)(unpub. Order); Director's Exhibit 24 at 31. On March 25, 2004, Administrative Law Judge Robert L. Hillyard denied benefits because claimant did not establish the existence of pneumoconiosis or total disability. Director's Exhibits 34 at 6, 37 at 1. On July 29, 2004, claimant requested modification. Director's Exhibit 38 at 1.

In the decision that is the subject of the current appeal, Administrative Law Judge Daniel F. Solomon (the administrative law judge) credited claimant with twenty-one

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[2] Claimant filed his first claim on August 25, 1992. Director's Exhibit 19 at 395. On February 21, 1995, Administrative Law Judge Rudolf L. Jansen denied the claim because claimant did not establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 19 at 31. Pursuant to claimant's appeal, the Board affirmed Judge Jansen's denial of benefits. [*D.R.*] *v. Trojan Mining Co.*, BRB No. 95-1261 BLA (Sept. 29, 1995)(unpub.); Director's Exhibit 19 at 16. Subsequently, the United States Court of Appeals for the Sixth Circuit affirmed the Board's decision. [*D.R.*] *v. Trojan Mining & Processing, Inc.*, No. 95-4111 (6th Cir. May 13, 1996); Director's Exhibit 19 at 9. Claimant moved for reconsideration of the court's decision, but in the interim filed another claim on June 14, 1996. Director's Exhibit 19 at 4. The district director informed claimant that his claim would be held in abeyance pending the Sixth Circuit's decision on reconsideration, and advised claimant to file a new claim after the Sixth Circuit issued its decision. Director's Exhibit 19 at 3. The Sixth Circuit court denied claimant's motion for reconsideration on July 12, 1996, and claimant filed another claim on July 29, 1997. Director's Exhibit 1.

years of coal mine employment.[3] The administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and thus established a material change in conditions pursuant to Section 725.309(d)(2000).[4] Reviewing the entire record, the administrative law judge found that claimant established that he has pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a)(1),(4); 718.203(b); 718.204(b),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence when he found that claimant established the existence of pneumoconiosis and that he is totally disabled due to pneumoconiosis at Sections 718.202(a)(1) and 718.204(c). Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[5]

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).

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 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).

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[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202, 1-203 (1989)(*en banc*); Decision and Order at 1; Director's Exhibit 19 at 389.

[4] The former version of 20 C.F.R. §725.309 applies to this claim, because it was filed prior to January 19, 2001, the effective date of revisions to 20 C.F.R. §725.309. *See* 20 C.F.R. §725.2(c).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability and thus a material change in conditions pursuant to 20 C.F.R. §§718.204(b)(2). 725.309(d)(2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer first argues that the administrative law judge erred by finding that claimant established the existence of clinical pneumoconiosis by x-ray pursuant to Section 718.202(a)(1). Specifically, employer states that the majority of the readings submitted previously were negative for pneumoconiosis, and that the "most recent x-rays show that the claimant does not have pneumoconiosis or that he has pneumoconiosis in the extreme early stage." Employer's Brief at 6. With respect to the more recent x-ray readings, employer argues that the negative reading by its physician, Dr. Jarboe, should have been credited because he examined claimant. *Id.* Employer's allegations of error lack merit.

The administrative law judge first considered twenty-nine readings of fifteen x-rays that were taken between June 12, 1991, and March 7, 2003, and submitted in claimant's 1992 claim and in the prior proceedings in this claim.[6] Noting that the readings of these earlier x-rays were now "more than three years old," and "conflicted" as to the existence of pneumoconiosis, the administrative law judge found that the prior x-ray readings were inconclusive, and "not as helpful as the newer evidence."[7] Decision

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[6] The record reflects that the June 12, 1991 x-ray was read as positive for pneumoconiosis by Drs. Anderson and Baker, who were B readers, and as negative by Drs. Shipley, Spitz, and Wiot, who were Board-certified radiologists and B readers. Director's Exhibit 19 at 34. A January 30, 1992 x-ray was read as negative for pneumoconiosis by Drs. Lane and Myers, both of whom were B readers. *Id.* The February 5, 1992 and June 19, 1992 x-rays were read as positive for pneumoconiosis by Dr. Baker, a B reader, while Dr. Sargent, a Board-certified radiologist and B reader, read the same two x-rays as negative for pneumoconiosis. *Id.* The June 25, 1992 x-ray was read as positive for pneumoconiosis by Dr. Westerfield, a B reader, while Dr. Sargent read the same x-ray as negative. *Id.* The November 2, 1992, November 6, 1992, and October 20, 1993 x-rays were read as negative for pneumoconiosis by Drs. Sargent, Halbert (a Board-certified radiologist and B reader), and Broudy (a B reader), respectively. *Id.* An August 27, 1997 x-ray was read as negative for pneumoconiosis by Drs. Sargent, West, and Fritzhand, and a March 3, 1998 x-ray was read as negative by Dr. Fino, a B reader. Director's Exhibit 21 at 67. A November 5, 1997 x-ray was read as negative for pneumoconiosis by Dr. West. Director's Exhibit 24 at 226. The September 6, 2000 x-ray was read as positive for pneumoconiosis Dr. Barrett, who was a Board-certified radiologist and B reader, and by Dr. Goldstein, who was a B reader, while Drs. Sargent and Fino read the same x-ray as negative for pneumoconiosis. *Id.* Finally, the August 4, 2002 and March 7, 2003 x-rays were read by Dr. West, who diagnosed heart-related conditions but made no mention of pneumoconiosis. Director's Exhibit 34 at 14.

[7] On appeal, employer has not challenged the administrative law judge's determination that the recent x-ray evidence was more helpful than the old x-ray evidence in determining whether claimant has pneumoconiosis.

and Order at 7. The administrative law judge then turned to the more recent x-ray evidence. Dr. Poulos, a Board-certified radiologist and B reader, read claimant's August 31, 2006 x-ray as positive for pneumoconiosis, while Dr. Jarboe, a B reader, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 1.

The administrative law judge credited Dr. Poulos's positive reading of the August 31, 2006 x-ray over Dr. Jarboe's negative reading, based on Dr. Poulos's superior qualifications as a Board-certified radiologist and B reader. The administrative law judge found that the more recent, positive x-ray evidence outweighed the earlier, inconclusive x-ray evidence. Consequently, the administrative law judge found that claimant established the existence of pneumoconiosis by a preponderance of the x-ray evidence.

The administrative law judge rationally found that the existence of pneumoconiosis was established based upon a qualitative analysis of the x-ray readings. *See Staton v. Norfolk & Western Ry. Co.,* 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Contrary to employer's contention, the administrative law judge need not have credited Dr. Jarboe's negative reading because Dr. Jarboe examined claimant, whereas Dr. Poulos did not, since a doctor need not perform a physical examination in order to provide a credible reading of an x-ray. *Alley v. Riley Hall Coal Co.*, 6 BLR 1-376, 1-377 (1983). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Ordinarily, affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established by the chest x-rays at Section 718.202(a)(1) would obviate the need to review his finding that the medical opinions also established the existence of pneumoconiosis at Section 718.202(a)(4). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, errors made by the administrative law judge in analyzing the medical opinions at Section 718.202(a)(4) for the existence of pneumoconiosis affected his consideration of the disability causation issue pursuant to Section 718.204(c). On appeal, employer alleges that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(4), but makes its specific arguments with reference to the administrative law judge's finding of total disability due to pneumoconiosis at Section 718.204(c). Employer's Petition for Review at 1; Employer's Brief at 6-9. Because employer's arguments necessarily implicate the administrative law judge's finding that the existence of pneumoconiosis was established by the medical opinion evidence at Section 718.202(a)(4), the Board will review the administrative law judge's finding thereunder.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Fannin and Jarboe as to the existence of legal pneumoconiosis.[8] Dr. Fannin, who the administrative law judge noted has been claimant's treating physician for over ten years, diagnosed claimant with both clinical and legal pneumoconiosis, and stated that he based these diagnoses on chest x-rays, pulmonary function studies, and blood gas studies administered during the course of his treatment of claimant. Director's Exhibits 46, 53. Dr. Fannin specified that claimant has legal pneumoconiosis in the form of "chronic obstructive pulmonary disease and coronary artery disease . . . significantly related to or substantially aggravated by, dust exposure in coal mine employment." Director's Exhibit 53 at 2.

By contrast, Dr. Jarboe, who the administrative law judge noted is Board-certified in Internal Medicine and Pulmonary Disease, concluded that there was not sufficient evidence to diagnose pneumoconiosis. Employer's Exhibits 1, 2. Dr. Jarboe explained that claimant's x-ray was negative for pneumoconiosis, and that, while claimant had pulmonary function changes that "would be compatible with a dust induced lung disease," claimant's specific changes had several possible, non-coal mine employment causes. Employer's Exhibit 1 at 4. Specifically, Dr. Jarboe stated that claimant has a significant restrictive impairment with air trapping. Noting that claimant had coronary artery bypass surgery, Dr. Jarboe explained that the splitting of the sternum that is done in that surgery often results in a reduction in forced vital capacity on pulmonary function study. Employer's Exhibit 1 at 4-5. Dr. Jarboe opined further that the mild degree of air trapping "may well have" resulted from claimant's smoking habit. Employer's Exhibit 1 at 5. In this regard, Dr. Jarboe noted that, although claimant stated that he stopped smoking following his bypass surgery, claimant's carboxyhemoglobin level, in combination with the results of another test,[9] indicated that claimant continues to smoke. Employer's Exhibit 1 at 4. Dr. Jarboe also concluded that possible congestive heart failure, based on claimant's known coronary artery disease and the fact that his heart was enlarged on x-ray, contributed to claimant's impairment. Employer's Exhibit 1 at 4, 5.

When deposed, Dr. Jarboe reiterated his opinion as to the "likely causes" of claimant's restrictive lung impairment, adding that obesity contributed, and that smoking was "most surely" causing the air trapping component. Employer's Exhibit 2 at 14-15, 21-22, 30-33.

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[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[9] Dr. Jarboe stated that this additional test detects serum cotinine, which is a metabolite of nicotine. Employer's Exhibit 1 at 3, 5; Employer's Exhibit 2 at 26-28.

Pursuant to Section 718.202(a)(4), the administrative law judge discounted "in large part" Dr. Jarboe's failure to diagnose legal pneumoconiosis because the administrative law judge found that Dr. Jarboe placed inappropriate reliance on his negative x-ray reading. Decision and Order at 9. The administrative law judge also found that Dr. Jarboe's statement that claimant has "changes in his pulmonary function which would be compatible with a dust induced lung disease" supported Dr. Fannin's opinion that claimant has legal pneumoconiosis. *Id.* The administrative law judge found that Dr. Fannin's opinion was reasoned and established that claimant has legal pneumoconiosis. Decision and Order at 9-10.

Employer contends that the administrative law judge failed to adequately explain why he discounted Dr. Jarboe's opinion, and did not consider the physicians' credentials when weighing the opinions. We agree. Contrary to the administrative law judge's finding, Dr. Jarboe did not rely primarily on a negative chest x-ray to conclude that claimant does not have legal pneumoconiosis. As summarized, Dr. Jarboe diagnosed a restrictive impairment on pulmonary function study, and he discussed the etiology of that impairment, to address whether claimant has legal pneumoconiosis. Thus, substantial evidence does not support the administrative law judge's finding, which was based on a selective analysis of Dr. Jarboe's opinion. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984). For the same reason, substantial evidence does not support the administrative law judge's finding that Dr. Jarboe's statement that claimant has pulmonary function changes "which would be compatible with a dust induced lung disease" supports Dr. Fannin's opinion that claimant has legal pneumoconiosis, as the finding is based on only part of Dr. Jarboe's overall opinion. *See Hess*, 7 BLR at 1-297. Additionally, we agree with employer that the administrative law judge did not take into account the differing credentials of Drs. Fannin and Jarboe when weighing their opinions.[10] *See Eastover Mining Co. v. Williams,* 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

Consequently, we vacate the administrative law judge's finding that claimant established legal pneumoconiosis at Section 718.202(a)(4), and remand this case to the administrative law judge for reconsideration of the entirety of the opinions of Drs. Fannin and Jarboe, with reference to the reasoning and documentation of the physicians' opinions, and the physicians' respective credentials. *See Williams,* 338 F.3d at 518, 22 BLR at 2-655; *Director, OWCP v. Rowe,* 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); 20 C.F.R. §718.104(d)(5).

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[10] Review of the record does not reveal documentation of Dr. Fannin's credentials. Both claimant and employer state that Dr. Fannin is Board-certified in Family Medicine. Claimant's Pre-Hearing Report at 3, Sept. 29, 2006; Employer's Brief at 9.

In light of our decision to remand the case to the administrative law judge for reconsideration of whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), we also vacate the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c), and instruct the administrative law judge to reconsider this issue on remand.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for reconsideration 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