BRB No. 07-0442 BLA

T. H.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 02/29/2008
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-BLA-5709) of Administrative Law Judge Paul H. Teitler on an initial 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] The administrative law judge accepted the parties' stipulation to twenty-seven years of coal mine employment, as supported by the record, and found that claimant established the existence of pneumoconiosis arising out

[1] Claimant filed his application for benefits on December 11, 2003. Director's Exhibit 2. When the district director issued a proposed Decision and Order awarding benefits on November 26, 2004, employer requested a formal hearing, which was held on August 3, 2006. Director's Exhibits 21, 22.

of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that claimant is totally disabled, and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge failed to address an x-ray reading under Section 718.202(a)(1) and erred in finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer further contends that the administrative law judge erred in finding that claimant proved that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so.[2]

The Board's scope of review is defined by statute. The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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, 363 (1965).

Pursuant to Section 718.202(a)(1), the administrative law judge considered six readings of three x-rays. Decision and Order at 4. The film dated October 18, 2002 was read as negative by Dr. Desai, who possesses no special radiological qualifications. Claimant's Exhibit 2. The x-ray obtained on April 14, 2004, was read as positive for pneumoconiosis by Dr. Alexander, a dually qualified Board-certified radiologist and B reader, and as negative by Dr. Patel, a Board-certified radiologist, and Dr. Scott, a dually qualified physician. Director's Exhibits 11, 14. A film dated August 12, 2004 was interpreted as positive for pneumoconiosis by Dr. Alexander, and as negative for pneumoconiosis by Dr. Poulos, who is also a dually qualified physician. Director's Exhibit 14; Claimant's Exhibit 3; Employer's Exhibit 5.

The administrative law judge stated that in considering the x-ray evidence of record, he would accord greatest weight to the readings performed by physicians with dual qualifications. Decision and Order at 4. Because there were two positive readings by dually qualified physicians and two negative readings by dually qualified physicians,

[2] The parties do not challenge the administrative law judge's findings that claimant had twenty-seven years of coal mine employment, that the evidence was insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), or that claimant proved that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). These findings, therefore, are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the administrative law judge found that the x-ray evidence was in equipoise. *Id*. The administrative law judge concluded, therefore, that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id*.

Employer argues that the administrative law judge erred in finding that the x-ray evidence was in equipoise, asserting that the administrative law judge failed to consider the June 6, 2006 x-ray interpretation by Dr. Broudy, a B reader, who found no evidence of pneumoconiosis. Employer's Exhibits 1, 3. Employer designated Dr. Broudy's reading as part of its affirmative case evidence and the administrative law judge admitted it into the record at the hearing. Hearing Transcript at 7-8. Although employer is correct in asserting that the administrative law judge did not weigh the reading performed by Dr. Broudy, Employer's Exhibit 3 at 4-6, the administrative law judge's oversight does not constitute error requiring remand. Because the administrative law judge's finding that the x-ray evidence was in equipoise was based upon the equal division between positive and negative readings performed by physicians who are dually qualified, the addition of the negative interpretation by Dr. Broudy, who is not dually qualified, would not alter the administrative law judge's determination, which was within his discretion as fact-finder. Decision and Order at 4; *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, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-4-5 (2004).[3] We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge weighed medical opinions prepared by four physicians. In a letter dated September 7, 2004, Dr. Rafiqul Alam (hereinafter referred to as Dr. R. Alam), whose qualifications are not of record, indicated that he had been treating claimant since December 2000 and attached claimant's treatment records. Claimant's Exhibits 1, 2. Dr. R. Alam diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease (COPD), bronchitis, and hypertension based on claimant's pulmonary function study values and chest x-rays, and twenty-nine year history of coal dust exposure. *Id.* Dr. R. Alam concluded that claimant's totally disabling pulmonary impairment prevented him from returning to his previous coal mine employment, and attributed the impairment to coal dust exposure and cigarette smoking. *Id.*

Dr. Mahmood Alam (hereinafter referred to as Dr. M. Alam), whose qualifications are not of record, examined claimant on behalf of the Department of Labor (DOL) on April 14, 2004. Director's Exhibit 10. Dr. M. Alam recorded a twenty-eight year history

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of coal mine employment occurred in Kentucky. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

of coal mine employment, and noted a smoking history of one-half to one pack per day from 1958 until 1970, then one cigarette per day from 1970 until 1994. *Id.* Based on a chest x-ray, and pulmonary function and arterial blood gas studies, Dr. M. Alam opined that claimant had chronic bronchitis, dyspnea, cough, and a mixed respiratory problem, which he attributed to claimant's history of coal dust exposure and cigarette smoking. *Id.*

Dr. Rosenberg, who is Board-certified in pulmonary disease, examined claimant on August 12, 2004, and reviewed claimant's medical records. Director's Exhibit 14; Employer's Exhibit 4. Based on the absence of restriction, claimant's negative chest x-rays, the arterial blood gas and pulmonary function study values, evidence of air trapping, and minimal bronchodilator response, Dr. Rosenberg diagnosed COPD and attributed claimant's totally disabling pulmonary impairment to cigarette smoking. *Id.* The physician also opined that the impairment was not caused or hastened by the past inhalation of coal dust. *Id.*

Dr. Broudy, who is Board-certified in pulmonary disease, examined claimant on June 6, 2006 and obtained claimant's history of coal mine employment, noting that claimant began smoking in his teens and continued to smoke up until "the last 15-20 years." Employer's Exhibit 1. Dr. Broudy found no evidence of pneumoconiosis or silicosis by chest x-ray or CT scan, but indicated that the pulmonary function study produced qualifying values. *Id*. Dr. Broudy diagnosed COPD due to cigarette smoking, and opined that claimant did not retain the respiratory capacity to return to his previous coal mine employment. *Id*. Dr. Broudy also reviewed the pulmonary examination reports of Drs. M. Alam and Rosenberg, and records from Drs. Rapier and Gilbert, who evaluated claimant for neck and back pain, and concluded that the additional records added further support to his conclusions. Employer's Exhibit 2. In a deposition conducted on July 28, 2006, Dr. Broudy opined that claimant's disabling impairment was not in any way related to, caused, or hastened by coal dust exposure. Employer's Exhibit 3 at 11-12. Dr. Broudy based his diagnosis on the reversibility of claimant's obstruction, the fact that the primary defect was obstructive, not restrictive, and the absence of progressive massive fibrosis. *Id.*

In weighing the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge referred to Drs. R. Alam and M. Alam as a single physician named "Dr. Alam." Decision and Order at 5. The administrative law judge initially found that the relevant medical opinions were insufficient to affirmatively establish the presence of clinical pneumoconiosis. Decision and Order at 7. Based upon his determination that the x-ray evidence was in equipoise, however, the administrative law judge further found that Dr. Rosenberg's and Dr. Broudy's opinion, that the absence of x-ray evidence of pneumoconiosis bolstered their conclusion that claimant's COPD was not related to coal dust exposure, was no more persuasive than the contrary opinion of Dr. Alam. *Id.* Regarding the issue of legal pneumoconiosis, the administrative law concluded that the qualifying pulmonary function studies conducted by Dr. Rosenberg

and Dr. Broudy were supportive of Dr. Alam's opinion that claimant had a pulmonary impairment that is due to both coal dust exposure and cigarette smoking. Decision and Order at 8. The administrative law judge also found that the opinions of Dr. Broudy and Dr. Rosenberg, that the absence of progressive massive fibrosis rules out the presence of legal pneumoconiosis, was less persuasive than Dr. Alam's conclusion that claimant's COPD was due to both coal dust exposure and cigarette smoking. Decision and Order at 8-9. The administrative law judge stated that:

> Under these circumstances, I find the contrary probative evidence, the medical opinion reports of Drs. Broudy and Rosenberg, is not well reasoned in regards to the etiology of the obstructive pulmonary impairment all physicians agree is present. Therefore, I find these reports are not sufficient to outweigh Dr. Alam's well reasoned and well supported medical opinion as Claimant's treating physician. Dr. Alam's conclusion that Claimant's pulmonary condition and disability are due to both coal mine dust exposure and cigarette smoke exposure is sufficient to establish the presence of legal pneumoconiosis. Therefore, I accept Dr. Alam's reports under the provisions of Section 718.104(d) and find they are sufficient to establish the presence of pneumoconiosis under Section 718.202(a)(4).

Decision and Order at 9.

Employer asserts that the administrative law judge erred in treating the medical opinions of Drs. M. Alam and R. Alam as if they were prepared by a single person. Employer further contends that the administrative law judge did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), as he mischaracterized the evidence, and failed to adequately explain his rationale for according greater weight to the opinion of Dr. Alam than to the opinions of Drs. Broudy and Rosenberg.[4] Employer also asserts that the administrative law judge erred in ignoring the report in which Dr. Gilbert attributed claimant's COPD to cigarette smoking. Director's Exhibit 14 at 53. Employer's contentions have merit.

[4] Employer also argues that because the administrative law judge should have found that the x-ray evidence was negative for pneumoconiosis, he should also have determined that the opinions of Drs. Broudy and Rosenberg were better supported than "Dr. Alam's" opinion. *See* Decision and Order at 7. We reject employer's allegation of error, as we have affirmed the administrative law judge's finding that the x-ray evidence was in equipoise.

In summarizing the medical opinion evidence of record, the administrative law judge attributed the separate submissions by Drs. R. Alam and M. Alam to a single physician, whom he identified as "Dr. Alam." Decision and Order at 5. In addition, the administrative law judge's finding that Dr. Alam is a treating physician is accurate only with respect to Dr. R. Alam. The record contains treatment notes prepared by Dr. R. Alam, but the only evidence submitted by Dr. M. Alam is his report of the April 2004 pulmonary evaluation that he conducted on behalf of the DOL. Claimant's Exhibits 1, 2; Director's Exhibits 9, 10. In addition, the administrative law judge made no reference to Dr. Gilbert's statement that claimant has COPD related to cigarette smoking.[5] Director's Exhibit 14 at 55. Because the administrative law judge did not accurately characterize the medical opinions of Drs. R. Alam and M. Alam, did not address all of the relevant evidence, and did not adequately explain his findings, his Decision and Order does not conform to the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987)*; Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Accordingly, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4).

Employer also contends that the administrative law judge's erroneous consideration of the medical opinion evidence under Section 718.202(a)(4) tainted his analysis at Section 718.204(c). We agree. In finding that pneumoconiosis is a contributing cause of claimant's totally disabling pulmonary impairment, the administrative law judge specifically relied upon his determination, pursuant to Section 718.202(a)(4), that Dr. Alam's opinion identifying coal dust exposure as a contributing cause of claimant's COPD outweighed the contrary opinions of Drs. Broudy and Rosenberg. Decision and Order at 11. Thus, we also vacate the administrative law judge's finding pursuant to Section 718.204(c). *Wojtowicz*, 12 BLR at 1-165; *Clark*, 12 BLR at 1-155 (1989); *Fields*, 10 BLR at 1-21; *Mabe*, 9 BLR at 1-68.

On remand, the administrative law judge should first consider whether claimant has established, by a preponderance of the medical opinion evidence, the existence of legal pneumoconiosis at Section 718.202(a)(4).[6] When weighing this evidence, the

[5] Dr. Gilbert was the attending physician during claimant's hospitalization for treatment of gastric bleeding and saw claimant on at least two occasions after his discharge. In the section of the hospital report labeled "Discharge Diagnoses," Dr. Gilbert indicated that claimant suffered from "[chronic obstructive pulmonary disease] with tobacco abuse." Director's Exhibit 14 at 55.

[6] Employer states correctly that in indicating that the opinions of Drs. Broudy and Rosenberg were "not sufficient to outweigh" the opinions supportive of a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge did not

administrative law judge must examine each medical opinion, including Dr. Gilbert's hospital report and the separate opinions of Drs. R. Alam and M. Alam, in light of the studies conducted, and admissible at 20 C.F.R. §725.414, and the objective indications upon which the medical opinion or conclusion is based. *See Director, OWCP v. Rowe*, 710 F.2d 569, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge must then determine whether the medical opinion evidence constitutes a reasoned medical judgment as to the presence or absence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).[7] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). The administrative law judge must also explain specifically the bases for his credibility determinations pursuant to Section 718.202(a)(4). *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998).

The administrative law judge must then resolve the conflict between the opinions of Drs. R. Alam and M. Alam, which state that claimant's COPD is related, in part to coal dust exposure, and the contrary opinions of record. In so doing, the administrative law judge may, but is not required to, consider the respective qualifications of the physicians. Under the terms of 20 C.F.R. §718.104(d), however, the administrative law judge must give consideration to the relationship between claimant and any treating physician whose report has been admitted into the record. 20 C.F.R. §718.104(d). The administrative law judge can give controlling weight to such an opinion, "provided that the weight given … shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." *Id*.

When addressing the opinions of Drs. Broudy and Rosenberg on remand, the administrative law judge should reconsider whether the physicians properly addressed the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). As employer

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allocate the burden of proof to claimant, as is required under 20 C.F.R. Part 718 and the Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Decision and Order at 9; *see* 20 C.F.R. §718.202(a).

[7] In considering whether each medical opinion is reasoned and documented on the issue of the existence of legal pneumoconiosis, the administrative law judge should address the extent to which the physicians' attribution of claimant's pulmonary impairment to cigarette smoking and/or coal dust exposure is supported by the evidence of record. To assist in resolving the conflict in the medical opinions regarding the role that smoking played in causing or contributing to claimant's impairment, the administrative law judge should make a finding as to the length of claimant's smoking history.

has indicated, contrary to the administrative law judge's finding, both Drs. Broudy and Rosenberg acknowledged that coal dust exposure can cause an obstructive impairment, but gave several reasons for why they did not attribute claimant's COPD to coal dust exposure. The administrative law judge should assess whether the explanations provided by Drs. Broudy and Rosenberg are consistent with the definition of legal pneumoconiosis adopted by the DOL and the conclusions expressed in the scientific studies that the DOL relied upon in drafting the definition. 20 C.F.R. §718.202(a)(2); *see* 65 Fed. Reg. 79936-45 (Dec. 20, 2000). In setting forth his findings on this issue, the administrative law judge must provide the underlying rationale, as required by the APA. If the administrative law judge determines that claimant has established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), he must then consider whether claimant has proven that pneumoconiosis is a substantially contributing cause of his total disability under Section 718.204(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge