BRB No. 07-0447 BLA

F.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APOLLO COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 02/29/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
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.

James D. Holliday, Hazard, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-5083) of Administrative Law Judge Janice K. Bullard 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 credited the miner with seventeen and one-half years of qualifying coal mine employment, and adjudicated this claim, filed on September 26, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated the responsible operator herein, and that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv), 718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges its designation as responsible operator, as well as the administrative law judge's findings that the evidence was sufficient to establish the existence of pneumoconiosis and disability causation. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that employer is the responsible operator. [1]

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).

Employer initially maintains that K & B Coal should have been designated as the responsible operator because claimant's employment with K & B Coal included a time

[1] Because no party challenges the administrative law judge's findings regarding the length of claimant's coal mine employment and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

frame after claimant worked for employer. Employer's Brief at 4. Alternatively, employer argues that the administrative law judge improperly calculated the number of weeks of claimant's employment to find that the miner was employed by employer for a cumulative period of not less than one year. Employer's Brief at 4. *See* 20 C.F.R. §§725.494(c), 725.101(a)(32). Employer thus contends that the administrative law judge erred in finding that employer was properly designated the responsible operator herein. We disagree. The administrative law judge's determination that employer failed to substantiate its assertion that it was not the potentially liable operator that most recently employed the miner is supported by substantial evidence. Decision and Order at 7; *see* 20 C.F.R. §§725.494, 725.495(c)(2). The administrative law judge next determined, using claimant's Social Security Administration earnings statement, that claimant worked for employer for a period greater than one year by dividing his total earnings from employer by his wage rate to yield a total of 57.58 weeks. Employer argues that this method fails to take into account that claimant did not always work a standard 40-hour week and sometimes worked overtime. Employer's Brief at 3. The Director, however, maintains correctly that employer's wage records establish that claimant worked for that entity for partial periods that, cumulatively, constitute more than one calendar year, and the record contains no evidence to rebut the presumption that claimant spent at least 125 working days in such employment.[3] Director's Brief at 3; Director's Exhibit 26; 20 C.F.R. §725.101(a)(32)(ii); *see generally Clark v. Barnwell Coal Company*, 22 BLR 1-275 (2003). Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer was properly designated the responsible operator herein.

Employer next contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Specifically, employer argues that the administrative law judge erred in crediting the equivocal 1/0 x-rays over the unequivocal 0/0 readings, and in failing to consider the x-ray interpretations from claimant's past medical file. Employer's arguments are without merit.

Initially, we note that x-ray evidence suitable to prove the presence or absence of pneumoconiosis shall be classified pursuant to 20 C.F.R. §718.102, and accordingly, the administrative law judge permissibly relied on eight interpretations of the three recent x-rays, dated January 8, 2004, January 12, 2004, and December 29, 2004 in making her determination. Decision and Order at 10; *see* 20 C.F.R. §§718.202(a), 718.102. The administrative law judge determined that the film dated January 8, 2004 was read as Category 1/0 by a B reader and a dually-qualified Board-certified radiologist and B

[3] Employer's wage records indicate that claimant was employed for the periods from July 21, 2001 to February 23, 2002, and from August 18, 2002 to February 2, 2003.

reader,[4] Director's Exhibit 16, Claimant's Exhibit 4, and as negative by two dually-qualified Board-certified radiologists and B readers, Director's Exhibits 17, 30. Decision and Order at 10. The administrative law judge further determined that the film dated January 12, 2004 was interpreted as Category 1/0 by a dually-qualified reader, Director's Exhibit 39, and as negative by a B reader, Director's Exhibit 18. Decision and Order at 11. In addition, the administrative law judge found that the film dated December 29, 2004 was interpreted as Category 1/0 by a dually-qualified reader, Claimant's Exhibit 3, and as negative by a B reader, Employer's Exhibit 1. Decision and Order at 11. Based on the preponderance of Category 1/0 classifications by the best qualified readers,[5] the administrative law judge acted within her discretion in finding that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 11; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1 (2004); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4 (1990). The administrative law judge's findings are supported by substantial evidence, and thus are affirmed.

Employer next argues that Dr. Wheeler's negative reading of the September 10, 2003 CT scan, when considered with the x-ray evidence, supports employer's position that the evidence is insufficient to support a finding of pneumoconiosis. The administrative law judge properly considered Dr. Wheeler's CT scan report under the provisions of Section 718.107(a), and permissibly accorded it less weight than the more recent x-rays of record. Decision and Order at 15; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-34 (1991)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge's findings pursuant to Section 718.107(a) are affirmed.

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[4] 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 Co. Inc. of Va. 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 particular expertise in the field of radiology.

[5] Section 718.202(a)(1) provides that where two or more x-ray reports are in conflict, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1). The United States Court of Appeals for the Sixth Circuit has also held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

Regarding Section 718.202(a)(4), employer contends that the opinions of Drs. Baker and Alam are equivocal and insufficient to support a finding of "legal pneumoconiosis," i.e., a chronic dust disease of the lungs arising out of coal mine employment, *see* 20 C.F.R. §718.201, because neither doctor could accurately quantify the impact that coal dust, as opposed to smoking, had on claimant's pulmonary condition; and furthermore, the doctors did not adequately understand that claimant's coal mine work was sporadic, but his smoking history was constant. Employer's Brief at 6. Employer also contends that the administrative law judge erred in finding Dr. Baker's opinion to be well-reasoned, and in crediting the opinions of Drs. Baker and Alam over those of Drs. Broudy and Dahhan on the issue of disability causation. Employer's Brief at 7. Employer's arguments lack merit.

Employer's assertions regarding the administrative law judge's analysis of the medical evidence are tantamount to requests that the Board reweigh the evidence, a role outside of the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The record contains numerous medical reports from four physicians. Drs. Baker and Alam both diagnosed a chronic obstructive pulmonary disease due to claimant's cigarette smoking, but with significant contribution from coal dust exposure. Director's Exhibit 16, 31; Claimant's Exhibits 1, 6, 5 at 7-8, 11-12. Dr. Dahhan opined that claimant's disabling pulmonary impairment resulted solely from smoking and was not caused by, related to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Broudy found no evidence of silicosis or any chronic lung disease caused by the inhalation of coal mine dust, and attributed claimant's chronic bronchitis to smoking. Director's Exhibit 18.

In determining that the weight of the medical opinions supported a finding of legal pneumoconiosis, the administrative law judge permissibly accorded more weight to the opinion of Dr. Baker because the physician set forth the clinical findings, observations, facts and other data upon which he based his diagnosis, and further explained the bases of his conclusions during his deposition testimony. Although the administrative law judge found the opinion of Dr. Alam, claimant's treating physician, not to be as well-documented, he accorded it some persuasive weight. Decision and Order at 16; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) citing *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Contrary to employer's assertion, Drs. Baker and Alam, who both diagnosed chronic obstructive pulmonary disease significantly related to coal dust exposure, were not required to quantify with any more specificity the impact that coal dust exposure had on claimant's pulmonary condition. 20 C.F.R. §718.201(a)(2). Additionally, Dr. Baker specifically stated at deposition that he knew claimant was still

smoking, and acknowledged an elevation of carboxyhemoglobin. Claimant's Exhibit 5 at 23. Accordingly, the administrative law judge's crediting of Drs. Baker and Alam, and her finding of legal pneumoconiosis at Section 718.202(a)(4), are affirmed as supported by substantial evidence.

Employer next contends that the administrative law judge erred in crediting the opinions of Drs. Baker and Alam over those of Drs. Broudy and Dahhan in finding that claimant established disability causation at Section 718.204(c). Employer's Brief at 7. We disagree. Although the administrative law judge found the reports of Drs. Dahhan and Broudy to be well-documented, she nonetheless accorded them diminished weight, in part, because their opinions are based on findings contrary to the administrative law judge's findings and the record as a whole. Decision and Order at 7. The administrative law judge permissibly discounted the opinions of Drs. Dahhan and Broudy as they are based on a determination that the miner did not suffer from pneumoconiosis, contrary to the administrative law judge's finding. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Abshire v. D & L Coal Co., 22* BLR 1-202, 214 (2002)(*en banc*). The administrative law judge additionally found Dr. Broudy's opinion to be equivocal because he stated that it "was more medically probable" that claimant's condition was due to his smoking habit. Decision and Order at 23; Employer's Exhibit 8; *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). The administrative law judge permissibly accorded diminished weight to Dr. Dahhan's diagnosis of "coronary artery disease, low back pain and abdominal pain," because it is inconsistent with the majority of physicians' opinions that diagnosed chronic bronchitis. Decision and Order at 17; Employer's Exhibit 1.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts. *See Groves*, 277 F.3d 829, 22 BLR 2-320; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984). It is also within the administrative law judge's discretion to determine whether an opinion is documented and reasoned. *See 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)*; Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). We, therefore, affirm the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c), as supported by substantial evidence, and affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge