BRB No. 08-0344 BLA

L.C. Claimant-Respondent v. PEABODY COAL COMPANY and PEABODY INVESTMENTS, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/24/2009 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2006-BLA-5111) of Administrative Law Judge Michael P. Lesniak on a living miner's claim filed on September 30, 2004, 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).

Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established thirty-four years of coal mine employment and the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a) and in finding that claimant's total disability was due to pneumoconiosis at Section 718.204(c). Claimant responds, countering employer's arguments, and urging affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[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. 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).[2]

To be entitled to benefits under the Act in a living miner's claim, claimant must establish 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).

First, turning to Section 718.202(a)(1), employer argues that the administrative law judge erred in relying on the numerical superiority of the positive x-ray readings to find that the x-ray evidence established pneumoconiosis pursuant to Section 718.202(a)(1). This argument is rejected.

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[1] The administrative law judge's finding that claimant established thirty-four years of coal mine employment, that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that total disability was established pursuant to 20 C.F.R. §718.204(b) are affirmed, as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 5.

In weighing the x-ray evidence, the administrative law judge noted that the January 19, 2005 x-ray was read as negative for pneumoconiosis by Dr. Scatarige, a B reader and Board-certified radiologist, and as positive for pneumoconiosis by Dr. Alexander, a B reader and Board-certified radiologist. Decision and Order at 5, Director's Exhibit 11; Claimant's Exhibit 2. The administrative law judge noted that the January 26, 2005 x-ray was read as positive for pneumoconiosis by both Dr. Patel and Dr. Alexander, B readers and Board-certified radiologists, and as negative for pneumoconiosis by Dr. Wheeler, a B reader and Board-certified radiologist. *Id*.; Director's Exhibits 10, 11; Claimant's Exhibit 1. The administrative law judge noted that the April 4, 2006 x-ray was read as positive for pneumoconiosis by Dr. Alexander, and as negative for pneumoconiosis by Dr. Wheeler, B readers and Board-certified radiologists. *Id*.; Claimant's Exhibit 1; Employer's Exhibit 4. After observing that all of the physicians were equally qualified in the reading of x-rays, the administrative law judge found that their qualifications were not a determinative factor in assessing the weight to accord the x-ray readings. *Id*. Instead, the administrative law judge properly found that since a majority of the x-ray readings, which were read by equally-qualified readers, were positive for pneumoconiosis, claimant met his burden of establishing pneumoconiosis by a preponderance of the x-ray evidence. The administrative law judge's weighing of the x-ray evidence constituted both a qualitative and quantitative analysis. Decision and Order at 6. *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon*.); Decision and Order at 5-6.

Second, employer argues that the administrative law judge failed to provide a sufficient explanation for his weighing of the x-ray evidence pursuant to the requirements of 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 also argues that the administrative law judge did not explain why he found one x-ray more credible than the others. These arguments are rejected, as the administrative law judge fully explained his reason for crediting the positive x-ray evidence. Decision and Order at 5-6; *see Anderson*, 12 BLR at 113 (the Board is not empowered to reweigh the evidence). The administrative law judge properly found pneumoconiosis established based on the totality of the positive x-ray readings by equally qualified physicians. Accordingly, we affirm the administrative law judge's finding that pneumoconiosis was established at Section 718.202(a)(1) on the basis of x-ray evidence.

Turning to Section 718.202(a)(4), employer asserts that the administrative law judge erred in finding pneumoconiosis established based on the medical opinion evidence. Specifically, employer contends that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Cohen, finding pneumoconiosis, because

they were based on only positive x-ray evidence and claimant's lengthy coal mine employment history. Employer contends that reliance on these factors does not make the opinions reasoned and documented. Additionally, employer contends that Dr. Rasmussen appears to be biased in favor of claimant since he drafted two letters on behalf of claimant, without charge.

In finding that the medical opinion evidence established pneumoconiosis at Section 718.202(a)(4), the administrative law judge credited the opinions of Drs. Rasmussen and Cohen over the opinions of Drs. Zaldivar and Crisalli, in light of their documentation and reasoning.[3] The administrative law judge properly found the opinions of Drs. Rasmussen and Cohen better reasoned and documented because they were more consistent with the credible objective medical evidence, such as the positive x-ray evidence and the claimant's lengthy coal mine employment history.[4] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge found the contrary opinions of Drs. Zaldivar and Crisalli, stating that claimant did not have coal workers' pneumoconiosis or a respiratory impairment arising out of coal mine employment, less credible because they provided ambiguous, and conflicting opinions on

[3] The administrative law judge found that Drs. Zaldivar, Crisalli, and Cohen were all Board-certified pulmonary specialists. Although the administrative law judge noted that Dr. Rasmussen was not a Board-certified pulmonary specialist, he nonetheless found that the doctor's credentials were comparable to those of Drs. Zaldivar, Crisalli, and Cohen, since his Curriculum Vitae reflected his extensive experience in the field of pulmonary disease and he had testified on several occasions regarding coal workers' pneumoconiosis before subcommittees of the United States Senate and House of Representatives, and before the West Virginia legislature. Decision and Order at 8; Director's Exhibit 10. The administrative law judge determined, therefore, that the physicians' credentials were not determinative in his assessment of their medical opinions. Decision and Order at 14.

[4] The administrative law judge also found the opinion of Dr. Rasmussen, diagnosing coal workers' pneumoconiosis and a respiratory impairment due to both coal mine employment and smoking, to be based on findings on physical examination, symptoms, smoking history, electrocardiogram and pulmonary function and blood gas studies. Likewise, the administrative law judge found that Dr. Cohen also based his finding of coal workers' pneumoconiosis and a respiratory impairment due to both coal mine employment and smoking on his extensive review of claimant's medical data, which included, in addition to x-rays and coal mine employment history, physical examination findings, smoking history, symptoms, and objective medical testing.

the existence of clinical and legal pneumoconiosis.[5] *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of both clinical and legal pneumoconiosis at Section 718.202(a)(4).

We reject employer's argument that Dr. Rasmussen appears to be biased in claimant's favor because he did not charge for two follow-up letters he submitted subsequent to his original report. Employer contends that this "suggests that Dr. Rasmussen's opinion is based on his desire to help out [claimant] rather than to provide a fully independent medical opinion…." Employer's Brief at 17. Claimant responds that employer's argument would make advocacy or altruism an improper motive, whereas monetary compensation would be proper.

Reports prepared in the course of litigation are probative evidence and are not presumptively biased. *Richardson v. Perales*, 401 U.S. 389 (1971); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence. *Cochran*, 16 BLR at 1-108. Employer's argument, which is merely a "suggestion" that Dr. Rasmussen might have been biased and does not provide any concrete proof of bias, falls short of the necessary standard to establish bias. *Cochran*, 16 BLR at 1-107.

Additionally, employer contends that the administrative law judge erred in finding pneumoconiosis established because he failed to weigh all the relevant evidence together pursuant to *Compton*, 211 F.3d at 211, 22 BLR at 2-174, *i.e.*, CT scan evidence and treatment records, along with the x-ray and medical opinion evidence. This argument is rejected. Contrary to employer's contention, the administrative law judge considered the CT scan evidence, which he found to be inconclusive,[6] and claimant's treatment records,[7]

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[5] Specifically, the administrative law judge found the opinions of Drs. Zaldivar and Crisalli to be ambiguous because Dr. Zaldivar only "suggested" that claimant's respiratory impairment "may" be cardiac-related and Dr. Crisalli testified that claimant's respiratory impairment was not due to coal mine employment or smoking, but to hypoxemia of unknown causes. Further, the administrative law judge noted that their opinions, finding that claimant did not have coal workers' pneumoconiosis, conflicted with the preponderance of the x-ray evidence that was positive for pneumoconiosis. Decision and Order at 14.

[6] The administrative law judge noted that the January 19, 2005 CT scan was read as showing pneumoconiosis by Dr. Alexander, a B reader and Board-certified radiologist, while it was read as negative for pneumoconiosis by Dr. Scott, a B reader and Board-certified radiologist. The administrative law judge concluded, therefore, that the CT scan

which he found unreasoned, along with the x-ray and medical opinion evidence. The administrative law judge properly concluded that the evidence, when considered together as a whole, established the existence of pneumoconiosis at Section 718.202(a).

Finally, employer challenges the administrative law judge's finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c). In so finding, the administrative law judge properly credited the opinions of Drs. Rasmussen and Cohen, that claimant's total disability was caused by both coal mine employment and smoking over the contrary opinions of Drs. Crisalli and Zaldivar for the same reasons he credited them on the issue of pneumoconiosis, *i.e.*, because they were better reasoned and documented and more consistent with the credible objective medical evidence. Moreover, the administrative law judge properly accorded less weight to the opinions of Drs. Crisalli and Zaldivar because they did not find, contrary to the administrative law judge's finding, the existence of either clinical or legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Consequently, we conclude that the administrative law judge's analysis of the medical opinion evidence on the issue of disability causation at Section 718.204(c) was reasonable and supported by substantial evidence. It is, therefore, affirmed.

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evidence was inconclusive on the issue of the existence of pneumoconiosis. Decision and Order at 13.

[7] The administrative law judge accorded little weight to the treatment records of Dr. Bembalkar, finding pneumoconiosis, because he gave no underlying rationale for his finding. Decision and Order at 13.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge