BRB No. 10-0348 BLA

JESSIE C. BOWLES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WARRIOR COAL COMPANY	)	
	)	
and	)	
	)	
INTERNATIONAL BUSINESS & MERCANTILE REASSURANCE COMPANY	)	DATE ISSUED: 02/28/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05657) of Administrative Law Judge Jeffrey Tureck rendered on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by*

Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with twenty-five years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that he does not have pneumoconiosis. Claimant specifically contends that the administrative law judge erred in his analysis of the x-ray, CT scan and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, advising that he will not submit a substantive brief in this appeal, unless specifically requested to do so by the Board.[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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant first contends that the administrative law judge erred in finding the x-ray evidence to be insufficient to establish the existence of pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten readings of two x-rays dated March 22, 2002 and August 26, 2004. Decision and Order at 3. The administrative law judge found that the March 22, 2002 x-ray was read by Dr. Simpao, a

[1] We agree with the Director, Office of Workers' Compensation Programs, that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. *See* Decision and Order at 2; Director's Exhibit 2.

[2] This case arises with the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

physician with no known radiological qualifications, and by Drs. Cappiello and Ahmed, Board-certified radiologists and B readers, as positive for pneumoconiosis, and by Drs. Wiot, Halbert and Poulous, dually qualified Board-certified radiologists and B readers, as negative for pneumoconiosis. *Id.*; Director's Exhibit 12; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 4. The administrative law judge further indicated that the August 26, 2004 x-ray was read by Dr. Smith, a dually qualified Board-certified radiologist and B reader, and Dr. Ahmed as positive for pneumoconiosis, and by Dr. Selby, a B reader, and Dr. Halbert as negative for pneumoconiosis. Decision and Order at 3; Director's Exhibit 63; Claimant's Exhibits 3, 5; Employer's Exhibit 2. In weighing the conflicting readings, the administrative law judge noted that three dually qualified radiologists provided four positive readings while three dually qualified also provided four negative readings. He concluded that "[a]t best for claimant, the x-ray readings are equally probative." Decision and Order at 3. He further noted that, [i]f anything[,] the preponderance of the x-ray readings is negative, since a fourth B-reader, Dr. Selby, read the August 26, 2004 x-ray as negative." *Id*. Thus, the administrative law judge concluded that claimant failed to satisfy his burden to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id*.

Claimant argues that the administrative law judge erred in applying a mechanical count of the readings by the equally-qualified radiologists to conclude that the evidence results in a tie. Claimant asserts that the administrative law judge must consider each x-ray separately for the presence or absence of pneumoconiosis, taking into consideration such factors as the recency of the evidence and the qualifications of the readers.[3] Claimant's argument has merit.

Pursuant to 20 C.F.R. §718.202(a)(1), an administrative law judge may not simply count the total number of negative and positive readings presented in the record, and choose the party having the most readings in its favor. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37 (7th Cir. 2007). It is not a "reading" that establishes the existence of pneumoconiosis under the regulations but the x-ray itself. *Cook v. Director, OWCP*, 816 F.2d 1185, 10 BLR 2-33 (7th Cir. 1987). The regulation at 20 C.F.R. §718.202(a)(1), specifically provides that "[a] chest X-ray . . . may form the basis for a finding of the existence of pneumoconiosis," and, in cases "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1).

[3] Claimant further asserts that the administrative law judge erred in failing to consider that "the positive interpretations consistently found category 1 profusion in all lung zones[,]. . . [while] the physicians who read the films negative did not agree on what the films showed." Claimant's Brief at 7.

We agree with claimant that the administrative law judge erred in failing to resolve the conflict in the readings of each individual x-ray presented in the record, as to the presence or absence of pneumoconiosis, as required by the regulation. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148-49, 11 BLR 2-1, 2-8 (1987), *reh'g denied*, 484 U.S. 1047 (1988) ("[T]he [administrative law judge] must weigh conflicting interpretations of the same X-ray in order to determine whether it tends to prove or disprove the existence of pneumoconiosis"); s*ee also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (*en banc*); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983). Thus, we vacate the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for further consideration. On remand, the administrative law judge should address whether each of the two x-rays presented in the record is positive or negative for pneumoconiosis, taking into consideration the radiological qualifications of the physicians, and then weigh the x-ray evidence, as a whole, to determine whether claimant has satisfied his burden to establish the existence of pneumoconiosis.[4]

Furthermore, we agree with claimant that the administrative law judge erred in weighing the conflicting medical opinions pursuant to 20 C.F.R. §718.202(a)(4). The record contains four medical opinions by Drs. Simpao, Cohen, Selby and Castle. Drs. Simpao and Cohen diagnosed pneumoconiosis, while Drs. Selby and Castle did not. The administrative law judge gave no probative weight to the opinions of Drs. Simpao, Cohen and Castle. By contrast, the administrative law judge found that Dr. Selby's opinion was reasoned and documented, and consistent with the negative CT scan and x-ray evidence. *Id*. at 4-5; Director's Exhibit 63.

Claimant argues that the administrative law judge erred in rejecting Dr. Simpao's diagnosis of clinical pneumoconiosis based on his findings with regard to the x-ray evidence. Because we have vacated the administrative law judge's findings at 20 C.F.R. §718.202(a)(1), he is instructed to reconsider Dr. Simpao's opinion on remand pursuant to 20 C.F.R. §718.202(a)(4).

In considering the opinion of Dr. Cohen, the administrative law judge accorded no weight to his diagnosis of clinical pneumoconiosis, finding that Dr. Cohen did not explain his statement that, "even if the sum of the x-ray evidence were judged as

[4] On remand, the administrative law judge should also address whether the chronology of the x-ray evidence is a relevant factor in resolving the conflict in the x-ray evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

negative," he would still diagnose clinical pneumoconiosis." Claimant's Exhibit 4; *see* Decision and Order at 4. The administrative law judge noted that Dr. Cohen's statement was unexplained in light of the negative CT scan evidence, lack of pathology evidence for pneumoconiosis, and claimant's smoking history. Decision and Order at 4. The administrative law judge also discounted Dr. Cohen's diagnosis of legal pneumoconiosis. *Id*. The administrative law judge found that, while Dr. Cohen "points out in great detail that exposure to coal dust has been proven to cause obstructive lung disease," . . . he "does not explain how it can be determined that both the claimant's smoking and coal mining contribute to his obstructive impairment." *Id*. The administrative law judge noted:

> This is particularly important here, since Dr. Cohen concedes that the claimant's obstruction is mild, and based on statistics cited by Dr. Cohen, claimant's smoking history of 40-60 pack years is three to four times as significant as his 26 years of coal mine work in regard to the development of lung disease. Dr. Cohen's reasoning would lead to a diagnosis of pneumoconiosis for any current or former coal miner who has any degree of obstructive impairment. Accordingly, his diagnosis of pneumoconiosis, whether clinical or legal, has no probative value.

Id. at 4-5 (citations omitted).

We agree with claimant that the administrative law judge erred in finding that Dr. Cohen did not explain the basis for his diagnosis of legal pneumoconiosis.[5] Contrary to the administrative law judge's findings, Dr. Cohen cited medical studies, stating that coal dust exposure and smoking cause similar types of obstruction, and also explained, based on the specific objective evidence presented in this case, why he believed that claimant's obstructive respiratory condition is due to both a lengthy smoking habit, as well as coal mine dust exposure. Claimant's Exhibit 4 at 4, 11. Dr. Cohen reviewed the results of two clinical examinations, objective tests and treatment records. In his report dated March 6, 2006, Dr. Cohen noted that claimant had symptoms and physical findings consistent with chronic lung disease due to coal dust exposure, including cough, sputum production, dyspnea, increased resonance, decreased breath sounds, and wheezes. Claimant's Exhibit 4 at 5. Dr. Cohen noted that the objective evidence was consistent with impairment related to smoking and coal dust exposure, citing to the pulmonary

[5] "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). For the purposes of the regulations, a disease "arising out of coal mine employment," means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

function studies revealing a mild obstructive lung disease with moderate diffusion impairment, and blood gas studies showing abnormal gas exchange with exercise. *Id*. Dr. Cohen explained that there is no history of any other occupational exposure that could cause coal workers' pneumoconiosis or obstructive lung disease, that claimant's only other significant exposure was his forty years of cigarette smoking, and that "[i]t is well known that coal mine dust[,] like tobacco smoke[,] can cause or contribute to [an] obstructive impairment like that in [claimant]." *Id*. Dr. Cohen stated, within a reasonable degree of medical certainty, that claimant's "long term exposure to coal dust is a significant contributing cause of his pulmonary disability as manifested by his *mild obstructive defect, moderate diffusion impairment and gas exchange abnormalities with exercise*. His significant tobacco smoke exposure is also a contributing factor." *Id*. (emphasis added).

Because the administrative law judge has failed to properly address the reasons provided by Dr. Cohen for his diagnosis of legal pneumoconiosis, we vacate his credibility determination and his findings pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for further consideration. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *see also Gunderson v. United States Department of Labor*, 601 F.3d 1013, BLR (10th Cir. 2010) (O'Brien, J., dissenting), *citing Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). On remand, the administrative law judge must reweigh the conflicting opinions of Drs. Cohen and Selby as to the etiology of claimant's chronic obstructive lung disease, and determine whether claimant has satisfied his burden to prove the existence of legal pneumoconiosis.[6]

Additionally, pursuant to 20 C.F.R. §718.202(a)(4), claimant argues that the administrative law judge erred in giving the CT scan evidence probative value in this case. Claimant notes that the record contains one CT scan, dated August 26, 2004, which was read by Dr. Eberly as showing emphysema, but as negative for the existence of pneumoconiosis. In his discussion of the medical opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge discredited two physicians' opinions as being inconsistent with the negative CT scan. Claimant asserts that the administrative law judge erred in relying on the CT scan because there is no indication in the record as

[6] The administrative law judge should address claimant's assertion that Dr. Selby based his diagnosis of pneumoconiosis, in part, on his own negative reading of the August 26, 2004 CT scan, which was not admitted into the record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting);

to whether Dr. Eberly was qualified to read the scan. Claimant's Brief at 8-9, 12 n.4; *see* Decision and Order at 3; Director's Exhibit 63 at 34. This argument has merit. Although the administrative law judge referenced Dr. Eberly as a "radiologist," he did not identify the basis for that finding in the record. On remand, the administrative law judge is instructed to consider whether Dr. Eberly is qualified by knowledge, training, or expertise to review CT scans for the presence or absence of pneumoconiosis.[7] *See Consolidation Coal Co. v. Director, OWCP*, [*Stein*], 294 F.3d 885, 893, 22 BLR 2-409, 2-423 (7th Cir. 2002); *Peabody Coal Co. v. McCandless*, 255 F.3d. 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001).

In conclusion, we remand the case for further consideration of the x-ray, CT scan and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1), (4). The administrative law judge must consider the comparative credentials of all of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments, in determining whether claimant has established the existence of either clinical or legal pneumoconiosis. If claimant satisfies his burden to prove that he has pneumoconiosis, the administrative law judge must render findings as to whether claimant is totally disabled due to pneumoconiosis pursuant 20 C.F.R. §718.204(b), (c). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). In addressing all of the requisite elements of entitlement on remand, the administrative law judge must explain the basis for all of his credibility findings in accordance with the Administrative Procedure Act.[8] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[7] Claimant asserts correctly that, while the CT scan evidence is relevant to the existence of clinical pneumoconiosis, it should not be cited by the administrative law judge as a basis for discrediting a physician's opinion regarding the existence of legal pneumoconiosis. *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213, 22 BLR 2-162, 2-177 (4th Cir. 2000).

[8] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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).

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

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