BRB No. 98-0644 BLA

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| EMMETT FOSTER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | DATE ISSUED: |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Rodger Pitcairn (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1310) of Administrative Law Judge J. Michael O'Neill denying benefits 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). After crediting claimant with eight years, nine months and one and one-half days of coal mine employment, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20

C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the evidence is sufficient to establish at least thirteen years of coal mine employment. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.[1]

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 (1965).

Claimant initially contends that he is entitled to credit for thirteen years of coal mine employment. Claimant's brief, however, neither raises any substantive issues nor identifies any specific error on the part of the administrative law judge in determining the length of his coal mine employment. Claimant's statements regarding this finding merely point to evidence favorable to his position and amount to no more than a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah,* Inc., 12 BLR 1-111 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore, affirm the administrative law judge's finding of eight years, nine months and one and one-half days of coal mine employment.

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. In determining whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. *See*

[1]Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2) and (a)(3), and 718.204(c)(1)-(3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

*Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7-8. Claimant's November 11, 1994 x-ray was the only film interpreted by readers with these qualifications. It was interpreted by two such qualified physicians as negative for pneumoconiosis. Director's Exhibits 12, 13. Inasmuch as it is supported by substantial evidence, the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although Drs. Baker and Clarke diagnosed pneumoconiosis,[2] the administrative law judge discredited the opinions of Drs. Baker and Clarke because they relied upon inaccurate coal mine employment and/or smoking histories. Decision and Order at 10. The administrative law judge, however, erred in not rendering a specific finding regarding the length of claimant's smoking history. *See generally Bowman v. Director, OWCP*, 7 BLR 1-718 (1985). Moreover, even if Drs. Baker and Clarke had a somewhat inaccurate understanding of the extent of claimant's coal mine employment and smoking histories, the administrative law judge failed to explain how this misunderstanding undermined their respective diagnoses of pneumoconiosis. 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 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[2]In his November 11, 1994 report, Dr. Baker diagnosed chronic bronchitis attributable to both coal dust exposure and smoking, a finding sufficient to constitute a diagnosis of legal pneumoconiosis under 20 C.F.R. §718.201. Director's Exhibit 10. In his July 15, 1996 report, Dr. Clarke also diagnosed pneumoconiosis. Director's Exhibit 31.

The administrative law judge also erred in discrediting Dr. Clarke's finding of pneumoconiosis because it was based in part upon a positive x-ray interpretation. Although an administrative law judge may properly consider whether contrary readings of an x-ray that a physician relied upon in rendering his opinion call into question the reliability of his conclusion, *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983), he may not reject a physician's diagnosis of pneumoconiosis merely because it is based upon a positive x-ray interpretation that is outweighed by the interpretations of *other* x-rays.[3] *See Winters*, 6 BLR at 1-881. We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.[4]

Claimant finally contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). We agree. The administrative law judge discredited Dr. Clarke's finding of a totally disabling respiratory impairment because he relied upon a non-qualifying pulmonary function study. Decision and Order at 11. We note, however, that test results which exceed the applicable table values may be relevant to the overall evaluation of a claimant's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). Moreover, the determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See*

[3]Dr. Clarke interpreted a July 2, 1996 x-ray as positive for pneumoconiosis. Director's Exhibit 31. There are no other interpretations of this x-ray in the record. We further note that Dr. Clarke's diagnosis of pneumoconiosis was not based entirely upon his positive x-ray interpretation. Dr. Clarke rendered his diagnosis "on the basis of the entire examination." *Id.*

[4]The administrative law judge also failed to address Dr. Rogan's November 29, 1996 report, wherein Dr. Rogan diagnoses COPD, chronic bronchitis and "[probable] coal workers pneumoconiosis." *See* Director's Exhibit 37.

*Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Dr. Clarke noted that claimant's non-qualifying July 2, 1996 pulmonary function study revealed results indicative of "moderate restrictive airway disease and moderate chronic obstructive airway disease. Director's Exhibit 31.

The administrative law judge also erred in his consideration of Dr. Joshi's opinion. The administrative law judge stated that Dr. Joshi, based upon pulmonary function, arterial blood gas, and cardiopulmonary stress tests, concluded that claimant could "resume his work from a pulmonary perspective." Decision and Order at 11-12. In a Pulmonary Consultation dated April 1, 1997, Dr. Joshi interpreted claimant's cardiopulmonary exercise test as revealing a "Class I to II respiratory impairment by ATS criteria." Director's Exhibit 44. Dr. Joshi further noted that the results of claimant's cardiopulmonary exercise test indicated that claimant could perform "[eight] hours of active physical work with normal maximal VO2 and normal anaerobic threshold documented." *Id.* Dr. Joshi, however, also noted that claimant's pulmonary function study "revealed some mild to moderate obstructive airway impairment with fixed obstruction with mild diffusion impairment." *Id.* Dr. Joshi, therefore, concluded that claimant had "chronic grade III dyspnea on exertion but only Class I to II respiratory impairment by ATS criteria noted on [his] cardiopulmonary exercise test." *Id.* Contrary to the administrative law judge's characterization, Dr. Joshi did not state that claimant could resume his work from a pulmonary perspective. Moreover, the administrative law judge failed to reconcile Dr. Joshi's findings regarding the results of claimant's pulmonary function study with the results of claimant's cardiopulmonary exercise test. In light of the above-referenced errors, we remand the case to the administrative law judge to reconsider whether the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). If, on remand, the administrative law judge finds the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), he must then weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*).

Furthermore, on remand, should the administrative law judge find the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c), he must then consider whether the evidence of record is sufficient to establish that claimant's pneumoconiosis is due to his coal mine employment pursuant to 20 C.F.R. §718.203(b) and whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *See Adams v. Director, OWCP*, 886 F.2d 818,

13 BLR 2-52 (6th Cir. 1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge