BRB No. 00-0449 BLA

JAMES C. FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED:
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Tom N. White (Law Offices of Stuart Calwell, PLLC), Charleston, West Virginia, for claimant.

Barbara A. North (Porter, Wright, Morris & Arthur), Columbus, Ohio, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (99-BLA-67) of Administrative Law Judge Gerald M. Tierney on a duplicate 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). Based on his review of the record, the administrative law judge found that claimant established twenty five years of coal mine employment and, based on the filing date of the claim, the administrative law judge applied the regulations found at

20 C.F.R. Part 718 in deciding this claim. The administrative law judge further found that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Benefits were, accordingly, awarded.

Employer appeals, contending that the administrative law judge erred in applying the law of the United States Court of Appeals for the Fourth Circuit to this case instead of the law of the United States Court of Appeals for the Sixth Circuit within whose jurisdiction this case arises, erred in finding that claimant established a mistake in a determination of fact sufficient to establish modification, erred in finding the existence of pneumoconiosis established at Section 718.202(a)(1) and (4), and erred in finding total disability due to pneumoconiosis established at Section 718.204(b). Claimant responds, urging affirmance of

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[1] Claimant filed his initial claim for benefits on May 6, 1980. Director's Exhibit 33. On November 21, 1986, Administrative Law Judge Philip J. Lesser found that claimant failed to establish the presence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 33. Claimant appealed to the Benefits Review Board, but on September 18, 1987, while the appeal was pending, claimant filed a petition for modification with the administrative law judge. The Board, therefore, remanded the claim to the deputy commissioner for further proceedings. Director's Exhibit 33. *Fields v. Southern Ohio Coal Co.*, BRB No. 86-3199 BLA (May 13, 1988)(unpub.). The deputy commissioner referred the case to the Office of Administrative Law Judges, and Administrative Law Judge Nicodemo De Gregorio reviewed the newly submitted evidence and found that claimant failed to establish total disability at Section 718.204(c) and, therefore, failed to establish a mistake in determination of fact or a change in conditions. Judge De Gregorio therefore denied claimant's request for modification on October 24, 1990. Director's Exhibit 33. Claimant appealed, and in *Fields v. Southern Ohio Coal Co.*, BRB No. 91-0278 (July 28, 1992)(unpub.), the Board affirmed Judge De Gregorio's denial of benefits. Claimant appealed, and the United States Court of Appeals for the Fourth Circuit affirmed the denial of benefits. *Fields v. Southern Ohio Coal Co.*, No. 93-1203 (Oct. 6, 1994)(unpub.). Director's Exhibit 33.

Claimant filed a duplicate claim on May 16, 1997, which was denied by the district director. Thereafter, claimant filed a timely request for modification by submitting new evidence on June 8, 1998. Director's Exhibit 32. Administrative Law Judge Gerald M. Tierney found that claimant established the existence of pneumoconiosis, and thereby established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

[2] The administrative law judge's findings that the existence of pneumoconiosis is not established at Section 718.202(a)(2), (3), that the pulmonary function studies at 20 C.F.R.

the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer 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). We disagree. The evidence of record contains eight readings of three x-ray films. Of the eight, the administrative law judge found that five were read positive for the existence of pneumoconiosis, while three were read negative. The administrative law judge noted that the three negative interpretations were rendered by one Board-certified B-reader and two B-readers, and that the five positive readings were rendered by one Board-certified B-reader and two B-readers. In resolving the conflict in the x-ray readings, the administrative law judge rationally accorded greater weight to the more recent x-ray which was interpreted as positive. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989). The administrative law judge therefore permissibly found that, "[o]n balance a preponderance of the x-ray evidence

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§718.204(c)(1) fail to establish total disability, and that the blood gas studies and medical opinions establish total disability at 20 C.F.R. §718.204(c)(2), (4), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] As employer contends, the administrative law judge erred in stating that there were four x-rays instead of three, Decision and Order at 7. However, inasmuch as the administrative law judge considered the correct number of x-ray readings and his findings in all other respects are correct, any error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

establishes the existence of pneumoconiosis," Decision and Order at 7; *Woodward, supra*; *Adkins, supra*; *Ferda, supra*. In light of the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000), *discussed infra*, however, we cannot affirm the administrative law judge's finding at Section 718.202(a)(1).

Employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis by medical opinions at Section 718.202(a)(4) and that his totally disabling respiratory impairment arose out of coal mine employment at Section 718.204(b). Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was established by x-ray evidence, we would not normally address employer's contention at Section 718.202(a)(4) in this case arising within the jurisdiction of the Sixth Circuit. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We agree with employer that because claimant's last coal mine employment occurred within the jurisdiction of the Sixth Circuit, Hearing Transcript at 10, the law of that circuit should apply to this case. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*). However, as claimant has also worked within the jurisdiction of the Fourth Circuit, and has already appealed once to that circuit, that circuit's law is also applicable. *Shupe* at 1-202. Accordingly, we will apply the holding of the Fourth Circuit in *Compton, supra*, which requires that all evidence relevant to the existence of pneumoconiosis be weighed together at Section 718.202(a), and must accordingly vacate the administrative law judge's findings at Section 718.202(a)(1), (4), and remand the case for consideration pursuant to *Compton*. Specifically, employer contends that the administrative law judge erred in his consideration of the opinions of Drs. Rasmussen and Zaldivar at Section 718.202(a)(4).

The evidence in the instant case contains the medical opinion of two physicians, Drs. Zaldivar and Rasmussen. Dr. Zaldivar attributed claimant's lung condition and disability to coronary artery disease and previous coronary bypass surgery. Director's Exhibit 25. Dr. Rasmussen found that claimant's coal mine employment was a significant contributing factor to his lung impairment and total disability. Director's Exhibit 26. In finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) and causation at Section 718.204(b), the administrative law judge accorded greater weight to Dr. Rasmussen's opinion because it was "well supported" while Dr. Zaldivar's opinion was entitled to less weight because it "offered no explanation for ruling out the miner's significant coal mine experience as a contributing factor to his disability, even though ..., normally, the miner's test results would indicate pneumoconiosis." Decision and Order at 8-9.

Employer contends, however, that the administrative law judge erred in crediting Dr. Rasmussen's opinion because it is "well supported," when, in fact, it was not and when Dr. Rasmussen, himself, acknowledged that the results of claimant's x-rays and pulmonary function studies were not consistent with coal workers' pneumoconiosis. Moreover,

employer contends that Dr. Rasmussen erred in finding that claimant's occupational exposure was his only risk factor for lung disease when the evidence contains claimant's admission of a lengthy smoking history to both Drs. Rasmussen and Zaldivar, *see* Director's Exhibits 25, 26, which was not considered by the administrative law judge. Likewise, employer contends that the administrative law judge erred in according less weight to Dr. Zaldivar's opinion because it lacked any basis or support for its conclusion that claimant's condition is due to his severe coronary artery disease and surgery, and offered no explanation for ruling out claimant's significant coal mine experience as a contributing factor when, in fact, Dr. Zaldivar had stated that the reduction of diffusing capacity and lung capacity [seen in claimant's pulmonary function study] are the result of severe coronary artery disease with left ventricular failure and previous coronary bypass surgery which resulted in the scarring of the lining of the lungs that is common in those have had the type of cardiac surgery claimant has had, and that claimant's wheezing in his lungs originated after surgery. Director's Exhibit 25. Employer further contends that Dr. Zaldivar's opinion is supported by claimant's pre-surgery blood gas studies which are nonqualifying. Director's Exhibit 20.

A physician's reliance, in part, on nonqualifying pulmonary function studies does not render a medical opinion unreasoned, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2- (6th Cir. 2000); *Church v. Eastern Associated Coal Corp.*, 21 BLR 1-51 (1997), *modifying on recon.*, 20 BLR 1-8 (1996). The administrative law judge must, however, provide a sufficient explanation for his evaluation of the evidence, and consider any factors which tend to undermine or diminish the reliability of a physician's opinion. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). We must, therefore, remand this case to the administrative law judge to review the medical opinions at Sections 718.202(a)(4) and 718.204(b), to assign particular weight to each opinion, and to give explicit reasons for his crediting of each piece of evidence. *Wojtowicz v. Duquense Light Co.*, 12 BLR 1-162 (1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge