BRB No. 08-0292 BLA

R.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/16/2009
	)	
GATEWAY COAL COMPANY	)	
	)	
and	)	
	)	
INTERNATIONAL BUSINESS AND MERCANTILE REASSURANCE COMPANY	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (07-BLA-5381) of Administrative Law Judge Michael P. Lesniak rendered on a subsequent claim[1] 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 claimant with at least 37.5 years of coal mine employment.[2] The administrative law judge found that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, he determined that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing the x-rays and medical opinions together, the administrative law judge found that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant is totally disabled by a respiratory impairment that is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.[3]

On appeal, employer challenges the administrative law judge's findings that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a), as well as his findings that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b)(2), (c). Claimant responds in support of the administrative law judge's award of benefits, to which employer has replied. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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

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[1] The administrative law judge considered claimant's instant claim, filed on August 8, 2005, as an initial claim even though claimant had filed an earlier claim on April 26, 1990, which was denied by reason of abandonment on September 24, 1990. Decision and Order at 2 n.1; Director's Exhibits 1, 3. On appeal, no party challenges this aspect of the administrative law judge's decision.

[2] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The administrative law judge did not determine whether claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(4), employer argues that the administrative law judge erred by failing to explain how Dr. Schaaf's medical opinion, which relied on x-ray readings, established the existence of clinical pneumoconiosis when the administrative law judge found that the x-ray evidence did not establish clinical pneumoconiosis.[4] Moreover, employer contends that the administrative law judge credited Dr. Schaaf's diagnosis of clinical pneumoconiosis without discussing whether the diagnosis was based on anything more than the doctor's x-ray readings and claimant's coal dust exposure history. Employer's contentions have merit.

The administrative law judge relied on Dr. Schaaf's opinion, that claimant has clinical pneumoconiosis, finding that the opinion was well-reasoned because it was based on x-ray readings and was consistent with claimant's coal dust exposure history. Decision and Order at 15. However, as employer argues, it is unclear how this finding is consistent with the administrative law judge's determination that claimant's x-rays do not establish clinical pneumoconiosis. A medical opinion that is merely a restatement of an x-ray is not a reasoned medical judgment pursuant to Section 718.202(a)(4). *See, e.g., Island Creek Coal Co. v. Compton,* 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). Thus, the administrative law judge erred in relying on Dr. Schaaf's opinion without addressing whether it was based on more than x-rays.

Employer further argues that the administrative law judge erred in failing to explain why he discounted the opinions of Drs. Renn and Fino, in violation 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).

[4] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found that the medical opinion evidence did not support a finding of legal pneumoconiosis. Decision and Order at 15.

The administrative law judge discounted Dr. Renn's opinion, that claimant does not have clinical pneumoconiosis, because Dr. Renn's diagnosis of congestive heart failure (CHF) was based on the fluctuations seen on the x-rays, whereas the administrative law judge found that Dr. Schaaf's explanation that the fluctuations were caused by "inter-reader" variability, was "more reasonable." Decision and Order at 15. However, the administrative law judge did not explain his rationale for finding that Dr. Schaaf's opinion was more reasonable. The administrative law judge discounted Dr. Fino's opinion, that claimant does not have clinical pneumoconiosis, because it was based on a negative x-ray, that was inconsistent with the remaining x-ray evidence showing fibrosis. Decision and Order at 14-15. However, the administrative law judge had found that the remaining x-ray evidence did not establish the existence of clinical pneumoconiosis by a preponderance of the evidence. Thus, the administrative law judge did not explain how the remaining x-ray evidence was inconsistent with Dr. Fino's negative x-ray. Therefore, the administrative law judge violated the APA, which 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Based on the foregoing errors, we vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis based on the medical opinion evidence pursuant to Section 718.202(a)(4), and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must reweigh the medical opinion evidence, and explain his reasons for crediting or discrediting the medical opinions, in accordance with the APA. Before finding the existence of pneumoconiosis established on remand, the administrative law judge must weigh all evidence together pursuant to Section 718.202(a), in accordance with the holding in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997), and explain his finding. If, on remand, the administrative law judge finds the existence of pneumoconiosis established, he must determine whether the pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203(b).

Pursuant to Section 718.204(b)(2)(i), employer argues that the administrative law judge did not adequately explain his finding that the pulmonary function studies were in substantial compliance with the applicable quality standards. We agree. Although all six pulmonary function studies of record were non-qualifying,[5] they were interpreted by

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, in Appendices B and C of Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

several physicians as reflecting a pulmonary impairment.[6] Dr. Renn, however, reviewed each study and concluded that none was valid for interpretation because of claimant's insufficient cooperation and effort on the breathing maneuvers. For each study, Dr. Renn explained that the "flow-volume loop" tracings indicated that claimant did not exhale forcibly and continuously for the minimum time required to produce a valid result. Employer's Exhibits 2 at 5; 9 at 29-34. The administrative law judge declined to accept Dr. Renn's opinion, noting that the physicians performing the tests reported that claimant's effort and cooperation were good. Decision and Order at 16. Although an administrative law judge may choose to credit the opinions of physicians who administered the pulmonary function studies over the opinions of reviewing physicians regarding the reliability of those studies, *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149-50 (1990), in this case the administrative law judge did not explain why he found that the administering physicians' views as to claimant's effort were more reliable than the opinion of a physician who stated that the tracings he reviewed documented inadequate effort. 5 U.S.C. §557(c)(3)(A). Consequently, we vacate the administrative law judge's finding as to the validity of the pulmonary function studies, and instruct him to reconsider this issue on remand. *See* 20 C.F.R. §§718.101(b), 718.103; *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987).

Pursuant to Section 718.204(b)(2)(ii), we agree with employer that the administrative law judge failed to explain why he credited Dr. Schaaf's opinion, that the qualifying, exercise blood gas study of May 15, 2006[7] was reliable evidence of total disability, over Dr. Renn's contrary opinion that the exercise study was abnormal because claimant suffers from heart disease and wears a pacemaker that prevents his heart rate from rising with exercise. The administrative law judge noted this dispute, and found, without elaboration, that Dr. Schaaf's opinion was "more persuasive." Decision and Order at 16. Because this finding does not comply with the APA, we vacate the administrative law judge's determination and instruct him to explain his finding on remand. 5 U.S.C. §557(c)(3)(A); *see Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-133-34 (1986).

Pursuant to Section 718.204(b)(2)(iv), employer argues that the administrative law judge mischaracterized the evidence when he found that all of the doctors opined that

[6] These pulmonary function studies were dated July 11, 2005; September 8, 2005; May 15, 2006; July 21, 2006; August 16, 2006; and May 24, 2007. Director's Exhibits 13, 14, 17; Claimant's Exhibit 4; Employer's Exhibit 4.

[7] The exercise blood gas study performed by Dr. Begley on May 15, 2006, was the sole qualifying blood gas study of record. Director's Exhibits 13, 16.

claimant has a totally disabling respiratory or pulmonary impairment. Employer's contention has merit. The administrative law judge summarily concluded that:

> All physicians . . . agree that Claimant is totally disabled due to [a] respiratory impairment. Drs. Begley, Fino, Renn and Schaaf all noted Claimant's reduced diffusing capacity as evidence of his respiratory impairment. Dr. Ewald also noted impaired lung function, though he recognized that Claimant's [pulmonary function test] PFT and [arterial blood gas] ABG results did not meet the regulatory standards for disability.

Decision and Order at 17. Although the administrative law judge properly characterized the opinions of Drs. Ewald, Begley, Fino, and Schaaf as diagnosing a totally disabling respiratory impairment, he found Dr. Renn's opinion supportive of total respiratory disability without adequate analysis of the doctor's statements. Director's Exhibits 16, 17; Claimant's Exhibits 8, 9 at 34-35; Employer's Exhibits 1 at 1; 7, 10 at 16-17.

Specifically, Dr. Renn opined that claimant is totally disabled due to heart disease, based on abnormal diffusion capacity. *See* Employer's Exhibits 2 at 7-8; 9 at 41, 52. Dr. Renn stated that he found no evidence of a pulmonary impairment "other than the isolated diffusion abnormality . . . [he] believe[d] . . . [was] a result of the chronic heart failure." Employer's Exhibit 9 at 52. Therefore, we vacate the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv). On remand, the administrative law judge must reconsider Dr. Renn's opinion and explain whether the doctor finds total respiratory disability. Further, the administrative law judge must assess the documentation and reasoning of the medical opinions in light of whatever findings he makes as to the validity of the objective studies underlying the doctors' opinions. *See Siwiec*, 894 F.2d at 639-40, 13 BLR at 2-267; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge must also include in this analysis an explanation of how he resolves the conflict between Drs. Schaaf and Renn concerning the reliability of the two diffusion capacity studies of record.

Based on the foregoing, we vacate the administrative law judge's finding that claimant established a totally disabling respiratory impairment pursuant to Section 718.204(b)(2), and remand this case to the administrative law judge for further consideration of this issue. *See Beatty v. Danri Corp.*, 49 F.3d 993, 1002, 19 BLR 2-136, 2-154 (3d Cir. 1995). The administrative law judge, on remand, must weigh all evidence together to determine whether claimant has established a totally disabling respiratory impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Pursuant to Section 718.204(c), the administrative law judge found that claimant's total disability is due to pneumoconiosis, relying on Dr. Schaaf's opinion and rejecting the contrary opinions of Drs. Fino and Renn because they failed to diagnose

pneumoconiosis. Employer challenges the administrative law judge's determination to accord less weight to the opinions of Drs. Fino and Renn. Because we have vacated the finding that the existence of pneumoconiosis was established, we also vacate the administrative law judge's disability causation finding. On remand, the administrative law judge must reconsider disability causation pursuant to Section 718.204(c), if reached, in accordance with the proper legal standard in the Third Circuit. *See Bonessa v. United States Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989). Contrary to employer's contention, if, on remand, the administrative law judge again finds that the existence of pneumoconiosis is established, he has the discretion to accord less weight to the disability causation opinions of physicians who do not diagnose pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 266, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-67, 1-76 (2008).

Accordingly, the administrative law judge's Decision and Order - Awarding 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge