BRB No. 94-2483 BLA

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

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

John H. Shumate, Jr., Mount Hope, West Virginia, for claimant.

J. Matthew McCracken (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (91-BLA-2792) of Administrative Law Judge Robert G. Mahony 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). The administrative law judge found this claim to be a duplicate claim, determined that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d), and considered the claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with seventeen years of coal mine employment, found the evidence insufficient to

establish the existence of pneumoconiosis pursuant to Section 718.202(a), and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge erred by finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The

Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.[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 supported by substantial evidence, is rational, and is in accordance with 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).

In finding this claim to be a duplicate claim, the administrative law judge also found that it merged with claimant's still-pending prior claim filed in 1983. *See* Section 725.309(d); Decision and Order at 2. The Director contends that since claimant abandoned his 1983 claim by failing to appeal the deputy commissioner's Memorandum of Conference denying benefits, the earlier claim was no longer pending and thus the administrative law judge erred in merging the claims. Director's Brief at 1, n.1. We reject the Director's contention, as the administrative law judge correctly found that claimant's 1983 claim was still pending because claimant had timely requested but never received a hearing before an administrative law judge following the deputy commissioner's initial finding of no entitlement in the 1983 claim. Decision and Order at 3; Director's Exhibit 15. Thus, we affirm the administrative law judge's finding that this claim merges with claimant's earlier claim. *See Tackett v. Howell and Bailey Coal Co*., 9 BLR 1-181 (1986).

Claimant's primary contention is that the administrative law judge erred by failing to apply the presumption contained in Section 718.305 that claimant is totally disabled due to pneumoconiosis. Claimant's Brief at 3-8. Contrary to claimant's contention, Section 718.305 is inapplicable to this claim because it was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. We therefore reject claimant's contention.

Claimant next contends that the administrative law judge erred by failing to exclude two rereadings of the June 3, 1981 x-ray pursuant to the rereading prohibition of Section 413(b), 30 U.S.C. §923(b). Claimant's Brief at 11. We reject this contention because the rereading prohibition implemented at Section 718.202(a)(1)(i) applies only to claims filed before January 1, 1982. *See Tobias v.*

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding a material change in conditions, length of coal mine employment, the inapplicability of the presumptions at Sections 718.304 and 718.306, and pursuant to Section 718.202(a)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Republic Steel Corp., 2 BLR 1-1277 (1981).

Pursuant to Section 718.202(a)(1) claimant contends that the administrative law judge erred in according greater weight to the readings of the June 3, 1981 x-ray rendered by Drs. Cole and Elmer, both Board-certified radiologists and B-readers, than to Dr. Bassali's reading, because the administrative law judge's finding that Dr. Bassali was only a B-reader is incorrect. Claimant's Brief at 10-11; Decision and Order at 7-8. The party who attempts to rely upon an x-ray interpretation has the burden of establishing for the record the qualifications of the reader in question. *Rankin v. Keystone Coal Mining Corp*., 8 BLR 1-54 (1985). Because the record contains no evidence of Dr. Bassali's qualification as a Board-certified radiologist, we affirm the administrative law judge's determination to accord less weight to Dr. Bassali's x-ray reading. *See Rankin, supra*.

Claimant further contends that the administrative law judge erred by excluding Dr. Bassali's positive reading of the August 15, 1983 x-ray from the record. Claimant's Brief at 8-9. At the hearing, counsel for the Director objected to the admission of the x-ray offered as Claimant's Exhibit 3 because claimant failed to send it to the Director at least twenty days before the hearing. *See* Section 725.456; Decision and Order at 2, n.2; Hearing Transcript at 12. The administrative law judge admitted Claimant's Exhibit 3 into evidence but told claimant's counsel to submit the x-ray to the Director after the hearing. Hearing Transcript at 14-16. In his Decision and Order, the administrative law judge stated that "[c]laimant's attorney did comply. Accordingly, Claimant's exhibit three will not be admitted into evidence." Decision and Order at 2, n.2.

Claimant contends that he sent the x-ray to the Director as required, Claimant's Brief at 10, while the Director responds that claimant did not submit it and thus the administrative law judge was required to exclude it. Director's Brief at 2. Because the administrative law judge has not explained the exclusion of this x-ray and has mischaracterized two positive x-ray readings,[2] we vacate his finding at

[2] Dr. Grundy read the February 3 and November 23, 1976 x-rays as 2/2 q and 2/2 q/r, respectively. Director's Exhibit 14. The administrative law judge noted that these readings qualified as pneumoconiosis, but did not credit them as positive because he found that Dr. Grundy's comments noting no active disease and describing emphysematous changes and scattered granulomatous lesions did not attribute the 2/2 rating to pneumoconiosis. Decision and Order at 7. Accordingly, the administrative law judge concluded that "I do not credit those x-rays with showing pneumoconiosis." *Id*. The administrative law judge mischaracterized the evidence, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*); Section 718.102(b), by concluding that these notations converted Dr. Grundy's readings into

Section 718.202(a)(1) and remand this case for him to determine the admissibility of Claimant's Exhibit 3 and to reweigh the x-ray evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*); *see also Christian v. Monsanto Corp*., 12 BLR 1-56 (1988).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred by according greater weight to the report of Dr. Futch, claimant's treating physician. Claimant's Brief at 13-14; Decision and Order at 8. Specifically, claimant argues that Dr. Futch should not have been accorded determinative weight because his opinion does not address the existence of pneumoconiosis. *Id*. We reject claimant's contention, inasmuch as the administrative law judge acted within his discretion in according greater weight to claimant's treating physician, *see Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and he permissibly found that this physician did not diagnose pneumoconiosis because he did not attribute claimant's chronic obstructive pulmonary disease to dust exposure in claimant's coal mine employment, despite his awareness of claimant's history of coal dust exposure. Claimant's Exhibit 1; *See* Section 718.201; *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990).

Finally, claimant contends that the administrative law judge should have

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negative interpretations, *see Valazak v. Bethlehem Mines Corp*., 6 BLR 1-282 (1983), and by applying the notation of "no active disease" to both readings, when it appeared on only one. Director's Exhibit 14. Therefore, we vacate his finding regarding Dr. Grundy's x-ray readings.

accorded less weight to the opinions of the physicians who did not examine claimant. Claimant's Brief at 13. We reject claimant's contention, inasmuch as an administrative law judge is not required to give less weight to a non-examining physician's opinion.[3] *See King v. Cannelton Industries, Inc*., 8 BLR 1-146 (1985). Therefore, we affirm the administrative law judge's findings pursuant to Section 718.202(a)(4).

[3] The administrative law judge erred in considering the x-ray reports by Drs. Braukman and Orr as reasoned medical opinions under Section 718.202(a)(4). Decision and Order at 6. This error is harmless, however, *see Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984), as the administrative law judge found that the six negative medical opinions, including that of claimant's treating physician, outweighed the single diagnosis of pneumoconiosis. Decision and Order at 8; Director's Exhibits 5, 8, 9, 14; Claimant's Exhibits 1, 2. In light of this finding, the administrative law judge's failure to consider Dr. Lasche's February 3, 1976 report is also harmless error, as that report contains no diagnosis of pneumoconiosis. Director's Exhibit 14; *see Larioni, supra*.

Accordingly, the administrative law judge's Decision and Order 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

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge