BRB No. 95-0434 BLA

ARVIS TOLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Christine M. Moore, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Eileen McCarthy (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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (94-BLA-0281) of Administrative Law Judge Christine M. Moore denying benefits on a

[1] Claimant is Arvis Toler, the miner, whose claim for benefits filed on February 4, 1993 was administratively denied on July 29, 1993. Director's Exhibits 1, 20. Thereafter, claimant requested a formal hearing. Director's Exhibit 21.

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 accepted the parties' stipulations that claimant established twenty-seven years of coal mine employment and had one dependent for the purpose of benefits augmentation, that the claim was timely filed, and that employer was the responsible operator. Decision and Order at 2. 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) and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge erred in weighing the evidence pursuant to Section 718.202(a)(1) and (4). Claimant's Brief at 5-9. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand[2], asserting that the administrative law judge erred in weighing the evidence pursuant to Section 718.202(a)(4) and urging the Board to remand the case to the administrative law judge to reconsider the medical opinion evidence in light of intervening case law.[3] Director's Brief at 2-8.

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 into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[2] We reject employer's contention that the Director's arguments are not properly before the Board. *See Kingery v. Hunt Branch Coal Co*., 19 BLR 1-6 (1994).

[3] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, miner, responsible operator status, and pursuant to 20 C.F.R. §§725.308, 718.202(a)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Claimant contends that remand is required because the administrative law judge converted positive x-ray interpretations into negative readings in weighing the x-ray evidence pursuant to Section 718.202(a)(1). Claimant's Brief at 5. The administrative law judge erroneously counted two properly classified positive readings as negative, *see* 20 C.F.R. §718.102(b); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*); Employer's Exhibits 3-4, by crediting the reader's notations that the films were not diagnostic of pneumoconiosis, *see Valazak v. Bethlehem Mines Corp*., 6 BLR 1-282 (1983). This error is harmless, however, *see Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984), inasmuch as she properly relied upon both the quantity and quality of the x-ray interpretations, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990), and permissibly accorded determinative weight to the "overwhelming number" of negative readings by Board-certified radiologists and B-readers in finding the preponderance of the x-ray evidence negative for pneumoconiosis,[4] *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *see also Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); Decision and Order at 5. Therefore, we reject claimant's contention.

Claimant asserts that the administrative law judge erred in crediting the medical opinions of Drs. Zaldivar and Tuteur pursuant to Section 718.202(a)(4) because both physicians required positive x-rays to diagnose pneumoconiosis. Claimant's Brief at 6-7. Contrary to claimant's contention, neither physician indicated that he would not diagnose pneumoconiosis without a positive x-ray; rather, in discussing the medical data, these physicians merely noted that the x-ray interpretations were negative. Employer's Exhibits 1, 5.

Claimant further contends that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Tuteur because they were based on the erroneous premise that pneumoconiosis does not cause obstructive ventilatory impairments. Claimant's Brief at 7-8. The Director asserts that remand is required for the administrative law judge to consider the medical opinions in light of *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, BLR (4th Cir. 1995)(administrative law judge erred by relying on physician's opinion that claimant did not have pneumoconiosis where physician based opinion on erroneous assumption that obstructive disorders cannot be caused by coal mine employment). Director's Motion to Remand at 1. These contentions have merit.

[4] The administrative law judge overlooked two additional negative readings by Board-certified radiologists and B-readers, yielding a total of ten negative and three positive readings. Director's Exhibits 13-14.

Dr. Tuteur stated that arterial heart disease and chronic obstructive pulmonary disease are not conditions related to, aggravated by, or caused by the inhalation of coal mine dust, and based his conclusion that claimant did not have pneumoconiosis, in part, upon his observation that claimant's pulmonary function studies revealed a purely obstructive defect. Director's Exhibit 5. Because the administrative law judge relied on this rationale in crediting Dr. Tuteur's opinion over that of Dr. Rasmussen, Decision and Order at 9, and since we must apply the law in effect at the time of this decision, *see Lynn v. Island Creek Coal Co*., 12 BLR 1-146 (1989), we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for her to reconsider the medical opinions in light of *Warth*.[5]

The Director further contends that the administrative law judge erred by according less weight to Dr. Rasmussen's opinion because he relied in part on a positive x-ray. Director's Brief at 2-3. In a letter to the Department of Labor explaining his diagnosis, Dr. Rasmussen stated that because he regarded the x-ray as a poor tool for excluding the existence of pneumoconiosis, his diagnosis of pneumoconiosis remained unchanged despite the subsequent negative readings of the positive x-ray interpretation upon which he had relied. Director's Exhibit 19.

The administrative law judge noted that this x-ray interpretation had been reread negative and stated that "Dr. Rasmussen himself believes that the x-ray is a poor diagnostic tool," concluding that therefore "one of the bases of his conclusion is faulty." Decision and Order at 8. We agree with the Director that the administrative law judge mischaracterized Dr. Rasmussen's opinion, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*), and erred in according less weight to Dr. Rasmussen's opinion because the positive x-ray he relied upon was reread negative, *see Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

[5] While Dr. Zaldivar did not distinguish between obstructive and restrictive impairments in making his diagnosis, he did conclude that claimant's pulmonary function studies revealed a severe obstructive defect, a factor the administrative law judge cited in weighing the medical opinions, finding that "Mr. Toler's studies show a progressive decrement in FEV1 without a restrictive defect." Decision and Order at 9; Employer's Exhibits 1, 6.

The Director further asserts that the administrative law judge erred by rejecting claimant's twenty-seven years of coal mine employment as "non-diagnostic." Director's Brief at 4. Dr. Rasmussen indicated that he relied in part upon claimant's "27+ years of employment in the coal mine industry" in formulating his opinion that claimant suffered from pneumoconiosis. Director's Exhibit 10. The administrative law judge faulted Dr. Rasmussen's reliance on this factor, stating that "the fact of one's coal mine employment is non-diagnostic." Decision and Order at 8. Because the administrative law judge overlooked the legitimate role that a claimant's coal mine employment history plays in the formulation of a reasoned medical opinion, *see* 20 C.F.R. §§718.104, 718.201; *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985), and otherwise erred in weighing Dr. Rasmussen's opinion, *see* discussion, *supra*, we instruct the administrative law judge to reweigh the medical opinion evidence on remand.

The Director also contends that the administrative law judge did not adequately explain why the four-year gap between the thirty-eight year smoking history taken by Dr. Rasmussen in the mistaken belief that claimant had quit smoking, and the forty-two year actual smoking history was significant enough to require discrediting of Dr. Rasmussen's opinion. Director's Brief at 8. We reject this contention because the administrative law judge did not actually discredit Dr. Rasmussen's opinion as based on an inaccurate smoking history, but rather credited the conclusions of Drs. Zaldivar and Tuteur that claimant was still smoking heavily, based on the carboxyhemoglobin levels they detected. Decision and Order at 10; Employer's Exhibits 1, 5. We also reject the Director's arguments that the administrative law judge failed to apply the legal definition of pneumoconiosis, Director's Brief at 3-4, and to give valid reasons for crediting the criticisms made by Drs. Zaldivar and Tuteur of the research studies that Dr. Rasmussen cited in concluding that claimant's emphysema was due in part to coal dust exposure, Director's Brief at 4-8, inasmuch as she stated the relevant regulation and thoroughly discussed the medical opinions. *See* Decision and Order at 6-10.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge