BRB No. 95-1134 BLA

RONNIE B. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
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 of George P. Morin, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen Jr. (Cohen, Abate & Cohen), Fairmont, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (93-BLA-1090) of Administrative Law Judge George P. Morin awarding 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). Pursuant to the parties' stipulations the administrative law judge credited claimant with "at least" forty years of coal mine employment, found that he had one dependent, and determined that employer was properly identified as the responsible operator. Decision and Order at 3. The

administrative law judge found the existence of pneumoconiosis and total respiratory disability due to pneumoconiosis established pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204 and, accordingly, awarded benefits.

On appeal, employer contends that the administrative law judge erred by compelling it to produce a positive x-ray interpretation and by failing to limit the number of post-hearing x-ray rereadings that claimant could submit. Employer's Brief at 5-10. Employer also asserts that the administrative law judge erred in weighing the evidence pursuant to Sections 718.202(a) and 718.204, and contends that two medical reports credited by the administrative law judge are legally insufficient to establish causation. Employer's Brief at 10-26.

Claimant has not responded, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[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 into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that the administrative law judge compelled the production of a 1/0 x-ray reading by Dr. Franke, a non-testifying expert, in violation of Rule 26(b)(4)(B)[2] of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 26(b)(4)(B);

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, responsible operator status, entitlement date, and pursuant to 20 C.F.R. §§718.202(a)(2), (3), and 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[2] Rule 26(b)(4)(B) provides that a party may, by interrogatories or deposition,

Employer's Brief at 5-9; Claimant's Exhibit 12. We note initially that an administrative law judge is not bound by formal rules of procedure. 20 C.F.R. §725.455(b). Moreover, Rule 26(b)(4)(B) is inapplicable because it conflicts with the regulatory requirement that "any evidence obtained by an operator shall be sent to the deputy commissioner and all other parties to the claim." 20 C.F.R. §725.414; *see Hamrick v. Eastern Associated Coal Co*., 12 BLR 1-39 (1988). Therefore, we reject employer's argument.

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discover facts known or opinions held by a non-testifying expert only as provided in rule 35(b), which permits the discovery of medical examination reports, or by showing exceptional circumstances. Fed.R.Civ.P. 26(b)(4)(B), 35(b).

Employer further asserts that the administrative law judge failed to limit the number of rereadings of the November 10, 1993 x-ray that claimant could submit post-hearing.[3] Employer's Brief at 9-10. We reject employer's argument, inasmuch as all relevant evidence is admissible and shall be considered, with reliance upon the trier-of-fact to determine the weight to be assigned to the evidence. *See* 30 U.S.C. §923(b); *Cochran v. Consolidation Coal Co*., 12 BLR 1-136 (1989).

Employer contends that the administrative law judge erred by relying upon 0/1 x-ray interpretations to find the existence of pneumoconiosis established. Employer's Brief at 11. Contrary to employer's contention, the administrative law judge did not credit the five 0/1 readings as positive for pneumoconiosis, but permissibly found that they "len[t] support" to the eight positive readings and detracted from the five completely negative readings by demonstrating at least "some radiographic changes of pneumoconiosis present." Decision and Order at 6; 20 C.F.R. §718.102(b); *see York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985).

Drs. Fino and Renn checked "Yes" to box 2A on the x-ray report form, thereby indicating that they detected "parenchymal abnormalities consistent with

[3] The administrative law judge held the record open, without objection, for claimant to obtain rereadings of the film, which was in employer's possession and had been reread three times by employer's experts. Hearing Transcript at 11, 105-06; Employer's Exhibits 14-16. The administrative law judge denied employer's request to limit the number of claimant's rereadings, stating that it was not his practice to "impose limits on either side," and claimant eventually obtained seven rereadings of this film. Hearing Transcript at 106; Claimant's Exhibits 13-19.

pneumoconiosis,"[4] and Dr. Lapp read two films as 0/1 at the hearing, noting "three, maybe four nodules that would qualify, but they're not as extensive as category 1." Director's Exhibits 23-25; Hearing Transcript at 23, 27. The administrative law judge thus acted within his discretion in finding the positive x-ray readings more persuasive, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Therefore, we reject employer's argument.[5]

[4] Dr. Goodwin indicated that the film he read was not completely negative but left box 2A unchecked. Director's Exhibit 16.

[5] Moreover, the administrative law judge overlooked five additional positive readings by Board-certified B-readers, resulting in sixteen positive and twelve negative readings by equally qualified experts. *See 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).

Employer next contends, citing *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), that the administrative law judge erred by weighing the interpretations of only the most recent x-rays. Employer's Brief at 10. The administrative law judge considered the earlier films, Decision and Order at 4, but permissibly relied upon the multiple interpretations of the three films taken since 1992, inasmuch as the readings of the earlier films, taken between 1972 and 1990, were uniformly negative,[6] a factor consistent with the holding of *Adkins* regarding the application of the later evidence rule. Therefore, we reject employer's contention.

Employer raises a host of additional arguments that are devoid of merit. We reject employer's contention that the administrative law judge violated 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), by failing to address inconsistencies in claimant's x-ray evidence because employer essentially invites the Board to reweigh the x-ray evidence, a function beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We therefore affirm the administrative law judge's findings pursuant to Section 718.202(a)(1).[7]

[6] A lone positive reading was not properly classified pursuant to Section 718.102(b). Claimant's Exhibit 6.

[7] In light of our affirmance of the administrative law judge's finding pursuant to Section 718.202(a)(1), we need not address employer's allegations of error at Section 718.202(a)(4).

We likewise reject employer's assertion that the administrative law judge erred at Section 718.204(c) by failing to weigh claimant's testimony with the medical opinions, which employer claims would have corroborated Dr. Renn's opinion that claimant was not totally disabled. Employer's Brief at 26. While claimant testified that he began to have difficulty performing his job only in the last two to three years of his employment which ended in 1991, the administrative law judge properly determined that claimant was incapable of performing his last coal mine employment, which the administrative law judge found required extended periods of heavy labor, at the time of the hearing on July 1, 1994.[8] *See Cooley v. Island Creek Coal Co*., 845 F.2d 622, 11
BLR 2-147 (6th Cir. 1988); *Parsons v. Black Diamond Coal Co*., 7 BLR 1-236 (1984); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Taylor v. Evans and Gambrel Co*., 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Therefore, we reject employer's contention and affirm the administrative law judge's finding pursuant to Section 718.204(c).

Finally, we reject employer's contention that the opinions of Drs. Rasmussen and Devabhaktuni are insufficient to establish causation pursuant to Section 718.204(b). Employer's Brief at 21-23. Dr. Devabhaktuni opined that both smoking and coal dust exposure contributed to claimant's total disability, and Dr. Rasmussen concluded that both factors were responsible for claimant's total disability, but the pattern of claimant's impairment indicated that pneumoconiosis was a significant contributing factor. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibits 6, 19. Both opinions are legally sufficient to establish that pneumoconiosis is at least a contributing cause of claimant's totally disabling respiratory impairment. *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Gorzalka v. Big Horn Coal Co*., 16 BLR 1-48 (1990). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(b).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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[8] Moreover, the administrative law judge permissibly accorded less weight to Dr. Renn's opinion that claimant was not totally disabled because he found that Dr. Renn was unaware that claimant's
employment duties required extended periods of heavy lifting. *See Eagle v. Armco, Inc*., 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984).

_____JAMES F. BROWN
Administrative Appeals Judge

_____NANCY S. DOLDER
Administrative Appeals Judge

_____REGINA C. McGRANERY
Administrative Appeals Judge