

BRB No. 95-1891 BLA

DAVID L. TOMBLIN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
ARCH OF WEST VIRGINIA DIVISION,)	
APOGEE COAL COMPANY)	
)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

George D. Blizzard, II (Shaffer & Shaffer), Madison, West Virginia, for claimant.

Henry C. Bowen and C. Scott Masel (Robinson & McElwee), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (93-BLA-1642) of Administrative Law Judge Jeffrey Tureck denying benefits on a claim filed pursuant

¹ Claimant is David L. Tomblin, the miner, who filed his application for benefits on September 28, 1992. Director's Exhibit 1.

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). This case is before the Board for the second time. In *Tomblin v. Arch of West Virginia Div., Apogee Coal Co.*, BRB No. 94-3676 BLA (Feb. 24, 1995)(unpub.), the Board vacated the denial of benefits because the administrative law judge discredited a physician's opinion merely because it was based in part on a positive x-ray. *Tomblin*, slip op. at 2. The Board remanded the case for the administrative law judge to reweigh the

medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), with instructions to determine whether Dr. Rasmussen's diagnosis of chronic bronchitis due to smoking and coal mine employment constituted statutory pneumoconiosis pursuant to 20 C.F.R. §718.201. *Tomblin*, slip op. at 3.

On remand, the administrative law judge reweighed the two conflicting medical opinions, according greater weight to that of Dr. Zaldivar because Dr. Rasmussen's opinion "was greatly influenced by Dr. Speiden's [positive] x-ray reading" which was "inconsistent with all the others in the record." Decision and Order on Remand at 2. The administrative law judge concluded that Dr. Rasmussen's "great reliance on it in arriving at his diagnosis of pneumoconiosis fatally taints that diagnosis." *Id.*

The administrative law judge found that Dr. Zaldivar, on the other hand, relied on an x-ray interpretation "consistent with the more probative x-ray evidence" and therefore was entitled to greater weight. *Id.* Regarding Dr. Rasmussen's diagnosis of chronic bronchitis caused by coal mine employment, the administrative law judge found that, "assuming this to be an alternate diagnosis [of] pneumoconiosis under §718.201, this diagnosis is equally tainted by Dr. Rasmussen's reliance on Dr. Speiden's positive x-ray interpretation." Decision and Order on Remand at 3.

On appeal, claimant contends that the administrative law judge failed to comply with the Board's remand instructions. Claimant's Brief at 2-6. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We agree that the administrative law judge again impermissibly discredited the opinion of Dr. Rasmussen because he relied, in part, on a positive x-ray reading that conflicts with the weight of the x-ray evidence. Decision and Order on Remand at 2-3; see *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). The Board has held that because Section 718.202(a) provides alternative methods of establishing pneumoconiosis, *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); see generally *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), an administrative law judge who has found the x-ray evidence to be negative for pneumoconiosis at Section 718.202(a)(1) may not discredit a medical opinion at

Section 718.202(a)(4) merely because it relies in part on a positive x-ray reading, *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-109-110 (1993); *Taylor, supra*.

In this case, the administrative law judge's exclusive focus on how an x-ray reading offered as documentation for a medical opinion compares with his weighing of the x-ray evidence at Section 718.202(a)(1) essentially forecloses the possibility that claimant can establish the existence of statutory pneumoconiosis by medical opinion evidence simply because he has failed to establish clinical pneumoconiosis by x-ray.² Therefore, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and instruct him on remand to consider each medical report as a whole, in conjunction with its complete documentation, in determining whether claimant has established pneumoconiosis as defined in the Act. 30 U.S.C. §902(b); 20 C.F.R. §718.201; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); see also *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated, 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

² Here, the administrative law judge inquired, "since I found that the x-ray evidence was negative for pneumoconiosis, how can a doctor's diagnosis which relies to a great extent on a positive x-ray reading be an exercise in sound medical judgment, as is required under 20 C.F.R. §718.202(a)(4)?" Decision and Order on Remand at 1-2.

_____NANCY S.
DOLDER
Administrative Appeals Judge