BRB No. 00-0954 BLA

JAMES EDWARD STEIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS SERVICES CORPORATION	)	
	)	
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 on Remand -- Awarding Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Gary B. Nelson (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Dorothy L. Page (Howard M. Radzely, Acting 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, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order -- Awarding Benefits (95-BLA-2437) of Administrative Law Judge Mollie W. Neal 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).[1] This case is before the Board for the second time. In her initial Decision and Order, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000) and credited claimant[2] with ten and one-half years of qualifying coal mine employment. The administrative law judge further found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability due to pneumoconiosis and awarded benefits.

Subsequently, employer appealed the award of benefits. The Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204 (2000) inasmuch as these determinations were rational and supported by substantial evidence. Accordingly, the Board affirmed the award of benefits. *Stein v. Consolidation Coal Co.*, BRB. No. 97-0923 BLA (Mar. 30, 1998)(unpub.).

Employer appealed the Board's decision to the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises. The Seventh Circuit vacated the administrative law judge's Decision and Order awarding benefits and remanded the case for the administrative law judge to consider the CT scan because the administrative law judge had failed to consider all medical evidence relevant to the existence of pneumoconiosis in making her determination. In light of its remand on the issue of pneumoconiosis, the Seventh Circuit did not address employer's other arguments, *i.e.*, whether claimant's pneumoconiosis arose out of coal mine employment and whether claimant was totally disabled due to pneumoconiosis. *Consolidation Coal Co. v. Stein*, No. 98-2234 (7th Cir. Mar. 18, 1999)(unpub.).

On remand, the administrative law judge reconsidered the x-ray evidence, along with the CT scan, as instructed by the Seventh Circuit, and determined again that the x-ray evidence of record established the existence of pneumoconiosis. Thereafter, the administrative law judge incorporated her prior findings of fact and conclusions of law, *i.e.*,

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant is James Edward Stein, the miner, who filed his application for benefits on July 14, 1994. Director's Exhibit 1.

that claimant established that his pneumoconiosis arose out of coal mine employment and total disability due to pneumoconiosis, and awarded benefits.

On appeal, employer argues that the administrative law judge erroneously found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in the appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which claimant and the Director have responded asserting that the regulations at issue do not affect the outcome of this case.[3] Based on the briefs submitted by claimant and the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Employer first argues that the administrative law judge erred by analyzing the CT scan[4] as though it were an x-ray because under the regulations, 20 C.F.R. §718.202(a)(1)-(4), a CT scan is not an x-ray, *citing Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).[5] Rather, employer argues that the CT scan should have been considered under Section 718.202(a)(4).

In the instant case, in her initial Decision and Order, the administrative law judge addressed the x-ray evidence of record and determined that the x-ray evidence as a whole was sufficient to establish the existence of pneumoconiosis based on a preponderance of the positive evidence by the better qualified readers. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 4. The Board affirmed that finding, holding that because a CT scan is not an x-ray, the administrative law judge was not compelled to consider it with the x-ray evidence. Board's Decision and Order at 3. However, in light of the fact that "[a]n administrative law judge must consider all relevant medical evidence before determining the existence, or lack thereof, of pneumoconiosis" and "there were conflicting readings of the same x-ray by B-readers[,]" the Seventh Circuit held that "it [was] necessary for [the] administrative law judge to devote some discussion to the CT scan before determining the existence of pneumoconiosis." Slip op. at 4. Moreover, noting the relevance and usefulness of CT scan evidence to determine the existence of pneumoconiosis, the Seventh Circuit held that "[w]hile the CT scan may not necessarily be outcome determinative, it [was] a valuable part of the evaluation process." Slip op. at 4.

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[4] A review of the evidence of record reveals a CT scan of claimant's thorax conducted by Dr. Hoffman dated May 3, 1995, who diagnosed mediastinal lipomatosis, small right paratracheal lymph nodes, and clear lung parenchyma. Director's Exhibit 21. Dr. Bruce reviewed the CT scan and opined that there was no evidence of pneumoconiosis or pulmonary nodules. Employer's Exhibit 2 at 19, Employer's Exhibit 3.

[5] In *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991), the Board addressed the appropriate place to consider CT scan evidence pursuant to 20 C.F.R. §718.304, the regulation dealing with the methods available for establishing the existence of complicated pneumoconiosis. *See* Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304(a)-(c). The Board acknowledged that, "although the regulations provide no guidance for the evaluation of CT scans, Section 718.304(c) provides for new methods of diagnosis, and allows the consideration of any acceptable medical means of diagnosis." *Melnick*, 16 BLR at 1-34. Therefore, when initially weighing the evidence in each category pursuant to Section 718.304, CT scans are not to be considered x-rays, but must be evaluated under subsection (c) together with any evidence or testimony that bears on the reliability and utility of CT scans and any other evidence not applicable under subsections (a) and (b). *Ibid*.

Thus, the Seventh Circuit held that "[w]ithout a written discussion of the relevant medical evidence, including the CT scan, [it could not] determine whether the administrative law judge discharged her duty under the law before determining [that claimant] suffered from pneumoconiosis[,]... and could not "determine whether the decision was rational and supported by substantial evidence." Slip op. at 4. Accordingly, the Seventh Circuit remanded the case "for further consideration of the CT scan[.]" Slip op. at 4.

Considering on remand the CT scan evidence, along with the x-ray evidence, in accordance with the Seventh Circuit's instructions, the administrative law judge noted that the Seventh Circuit had not found error with her rationale in weighing the x-ray evidence, only in her failure to address and discuss the reading of the CT scan of May 3, 1995 by Dr. Bruce and to determine the weight it carried. Decision and Order on Remand at 4. Recognizing that while a CT scan may be superior to a plain-view x-ray, as discussed by the Seventh Circuit, Decision and Order on Remand at 4, the administrative law judge found that because the sole reader of the CT scan was neither a radiologist (certified or otherwise) nor a B-reader and possessed no special qualifications in the field of radiology and had no particular training or certification in examining either plain view x-rays or CT scans, "his opinion regarding the presence or absence of pneumoconiosis on any film is given very little weight, and in this case does not outweigh the opinion of highly qualified Dr. Mathur, that pneumoconiosis is visible on plain view x-ray." Decision and Order on Remand at 4. Accordingly, turning to the x-ray evidence as a whole, the administrative law judge found that it established the existence of pneumoconiosis. This was rational and in keeping with the court's remand instructions.[6] *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); Decision and Order on Remand at 4. Accordingly, the administrative law judge's finding that the existence of pneumoconiosis was established based on x-ray evidence is affirmed and employer's argument concerning the consideration of the CT scan is rejected.

Regarding employer's argument that Dr. Bruce's CT scan evaluation should have been considered at Section 718.202(a)(4) instead of 718.202(a)(1) because it was not an x-ray, we need not address that argument in the instant case. Because Section 718.202(a) provides separate, distinct methods of establishing the existence of pneumoconiosis, *Dixon*,

[6] The administrative law judge found that the CT scan opinion of Dr. Hoffman, whose credentials are not of record, was insufficient to establish either the presence or absence of pneumoconiosis because Dr. Hoffman did not render an opinion regarding the presence or absence of pneumoconiosis. Decision and Order on Remand at 4 n.3; Director's Exhibit 21. Inasmuch as employer has not challenged this determination on appeal, we affirm the administrative law judge's finding. *See Coen v. Director, OWCP*, BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

supra, and the administrative law judge found the existence of pneumoconiosis established at Section 718.202(a)(1) by x-ray evidence, it was not necessary for him to consider whether medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4). Thus, in order to comply with the Seventh Circuit's instructions to consider the CT scan on remand, the administrative law judge necessarily had to consider it at Section 718.202(a)(1). Our affirmance of the administrative law judge's consideration of the CT scan evidence, along with the x-ray evidence at Section 718.202(a)(1) in the instant case, however, should not be interpreted as a holding, by us, that a CT scan is an x-ray and may not be more appropriately considered along with medical opinion evidence at Section 718.202(a)(4) when relevant. *See generally Melnick*, *supra*.

Employer next argues that the administrative law judge erred by discrediting Dr. Bruce's CT scan evaluation based on the fact that he was not a radiologist or a B-reader because the regulations do not require a physician interpreting a CT scan to have radiological expertise. Rather, employer contends that Dr. Bruce's qualifications as a pulmonologist qualify him to review the CT scan.

The regulations provide no guidance for the evaluation of CT or CAT scan evidence, *Melnick*, 16 BLR at 1-34. Experts's respective qualifications are important indicators of the reliability of their opinions, however, *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998). Although Dr. Bruce is Board-certified in internal medicine and pulmonary diseases, as employer contends, a review of the record does not reveal, nor does employer argue, that Dr. Bruce has any demonstrated expertise or specialized training in rendering CT scan interpretations. Employer's Exhibit 2. The administrative law judge, therefore, rationally determined that the CT scan interpretation of Dr. Bruce, the only physician of record who read the CT scan specifically for the presence or absence of pneumoconiosis, was entitled to little weight, and did not outweigh the positive x-ray reading of a physician who was both a B-reader and a Board-certified radiologist. *See Peabody Coal Co. v. Helms*, 901 F.2d 571, 573, 13 BLR 2-449, 2-451 (7th Cir. 1990); *Hicks*, *supra*; *Trent*, *supra*; *Dixon*, *supra*. Accordingly, inasmuch as the administrative law judge reasonably found Dr. Bruce's interpretation of the CT scan undermined based on a lack of demonstrated CT scan expertise, we reject employer's argument. *See generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*. 17 BLR 1-85, 1-88 (1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985).

Employer also asserts that the administrative law judge acted irrationally in assigning greater weight to the x-ray evidence in light of her admission that the CT scan, which in this case demonstrated the absence of pneumoconiosis, was a superior test. We disagree. Specifically, the administrative law judge found that, "although, the test itself is superior, the sole reader of this test (for pneumoconiosis) is far less qualified in the interpretation of x-rays

and CT scans than the majority of readers of record." Decision and Order on Remand at 4. Further, the Seventh Circuit, citing from various medical texts, acknowledged that CT scans have been "found useful 'for categorizing the lesions [associated with pneumoconiosis] more accurately than is possible with chest x-rays[,]'... 'show[ing] parenchymal abnormalities in patients with normal or questionable findings on the chest radiography[,]'... [and] 'improv[ing] the sensitivity of identifying diffuse parachymal abnormalities of the lung.'" Slip op. at 4. In spite of these authorities, however, the Seventh Circuit nonetheless held that while "a valuable part of the evaluation process[,]" "the CT scan may not necessarily be outcome dispositive." *Slip op.* at 4. Thus, contrary to employer's argument, the administrative law judge did not act irrationally in crediting the x-ray evidence. Moreover, it is well established that the administrative law judge must consider all evidence which calls into question the reliability of a physician's opinion, and address the pertinent factors that lend or detract credence to that physician's opinion, *i.e.*, the expert's qualifications, the reasoning of the opinion, the detail of analysis, freedom from outside distractions and prejudices, etc., which may consequently affect the probative value of that opinion. *See Underwood v. Elkay Mining Co.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997). Accordingly, we affirm the administrative law judge's consideration of the CT scan in this case.[7]

Additionally, employer argues that the administrative law judge erred in mechanically applying greater weight to the positive readings of the chest x-ray dated June 20, 1995 because it was the most recent x-ray. We disagree. The administrative law judge examined all of the interpretations of the three chest x-ray films of record and, within a proper exercise of her discretion, properly found that the positive readings of the x-ray dated June 20, 1995 were more credible and probative than the negative x-ray dated August 15, 1994 because the June 1995 x-ray was read by physicians with superior radiological expertise. *See* 20 C.F.R. §718.202(a)(1); *Trent*, *supra*; *Dixon*, *supra*; *Roberts*, *supra*; Decision and Order on Remand at 3; Director's Exhibits 9, 10; Claimant's Exhibits 3, 4; Employer's Exhibit 1. Thus, the administrative law judge's determination did not rely on the recency of the x-rays alone. Moreover, contrary to employer's argument where, as here, the chronology of the x-rays have gone from negative to positive, the administrative law judge may accord greater weight to the more recent evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Consequently, we affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis as this determination is rational and supported by substantial evidence. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 382, 9 BLR 2-239, 2-247 (7th Cir. 1987).

[7] We reject employer's contention that CT scan evidence is analogous to autopsy evidence in this living miner's case.

Finally, employer argues that, even assuming claimant established the existence of pneumoconiosis, he failed to establish that pneumoconiosis arose out of coal mine employment or that he was totally disabled thereby. However, inasmuch as these contentions were previously raised and addressed by the Board , they will not be revisited. *See Stein*, *slip op.* at 3-5; *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion with Brown, J., dissenting); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984).[8] Therefore, inasmuch as claimant has satisfied his burden of affirmatively establishing the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis, requisite elements of entitlement under Part 718, we affirm the administrative law judge's finding that claimant is entitled to benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the Decision and Order on Remand -- Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[8] The Seventh Circuit did not address these arguments inasmuch as it remanded the case for reconsideration on the issue of pneumoconiosis.