BRB No. 01-0916 BLA

BRENDA CARPENTER (Executrix of the Estate of ROSCOE CARPENTER)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY)	)	DATE ISSUED:
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.[1]

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

[1] On April 8, 2002, claimant's counsel filed a Motion for Substitution of Party and for Revivor requesting the substitution of Ms. Brenda Carpenter for Roscoe Carpenter, the miner, due to the death of Mr. Carpenter on March 9, 2002 and Ms. Carpenter's appointment as the executrix of the miner's estate. Based on the supporting documentation and because neither employer nor the Director, Office of Workers' Compensation Programs, has filed an objection, we grant claimant's counsel's request and amend the caption herein.

Employer appeals the Decision and Order - Awarding Benefits (00-BLA-0599) of Administrative Law Judge Daniel L. Leland on a duplicate claim[2] 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).[3] Adjudicating this duplicate claim pursuant to 20 C.F.R. Part 718, the administrative law judge initially credited the miner with twenty-nine years and five months of qualifying coal mine employment. Next, considering the evidence submitted since the denial of the previous claim for benefits, the administrative law judge found that claimant established a totally disabling respiratory impairment and, therefore, determined that claimant established a material change in conditions. Consequently, the administrative law judge considered all of the evidence of record and determined that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Accordingly, benefits were awarded.

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[2] Roscoe Carpenter, the miner, filed his first application for benefits on June 4, 1982, which was finally denied on October 6, 1983. Director's Exhibit 38. On June 25, 1991, he filed a second application for benefits, which was similarly denied on November 4, 1991. Director's Exhibit 39. The third application, filed on August 23, 1993, was finally denied by Administrative Law Judge Charles P. Rippey in a Decision and Order dated April 5, 1996. Director's Exhibit 40. On August 3, 1999, claimant filed a fourth application for benefits, which is the subject of the appeal before us. Director's Exhibit 1.

[3] 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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, employer argues that the administrative law judge erroneously found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis pursuant to Section 718.204(c). 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 that he will not participate in this appeal.[4]

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer first argues that the administrative law judge erred in finding that the preponderance of the x-ray evidence established the existence of pneumoconiosis. Specifically, employer asserts that the administrative law judge erred by relying on positive readings by B-readers to find that a preponderance of the x-ray evidence was positive, after he had already found that a preponderance of the readings by dually qualified Board-certified, B-readers was negative, thereby improperly according greater weight to the readings of the less qualified physicians.

Focusing on the x-rays taken since 1990, the administrative law judge found that eight, dually qualified, Board-certified, B-readers provided positive x-ray readings, while

[4] We affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2), (a)(3), 718.203(b), 718.204(b), and 725.309(d) (2000) as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10-12.

nine, dually-qualified, Board-certified, B-readers rendered negative readings. Turning to additional readings rendered by physicians who were either B-readers or Board-certified readers, but were not dually-qualified, the administrative law judge determined that since at least three B-readers and one Board-certified reader interpreted x-rays as positive, while only one B-reader made a negative reading, the preponderance of the x-ray evidence was positive for the existence of simple pneumoconiosis. This was rational.

Contrary to employer's argument, the administrative law judge properly considered the qualitative and quantitative nature of the x-ray evidence by assessing the readings rendered by the physicians with demonstrated radiological expertise and, within a rational exercise of his discretion, accorded determinative weight to the positive x-ray readings of record. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 11. Further, contrary to employer's contention that the administrative law judge improperly credited the positive readings by B-readers, over the negative readings by the better qualified, Board-certified, B-readers, the administrative law judge, in this case, permissibly accorded greater weight to the positive interpretations rendered by physicians who possessed both single and dual radiological qualifications since the readings of equally-qualified readers were essentially the same (eight to nine), and hence, rationally concluded that the preponderance of the x-ray evidence established the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *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); *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); *see also Allen v. Union Carbide Corp.*, 8 BLR 1-393, 1-395 (1985) (preponderance of evidence is evidence which is of greater weight, more credible or convincing, not necessarily evidence that is numerically superior). Because the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers, we affirm the administrative law judge's Section 718.202(a)(1) determination as it is rational and supported by substantial evidence.

Employer also asserts that, in weighing the x-ray evidence of record, the administrative law judge acknowledged that Dr. Wiot's deposition was part of the record but failed to consider and assess the value of Dr. Wiot's opinion, that the miner did not have any evidence of coal workers' pneumoconiosis, based on his readings of the x-rays. Employer's Exhibit 11 at 23.

While the administrative law judge did not discuss Dr. Wiot's deposition testimony in his discussion of the x-ray evidence, Decision and Order at 11, he acknowledged Dr. Wiot's credentials as a Board-certified, B-reader, who interpreted several x-rays as negative. Decision and Order 3-5 at 11. Although an administrative law judge may accord greater weight to the reading of a physician who has demonstrated other superior radiological

expertise, *e.g.*, a professor of radiology, *see Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993), contrary to employer's argument, the administrative law judge was not required to accord greater weight to Dr. Wiot's x-ray readings based on his professorship in radiology and past history of involvement in creating standards for B-readers, inasmuch as the administrative law judge referred to Dr. Wiot's deposition, noted his credentials as a Board certified, B-reader, and considered his x-ray readings. *See Worhach*, *supra*.

Similarly, we reject employer's argument that the administrative law judge erred by failing to consider and weigh the reports of a CT scan of September 13, 2000 which were interpreted as negative for the existence of coal workers' pneumoconiosis. Employer's Exhibit 13. While the administrative law judge did not address the CT scan reports in his discussion of the medical opinion evidence, Decision and Order at 11-12, he did refer to them in his discussion of the x-ray evidence. Moreover, contrary to employer's argument, that the administrative law judge failed to consider and weigh medical evidence explaining the importance and value of CT scan technique, we do not see that evidence in the record other than as references to numerous publications regarding CT scans listed in the curriculum vitae attached to the reports of the physicians, Drs. Wheeler and Scott, who interpreted the CT scan. *See* Employer's Exhibit 11. The listing of these publications does not, without explanation or elaboration by the physicians, constitute medical evidence of record regarding the importance and value of the CT scan submitted in this record. Decision and Order at 5.

Employer next asserts that the administrative law judge erred in not crediting the "reasoned and documented" opinions of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle, who opined that the miner did not have pneumoconiosis, over the "cursory and conclusory" opinions of Drs. Chillag, Ranavaya, Gaziano, Baker, and D'Brot, who diagnosed the presence of pneumoconiosis. Specifically, employer avers that the opinions of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle are based on multiple x-ray readings, pathological and CT scan evidence, and extensive objective data while those of Drs. Chillag, Ranavaya, Gaziano, Baker, and D'Brot are based upon very limited information.

Finding that all of the physicians, except Dr. Chillag, are Board-certified pulmonary specialists, the administrative law judge, within a rational exercise of his discretion, concluded that the opinions of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle, that claimant's pulmonary disease had no connection to coal mine employment, contained several flaws. The administrative law judge reasonably found that Dr. Dahhan's opinion was less persuasive because he based his finding, in part on the pulmonary function study showing an obstructive ventilatory impairment and on the absence of any coal dust exposure since 1982. 20 C.F.R. §718.201(a)(2), (c)(pneumoconiosis is recognized as a latent and progressive disease that may become detectable only after cessation of coal mine employment); *see Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Labelle Processing Co. v. Swarrow*,

72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); Decision and Order at 12; *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge also concluded that Dr. Dahhan's opinion was internally inconsistent because, in a report dated August 3, 2000 he opined that claimant's obstructive ventilatory defect was due to hyperactive airway disease, while subsequently reporting, on March 9, 2001, that it was due to cigarette smoking. Because of this internal inconsistency, the administrative law judge permissibly accorded less weight to Dr. Dahhan's opinion. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984); *see also Brazzalle v. Director, OWCP*, 803 F.2d 934, 9 BLR 2-133 (8th Cir. 1986); *Kozele*, *supra*; Decision and Order at 12.

Similarly, the administrative law judge accorded less weight to Dr. Fino's opinion because he found that Dr. Fino's extensive reliance on negative chest x-rays and pulmonary function studies demonstrating an absence of interstitial lung disease showed that Dr. Fino was focusing on the presence of clinical pneumoconiosis as opposed to "legal" pneumoconiosis, and did not sufficiently consider whether pneumoconiosis, as broadly defined by the Act, was established. Decision and Order at 12. This was rational. We, therefore, affirm the administrative law judge's accordance of little weight to Dr. Fino's report. *See* 20 C.F.R. §718.201(a)(2); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

After considering the opinion of Dr. Loudon, that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis, the administrative law judge likewise discounted it because the doctor relied upon the pulmonary function study abnormality which he found was inconsistent with coal workers' pneumoconiosis, but failed to adequately explain the inconsistency, and the doctor appeared to rely on the negative radiological evidence, thereby limiting his opinion to a determination of whether the presence of clinical pneumoconiosis was established. *See Fuller*, *supra*; *Barber*, *supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

In addition, the administrative law judge permissibly concluded that Dr. Spagnolo's opinion was less probative because it identified the miner's continued cigarette smoking history as a causative factor for the miner's decrease in lung function, after his retirement from coal mine employment in 1982, without considering whether coal dust exposure made a similar contribution. *See Fagg*, *supra*; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Likewise, noting that Dr. Castle's opinion suffered the same deficiencies as those in the opinions of Drs. Fino, Loudon and Spagnolo, the administrative law judge found that Dr.

Castle's opinion was predicated on factors that precluded Dr. Castle from considering fully whether the presence of pneumoconiosis as defined by the Act was established, *i.e.*, the lack of physiological evidence of an interstitial lung disease, the post-coal mine employment retirement decline in the miner's lung function, and negative chest x-ray readings.

It is well established that where there is conflicting evidence on a single issue, the administrative law judge's function is to render a determination of the relative credibility of the evidence relevant to that issue, *Fagg, supra*; *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985), and the administrative law judge need not accept the opinion or theory of any given medical witness but may properly weigh the medical evidence and draw his or her own conclusions, *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985). The administrative law judge's findings will be affirmed if they are supported by the record. Accordingly, because the administrative law judge's accordance of less weight to the opinions of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle concerning the presence of pneumoconiosis was rational, employer's arguments regarding those physicians' opinions are rejected and the administrative law judge's finding regarding the medical opinion evidence is affirmed.

Employer avers further that, because the administrative law judge failed to determine whether the opinions of Drs. Chillag, Ranavaya, Gaziano, Baker, and D'Brot were reasoned and credible, he impermissibly invoked a "presumption" of the existence of legal pneumoconiosis and, in so doing, relied on medical opinions that contained a diagnosis of neither clinical nor legal pneumoconiosis. The administrative law judge implicitly found that the opinions of Drs. Chillag, Ranavaya, Gaziano, Baker, and D'Brot were dispositive on the issue of the existence of pneumoconiosis inasmuch as he reasonably discounted the opinions of physicians who failed to diagnose the presence of the disease. The administrative law judge, therefore, did not invoke a presumption of the presence of legal pneumoconiosis, but alternatively, credited the opinions of the physicians who diagnosed pneumoconiosis. Furthermore, contrary to employer's argument, Dr. D'Brot, who was also the miner's treating physician, as well as Drs. Chillag, Ranavaya, Gaziano, and Baker, all conducted pulmonary evaluations of claimant, including physical examinations and diagnostic pulmonary testing, and affirmatively diagnosed the existence of coal workers' pneumoconiosis in the miner. Director's Exhibits 12, 39, 40; Claimant's Exhibits 1, 33. Consequently, employer's argument is rejected. *Fagg*, *supra*; *Calfee*, *supra*.

Employer next avers that the administrative law judge erred by failing to "weigh together" all the different types of evidence in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) to determine whether the existence of pneumoconiosis was established by a preponderance of the evidence. At the conclusion of his discussion regarding the medical opinion evidence, the administrative law judge stated,

"[a]fter weighing all the evidence of record, I find that claimant has pneumoconiosis." Decision and Order at 12. The administrative law judge's statement demonstrates a sufficient weighing of the evidence and adequately comports with *Compton*, which requires an administrative law judge to weigh all the evidence relevant to the presence of pneumoconiosis. *Compton*, *supra*. Accordingly, we reject employer's argument and affirm the administrative law judge's finding that the miner satisfied his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *See* 20 C.F.R. §718.202(a); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Compton*, *supra*; *accord Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Turning to the issue of disability causation, employer contends that the administrative law judge erred in finding that the miner's pneumoconiosis substantially contributed to his totally disabling respiratory impairment. Specifically, employer asserts that the administrative law judge erred in failing to separately analyze the issues of the existence of pneumoconiosis and disability causation. Contrary to employer's assertion, however, the administrative law judge did treat these issues separately. Decision and Order at 11-13. After finding that the most recent pulmonary function studies, blood gas studies, and medical reports demonstrated total respiratory disability pursuant to Section 718.204(b), the administrative law judge cited the pertinent regulation set forth in Section 718.204(c)(1) and addressed whether the miner had established disability causation, rationally finding that the opinions of Drs. Chillag, Ranavaya, Gaziano, Baker, and D'Brot were better reasoned than those of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle. Decision and Order at 13. We, therefore, reject employer's argument that the administrative law judge failed to analyze separately the issues of pneumoconiosis and disability causation.

Employer next argues that the administrative law judge erred by failing to determine whether the physicians' opinions that he credited were "actually reasoned and documented," while rejecting the opinions of employer's physicians, Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle, merely because he had previously rejected them on the issue of pneumoconiosis. Employer's Brief at 9. For the reasons previously discussed in his decision, however, the administrative law judge found that the opinions of Drs. Chillag, Ranavaya, Gaziano, Baker, and D'Brot, who each opined that pneumoconiosis contributed to the miner's total disability, were well- reasoned, and therefore, entitled to dispositive weight because they outweighed those of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle, who opined that the miner's twenty-nine year coal mine employment played no role in his totally disabling respiratory impairment. This was proper. *See Lucostic, supra; Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Decision and Order at 13. Further, the administrative law judge's rejection of the opinions of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle on the issue of disability causation because he similarly discounted them regarding the existence of

pneumoconiosis was not error as the administrative law judge permissibly found that they were flawed, and hence, worthy of little probative value. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984) (medical report is considered documented if minimally based upon symptomatology, patient history, and physical examination and is considered reasoned if underlying documentation adequately supports physician's conclusions). Accordingly, we affirm the administrative law judge's credibility determination that the opinions of Drs. Chillag, Ranavaya, Gaziano, Baker, and D'Brot, were more persuasive on the issue of disability causation as this determination was rational and supported by substantial evidence.

Finally, employer contends that the administrative law judge erred in discounting the opinions of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle because he found that they did not diagnose the existence of pneumoconiosis when the preponderance of the evidence established the presence of pneumoconiosis. Specifically, employer contends that the administrative law judge erred in discounting these opinions for that reason, however, because the physicians, nonetheless, considered the effect of the presence of pneumoconiosis, if any, on etiology.

We reject employer's contention, however. Although the administrative law judge determined that the opinions of Drs. Dahhan, Fino, Loudon, Spagnolo, and Castle "carr[ied] little weight as they did not find the presence of pneumoconiosis," Decision and Order at 3, the basis for this finding, which can be gleaned from his earlier discussion of the evidence, is that these physicians had relied heavily on x-ray findings of "no pneumoconiosis" but failed to consider fully whether the existence of pneumoconiosis as more broadly defined by the Act had been established, *i.e.*, a respiratory impairment arising out of coal mine employment. *See* 20 C.F.R. §718.201. Accordingly, in this case, we reject employer's contention that the administrative law judge erred in according little weight to the opinions of physicians who did not find the existence of pneumoconiosis. *Compare Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193, 19 BLR 2-304, 2-315-316 (4th Cir. 1995), *citing Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Consequently, we affirm the administrative law judge's weighing of the medical reports and his finding that disability causation was established. Because the administrative law judge properly found that claimant affirmatively established all requisite elements of entitlement, we affirm the administrative law judge's determination that claimant is entitled to benefits. *See Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge