BRB No. 08-0754 BLA

M.E. (On Behalf of E.E., Deceased) Claimant-Petitioner v. BUFFALO MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2009 DECISION and ORDER

Appeal of the Decision and Order on Second Remand - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

William S. Mattingly and Christina N. Morgan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Second Remand - Denying Benefits (2003-BLA-6192) of Administrative Law Judge Richard A. Morgan 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). This case has previously been

[1] Claimant is M.E., the executrix of the estate of the miner, E.E., who died on July 26, 2007. Administrative Law Judge Exhibit 1.

before the Board.[2] In his 2004 Decision and Order, the administrative law judge credited the miner with at least twelve years of coal mine employment and, based on the date of filing, adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.[3] The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis and that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that the miner established a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Evaluating the merits of entitlement upon consideration of all of the evidence of record, the administrative law judge found that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), 718.204(c). Accordingly, the administrative law judge awarded benefits.

In considering employer's appeal, the Board affirmed the administrative law judge's findings that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and thus demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). [*E.E.*] *v. Buffalo Mining Co.*, BRB Nos. 05-0235 BLA and 05-0235 BLA-A (Feb. 15, 2006)(unpub.), slip op. at 3 n.3. The Board, however, held that the administrative law judge erred in weighing the x-ray and medical opinion evidence at 20 C.F.R. §718.202(a)(1), (4), and in evaluating the computerized tomography (CT) scans pursuant to 20 C.F.R. §718.107(a). *Id*. at 4-7. Therefore, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§ 718.107, 718.202(a)(1), (4), and instructed the administrative law judge, on remand, to reweigh the relevant and admissible x-ray readings, CT scan readings and medical opinions to determine whether they support a finding of the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a); 718.201. *Id*. at 7. In addition, in light of the Board's holdings

[2] The complete procedural history of this case is contained in the Board's prior decisions in *E.E. v. Buffalo Mining Co.*, BRB No. 06-0892 BLA (July 16, 2007)(unpub.), and [*E.E.*] *v. Buffalo Mining Co.*, BRB Nos. 05-0235 BLA and 05-0235 BLA-A (Feb. 15, 2006)(unpub.), and is incorporated herein by reference.

[3] The current claim is the miner's fourth application for benefits. His three prior claims were denied because he did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 1-3. His third claim was denied on December 28, 1994 and again, after consideration of additional evidence, on a date not reflected by the record. Director's Exhibit 3. The miner filed his current claim on August 15, 2001, a date that the parties agree is more than one year after the final denial of his previous claim. 20 C.F.R. §725.309(d).

at 20 C.F.R. §718.202(a), the Board vacated the administrative law judge's disability causation finding pursuant to 20 C.F.R. §718.204(c) and instructed him to reweigh the medical opinions on that issue after reassessing the relevant evidence regarding the existence of pneumoconiosis. *Id*.

On remand, the administrative law judge, in his 2006 Decision and Order, found that the evidence was sufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer again appealed, and the Board vacated the administrative law judge's award of benefits on the ground that he erred in excluding employer's rebuttal interpretation of the April 10, 2004 x-ray by Dr. Scatarige contained at Employer's Exhibit 21. *E.E. v. Buffalo Coal Co.*, BRB No. 06-0892 BLA (July 16, 2007)(unpub.). Furthermore, because the administrative law judge's evidentiary error influenced his weighing of the evidence at 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c), the Board also vacated the administrative law judge's findings under those subsections. *Id*. at 5, 8-9. The Board instructed the administrative law judge on remand to admit Employer's Exhibit 21 into the record, and then to consider whether the miner had satisfied his burden of proving the existence of pneumoconiosis and disability causation. *Id*. at 5-9.

On remand, the administrative law judge admitted Employer's Exhibit 21 into the record. Weighing the conflicting x-rays and medical opinions, he determined that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a)(1), (4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in admitting, as instructed by the Board, Dr. Scatarige's negative rebuttal reading of the April 10, 2004 x-ray into the record, alleging employer waived its right to admit this evidence. Claimant further contends that, even if Dr. Scatarige's reading was properly admitted into the record, the administrative law judge failed to perform a proper analysis of the x-ray evidence at 20 C.F.R. §718.202(a)(1). Claimant also argues that the administrative law judge erred in failing to find that she established the existence of pneumoconiosis based on the medical opinion of Dr. Kowalti pursuant to 20 C.F.R. §718.202(a)(4). Claimant additionally challenges the administrative law judge's evaluation of the relevant evidence in finding that claimant failed to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds, asserting that the Board should decline to readdress claimant's arguments as to the admissibility of Dr. Scatarige's x-ray interpretation, as the Board's prior holding constitutes the law of the case on that issue. Employer further urges affirmance of the denial of benefits. The

Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not participate in the appeal before the Board, unless specifically requested to do so.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order on Second Remand – Denying Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner suffered from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he was totally disabled by a respiratory or pulmonary impairment, and that his total disability was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant argues that the administrative law judge erred in his consideration of the conflicting x-ray evidence with respect to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[5] On remand, the administrative law judge initially reiterated his prior finding that the x-rays dated October 23, 2001, March 27, 2002, and April 10, 2004 were positive for pneumoconiosis, whereas the x-rays dated December 12, 2001 and

[4] The record indicates that the miner's coal mine employment occurred in West Virginia. Decision and Order at 2; Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[5] Claimant again argues on appeal that employer waived its right to challenge whether Dr. Scatarige's negative reading of the April 10, 2004 x-ray is admisssible as rebuttal evidence. Claimant's Brief at 20. We decline to revisit our prior holding with regard to the admission of Dr. Scatarige's x-ray reading into the record as claimant has not set forth any valid exception to the law of the case doctrine, *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in manifest injustice. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*)(Hall, C.J., and Nelson, J., concurring and dissenting); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989).

January 30, 2002, were negative for pneumoconiosis and the July 1, 2002 x-ray was in equipoise, thus resulting in three positive x-rays, two negative x-rays and one x-ray in equipoise. Decision and Order on Second Remand at 5. In addition, the administrative law judge noted that the sixteen x-ray readings submitted in connection with the miner's prior claims were accorded less weight because they were older. *Id*. When considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) on remand, the administrative law judge first determined that the December 12, 2001 x-ray was inconclusive. Decision and Order on Second Remand at 6; *see* Director's Exhibit 19; Claimant's Exhibit 12; Employer's Exhibit 13. In accordance with the Board's remand instruction to admit Dr. Scatarige's negative rebuttal reading of the April 10, 2004 x-ray into the record, the administrative law judge noted that there were now four readings of the x-ray in the record. Decision and Order on Second Remand at 6. Two readings, by Dr. Baker, a B reader, and by Dr. Miller, a dually-qualified B reader and Board-certified radiologist, were positive for the presence of pneumoconiosis.[6] Claimant's Exhibits 2, 3. The other two readings, by Drs. Scott and Scatarige, dually-qualified as B readers and Board-certified radiologists, were negative for the presence of pneumoconiosis. Employer's Exhibits 21, 22. Observing that both of the negative readings were rendered by dually-qualified radiologists, while only one of the positive readings was rendered by a dually-qualified radiologist, the administrative law judge found that the April 10, 2004 x-ray was negative for the presence of pneumoconiosis by a preponderance of the evidence.[7] Decision and Order on Second Remand at 6. The administrative law judge further found that, upon reevaluation of the x-ray evidence, even though there were two positive x-rays, dated October 23, 2001 and March 27, 2002, and two negative x-rays, dated January 30, 2002 and April 10, 2004, the x-ray evidence overall was negative by a "slight preponderance," in light of the fact that the most recent x-ray was negative for the presence of pneumoconiosis. *Id*.

[6] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

[7] 20 C.F.R. §718.202(a)(1) provides that where two or more x-ray reports are in conflict, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

Claimant challenges the administrative law judge's weighing of the x-ray evidence under 20 C.F.R. §718.202(a)(1), first asserting that, "in light of the overall positive tenor of the chest x-ray evidence, the [April 10, 2004] chest x-ray should have been found to be positive for the presence of pneumoconiosis." Claimant's Brief at 19. Alternatively, claimant asserts that the April 10, 2004 x-ray should have been found to be in equipoise. *Id*.

Contrary to claimant's assertions, the administrative law judge properly considered both the quantity of x-ray interpretations and the relative qualifications of the physicians who performed them. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). The administrative law judge reasonably accorded more weight to the interpretations of Drs. Scott, Scaterige and Miller since all three physicians are dually-qualified radiologists. Decision and Order on Second Remand at 6. His determination that the April 10, 2004 x-ray was negative for the existence of pneumoconiosis is therefore rational and accords with law. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Trent*, 11 BLR at 1-27; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence fails to satisfy claimant's burden of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) by a preponderance of the evidence, as supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Under 20 C.F.R. §718.202(a)(4), the administrative law judge concluded that the opinions of Drs. Zaldivar and Crisalli, that the miner was not suffering from pneumoconiosis or any other dust-related disease of the lungs, were entitled to greater weight than the contrary opinions of Drs. Kowalti, Baker and Ranavaya diagnosing pneumoconiosis. Decision and Order on Second Remand at 7. Claimant argues that the administrative law judge erred in discrediting the opinions in which pneumoconiosis was diagnosed, particularly the opinion of Dr. Kowalti, the miner's treating physician. Claimant submits that Dr. Kowalti's opinion diagnosing pneumoconiosis should have been credited to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant's contentions are without merit.

The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded

shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). Moreover, in *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002), the United States Court of Appeals for the Fourth Circuit held that although the opinions of treating and examining physicians deserve special consideration, there is no rule that a treating or examining physician must be accorded greater weight than the opinions of other physicians. *Held*, 314 F.3d at 187-8, 22 BLR at 2-571.

The administrative law judge reevaluated the medical opinions on remand and stated that:

> Although the absence of "clinical pneumoconiosis" radiographically clearly does not preclude a finding of "legal pneumoconiosis," the shift in the x-ray analysis from "positive" to "negative" further buttresses Dr. Zaldivar's opinion. More significantly, it tends to undermine the opinion of Dr. Kowalti, which is based, at least in part, upon a diagnosis of "clinical pneumoconiosis" and his reliance on questionable positive x-ray and/or CT scan findings of pneumoconiosis. Unlike Dr. Zaldivar, who provided extensive testimony regarding the nature of the miner's impairment, whereby he excluded any relationship between the miner's coal mine employment and his totally disabling pulmonary or respiratory impairment, Dr. Kowalti provided very little analysis regarding the issue of "legal pneumoconiosis" and/or disability causation. Therefore, upon reevaluation of the evidence, I find that Dr. Zaldivar's opinion is the best reasoned and documented of all the physicians opinions, including Dr. Kowalti's. In view of the foregoing, I accord the most weight to the opinion of Dr. Zaldivar, which is supported by the opinion of Dr. Crisalli, over the contrary opinions of Drs. Kowalti, Baker, and Ranavaya.

Decision and Order on Second Remand at 7 (citations omitted). The administrative law judge permissibly accorded more weight to Dr. Zaldivar's opinion, noting that the physician provided the best reasoned and documented medical opinion of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, claimant advances no challenge to the specific reasons provided by the administrative law judge for crediting the opinions of Drs. Zaldivar and Crisalli over those of Drs. Kowalti, Baker and Ranavaya. Rather, claimant's arguments essentially urge a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson*, 12 BLR at 1-112.

The administrative law judge permissibly exercised his discretion to evaluate and weigh the conflicting medical evidence, draw inferences and make findings thereon. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *Dillon v. Peabody Coal*

Co., 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 139 (1985). We therefore conclude that the administrative law judge provided valid reasoning for his evaluation of Dr. Kowalti's medical opinion, and his determination to accord the most weight to the opinion of Dr. Zaldivar, supported by the opinion of Dr. Crisalli, over the contrary opinions of Drs. Kowalti, Baker, and Ranavaya in finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order on Second Remand at 8; *see generally Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-155; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4), and we also affirm his determination that claimant failed to meet her burden of proof to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-1; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Because substantial evidence supports the administrative law judge's conclusion that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the denial of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Consequently, we need not address claimant's remaining contentions regarding the administrative law judge's findings on the issue of disability causation at 20 C.F.R. §718.204(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order on Second Remand – Denying Benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge