BRB No. 98-0908 BLA

MALCOLM MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY	)	DATE ISSUED: 7/15/99
	)	
	)	
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 on Modification - Denial of Benefits and the Order Denying Motion for Reconsideration of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, London, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Killcullen), Washington, D.C.,for employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Modification - Denial of Benefits and the Order Denying Motion for Reconsideration (96-BLA-1842) of Administrative Law Judge Robert L. Hillyard 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). Originally, benefits were awarded in this case in a Decision and Order issued on June 22, 1993 by Administrative Law Judge George Fath. On July 6, 1993, the employer filed an appeal with the Benefits Review Board (hereinafter, the Board.) Director's Exhibit 44. Subsequently, in August 1993, the employer filed a motion for modification of the award of benefits. Director's Exhibit 48. Because of this latter filing, the Board dismissed the employer's appeal and remanded the

case to the district director to address the request for modification.[1] Director's Exhibit 61. On July 8, 1996, the district director denied the motion for modification. and employer requested a hearing. Following the hearing, the administrative law judge issued a Decision and Order on modification denying benefits. The administrative law judge found that the evidence established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4). Decision and Order at 19-20. However, he stated that "based on the strength of the newly submitted evidence and the equivocal nature of the original evidence, I find that the previous determination that claimant had pneumoconiosis was a mistake in a determination of fact" within the meaning of Section 725.310. Decision and Order at 15. Further, the administrative law judge found that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Thus, on December 30, 1997, the administrative law judge denied benefits. On January 23, 1998, claimant filed a motion for reconsideration. This motion was denied by the administrative law judge by Order dated March 17, 1998. Thereafter, on March 27, 1998, claimant filed the instant appeal, contesting the Decision and Order and the Order Denying Motion for Reconsideration. Employer responds, urging affirmance of the Decision and Order and of the Order Denying Motion for Reconsideration as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this appeal.

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

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Id*. Additionally, in determining whether claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71

[1]The administrative law judge incorrectly stated that this decision was issued on September 9, 1996. Decision and Order at 3.

(1992). Further, under Section 725.310, in considering whether a mistake of fact occurred in the prior determination, the administrative law judge is required to review the entire evidentiary record. *See Nataloni, supra; Kovac, supra*.

In the Decision and Order on Modification the administrative law judge weighed all of the evidence of record and concluded that the previous Decision and Order contained mistakes in determinations of fact.[2] Claimant raises numerous challenges to the administrative law judge's finding that claimant failed to establish the presence of pneumoconiosis. Initially, claimant argues that the existence of pneumoconiosis was established by the positive x-ray interpretations rendered by Drs. Baker and Vaezy. Director's Exhibits 24, 85. While the administrative law judge recognized the positive readings of Drs. Baker and Vaezy, he noted that as B-readers only, he would not find their interpretations as credible as those of physicians who are both B-readers and Board-certified radiologists. The administrative law judge correctly found that the preponderance of the x-ray evidence rendered by these physicians is negative for the presence of pneumoconiosis. Director's Exhibits 12, 14, 33, 35, 38, 85. Inasmuch as the administrative law judge properly weighed the x-ray evidence, having considered not only the numerical weight of the evidence but the qualifications of the x-ray readers as well, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), we affirm the administrative law judge's finding that the preponderance of the x-ray evidence failed to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(1).

Next, claimant asserts that in view of opposing opinions as to the presence of pneumoconiosis, the administrative law judge should have applied the true doubt rule and resolved any conflict in the evidence in claimant's favor. We disagree. In view of the United States Supreme Court's rejection of the true doubt rule in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the administrative law judge properly required claimant to establish each element of entitlement by a preponderance of the evidence.

Claimant also asserts that Dr. Dahhan's opinion is hostile to the Act in that he attributes claimant's impairment to cigarette smoking, which claimant ceased thirty years prior to the initiation of this claim. We reject this assertion and note that hostility to the Act is demonstrated when a doctor forecloses all possibility that simple pneumoconiosis can be totally disabling.

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[2]In his Motion for Reconsideration, claimant conceded that Administrative Law Judge George Fath erred in setting the date for commencement of benefits as January 1989, given claimant's continued coal mine employment until January 1990. Unnumbered Exhibit at 4.

Searls v. Southern Ohio Coal Co., 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985).

Next, claimant argues that the administrative law judge erred in failing to recognize that the diagnoses of chronic bronchitis, pulmonary fibrosis, and emphysema constitute "legal pneumoconiosis." We disagree. The specified impairments identified by claimant may constitute legal pneumoconiosis when medical opinion evidence established that claimant's chronic pulmonary disease is related to coal mine employment. *See* 20 C.F.R. §718.201; *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *see also Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995). Claimant's argument ignores the fact that claimant bears the burden of establishing that his respiratory disease falls within the legal definition of pneumoconiosis. Therefore, we reject claimant's suggestion that the administrative law judge should have made the nexus between claimant's impairment and his coal mine employment based on claimant's years of coal mine employment.

Finally, claimant argues that the administrative law judge erred in finding that the medical reports of record fail to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4).[3] The administrative law judge found that the reports of Drs. Baker and Wright are mere recitations of positive x-rays and not medical opinions within the meaning of Section 718.202(a)(4), although he noted that Dr. Baker's report was also based secondarily on the length of claimant's coal mine employment. Decision and Order at 18. The administrative law judge further found that, contrary to claimant's assertion, Dr. Hiller did not diagnose the presence of pneumoconiosis. Decision and Order at 19. The administrative law rejected Dr. Hiller's deposition testimony to the effect that there "was a good likelihood" that coal dust exposure contributed to claimant's emphysema and bronchitis because he found it to be equivocal. *Id.* Although we note that an administrative law judge may properly discredit a report which amounts to a mere recitation of an x-ray interpretation, *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Worhach, supra*, our review of the reports of Drs. Baker and Wright does not confirm the administrative law judge's findings that the report of Dr. Wright was based solely upon positive x-ray evidence and the report of Dr. Baker was based on x-ray evidence and coal mine employment history. Decision and Order at 18. Both physicians specifically noted, and based their opinions upon, claimant's history, physical examination findings and objective study results. Director's Exhibits 24, 25. Thus, we vacate the administrative law judge's finding that the reports merely reiterate positive x-ray results and remand this case for a reassessment of the reports of Drs. Baker and Wright pursuant to Section

[3]Inasmuch as claimant raises no objection to the administrative law judge's finding that pneumoconiosis cannot be established pursuant to Section 718.202(a)(3) because none of the presumptions contained therein is applicable to the instant claim, Decision and Order at 17, we affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.202(a)(4). However, we affirm the administrative law judge's rejection of Dr. Hiller's opinion in that, given the doctor's statement that there was a "likelihood" that coal dust exposure contributed to the claimant's impairments, it was within the administrative law judge's discretion to find the doctor's statement to be equivocal.[4] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

If on remand, the administrative law judge determines that there is sufficient evidence to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge must reconsider his finding at Section 718.204(b).

Accordingly, the Decision and Order on Modification - Denial of Benefits and the Order Denying Motion for Reconsideration of the administrative law judge are affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

[4] At Section 718.202(a)(2), claimant asserts that the administrative law judge should have given more weight to Dr. Hiller's biopsy evidence because he is the treating physician. Inasmuch as we affirm the administrative law judge's rejection of Dr. Hiller's opinion as equivocal, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988), we reject claimant's assertion.

McGRANERY, J., dissenting:

I respectfully dissent from my colleagues' determination to vacate the administrative law judge's decision denying benefits for him to reconsider whether the reports of Drs. Baker and Wright establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

The administrative law judge properly determined that the opinions of Drs. Baker and Wright were not reasoned medical diagnoses of pneumoconiosis based on objective medical evidence as required by Section 718.204(a)(4).[5] In his report, Dr. Baker wrote under the heading Cardiopulmonary Diagnosis and Rationale:

> 1. Coal workers' pneumoconiosis, category 1/0 on basis of the ILO Classification - based on abnormal chest x-ray and significant duration exposure.

Director's Exhibit 24 at 5. The administrative law judge carefully analyzed the doctor's report and explained why it was not a reasoned medical opinion as required by Section 718.202(a)(4):

> Dr. Baker...diagnosed coal workers' pneumoconiosis based on an abnormal x-ray and a history of coal dust exposure. A diagnosis or medical opinion which is merely a restatement of a positive x-ray is not a reasoned medical opinion within the meaning of §718.202(a)(4). *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). A medical opinion which is merely a restatement of an x-ray opinion may not establish the existence of pneumoconiosis. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). A medical opinion that purports to be based on clinical

[5]Section 718.202(a)(4) provides:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

20 C.F.R. §728.202(a)(4).

> findings beyond an x-ray reading may be found to be based solely on the x-ray reading. *See Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405, 1-407 (1985). Dr. Baker's opinions are based on his positive x-ray interpretations and length of exposure. The x-ray evidence has been found to be negative for pneumoconiosis. Length of exposure to coal dust is an insufficient basis on which to find pneumoconiosis. Thus, I find his opinions poorly reasoned, poorly documented and entitled to little weight.

Decision and Order at 18.

It is well-established that it is the responsibility of the administrative law judge to analyze the evidence and his findings cannot be overturned unless clearly erroneous. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). The administrative law judge's determination that Dr. Baker's diagnosis is based exclusively on x-ray evidence and coal mine employment history is entirely reasonable. In vacating this finding, the Board exceeds its authority. *See Tackett , supra; Calfee, supra.*

The administrative law judge's rejection of Dr. Wright's opinion is similarly well-founded. In his report Dr. Wright discussed pneumoconiosis only in connection with the x-ray evidence. Director's Exhibit 25 at 3 (unnumbered). He concluded his report stating:

> My impression based upon this evidence is as follows:
>
> 1. Coal Workers' Pneumoconiosis early Category 1, simple.

The administrative law judge thoroughly discussed this report:

> Dr. Wright diagnosed pneumoconiosis based on an abnormal x-ray. A diagnosis or medical opinion which is merely a restatement of a positive x-ray is not a reasoned medical opinion within the meaning of §718.202(a)(4). Dr. Wright gave no other reason for his positive finding. Pulmonary function and arterial blood gas studies administered by Dr. Wright failed to qualify under the regulations. Since Dr. Wright based his opinion on nothing more than a positive x-ray interpretation, I find his report to be poorly reasoned and give it little weight. *See Worhach,* 17 BLR at 1-110.

Decision and Order at 18.

The majority has clearly exceeded its authority in overturning the administrative law judge's rejection of Dr. Wright's report. It is the majority which has failed to explain the basis for its determination that both Drs. Baker and Wright "specifically noted, and based their opinions upon, claimant's history, physical examination findings and objective study results." Decision and Order at 4. I can find no support for this statement in either doctor's report.

In sum, I believe that the administrative law judge properly rejected the opinions of both Drs. Baker and Wright and that the denial of benefits should be affirmed.

REGINA C. McGRANERY
Administrative Appeals Judge