BRB No. 98-1405 BLA

ROBERT L. WEAVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN 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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Jason E. Huber (Forman & Crane), Charleston, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Jill M. Otte (Henry L. Solano, 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 and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1334) of Administrative Law Judge Gerald M. Tierney awarding benefits 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). Initially, the administrative law judge noted that, although the instant

claim was a duplicate claim, employer had stipulated that claimant established total disability, an element of entitlement previously decided against him in his original claim, and, therefore, that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d).[1] Thus, the administrative law judge reviewed the entire record to determine if claimant was entitled to benefits.

The administrative law judge found at least twenty-five years of coal mine employment established, as agreed to by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the existence of pneumoconiosis established by the most recent x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) and by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). In addition, although the administrative law judge noted that employer had contended that all relevant evidence must be weighed together to determine if claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge also found that such a weighing of the evidence would not change the result in this case as the administrative law judge found that after reviewing all of the evidence of record relevant to pneumoconiosis, the existence of pneumoconiosis was established by a preponderance of the evidence. The administrative law judge further found pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b) and total disability established, as stipulated by employer, *see* 20 C.F.R. §718.204(c). Finally, the administrative law judge found total disability due to pneumoconiosis established by the medical opinion evidence pursuant to 20 C.F.R. 718.204(b). Accordingly benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a) and total disability due to pneumoconiosis established pursuant to Section 718.204(b). Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, also responds in order to urge the Board to adopt the Director's interpretation regarding the weighing of relevant evidence pursuant to Section 718.202(a).

[1] Claimant originally filed a claim on June 24, 1992, which was denied on November 24, 1992, inasmuch as claimant failed to establish total disability due to pneumoconiosis, Director's Exhibit 30. Claimant took no further action on this claim. Claimant filed the instant, duplicate claim on July 12, 1995, Director's Exhibit 1.

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).[2] Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204(b), in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment, *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[2] As the administrative law judge found, the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim, filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1; *see also* 20 C.F.R. §718.202(a)(3). Decision and Order at 10-11. Moreover, we affirm as unchallenged on appeal the administrative law judge's finding that the existence of complicated pneumoconiosis was not established and, therefore, that claimant is not entitled to the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, *see* 20 C.F.R. §§718.304; 718.202(a)(3); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, pursuant to Section 718.202(a)(1), the administrative law judge gave greater weight to the most recent x-ray of record which was read as positive by Dr. Patel, a board-certified radiologist and B-reader,[3] Claimant's Exhibit 1, noting that pneumoconiosis is a progressive and irreversible disease and that Dr. Patel's reading was unchallenged in the record. Decision and Order at 11.[4] Thus, the administrative law judge found the existence of pneumoconiosis established by the x-ray evidence. However, the Fourth Circuit Court has held that a bare appeal to "recency," in and of itself, is an abdication of rational decision making, *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Consequently, because the administrative law judge did not adequately explain why Dr. Patel's x-ray reading was entitled to more weight under Section 718.202(a)(1) than the contrary x-ray readings of record, we vacate the administrative law judge's finding under Section 718.202(a)(1).

Next, the administrative law judge noted that there was CT scan evidence,[5] but determined that a CT scan, in and of itself, is not sufficient to establish or refute the existence of pneumoconiosis, is not an x-ray and is not one of the listed methods for establishing the existence of pneumoconiosis at Section 718.202(a)(1)-(4), but can be considered in conjunction with and as support for a reasoned medical opinion under Section 718.202(a)(4). The administrative law judge considered the medical opinion evidence pursuant to Section 718.202(a)(4) and credited the most recent opinion of record of Dr. Rasmussen, Claimant's Exhibit 1, whom the administrative law judge noted based his opinion on a physical examination, objective test results and a positive x-ray reading from Dr. Patel and diagnosed

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[3] 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 of 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 Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[4] The record also contains twenty readings of four prior x-rays, including seventeen negative readings and three positive readings, Director's Exhibits 12-14, 24, 27, 30; Employer's Exhibits 2, 6, 8, 10.

[5] The record contains interpretations of a June, 1995, CT scan from a number of physicians, including Drs. Burton, Director's Exhibit 22, Bellotte, Director's Exhibit 24; Employer's Exhibit 14, Wiot, Director's Exhibit 27; Employer's Exhibit 7, Goodman, Employer's Exhibits 3-4, Wheeler, Employer's Exhibit 8, and Fino, Employer's Exhibits 10, 13, none of whom found that it revealed the existence of pneumoconiosis.

pneumoconiosis, Decision and Order at 11-12. The administrative law judge found his opinion to be documented and reasoned and supported by the objective evidence of record, as well as the opinion of Dr. Ranavaya, Director's Exhibit 10; Employer's Exhibit 1, who examined claimant two years prior to Dr. Rasmussen and also diagnosed pneumoconiosis, Director's Exhibit 10.[6]

The administrative law judge gave more weight to Dr. Rasmussen's opinion than the opinion of Dr. Wiot, who found no evidence of pneumoconiosis, because Dr. Wiot merely reviewed x-rays and a CT scan, Director's Exhibit 27; Employer's Exhibit 7, while Dr. Rasmussen had conducted extensive objective testing and an examination of claimant and because Dr. Wiot did not review the most recent, positive x-ray of record from Dr. Patel which had been credited by the administrative law judge. The administrative law judge also gave more weight to Dr. Rasmussen's opinion than the opinions of Drs. Goodman, Employer's Exhibits 3-4, 12, and Fino, Employer's Exhibits 10, 13, who found no pneumoconiosis, because they only reviewed the evidence of record, whereas Dr. Rasmussen had examined claimant and conducted objective testing. Finally, the administrative law judge gave more weight to Dr. Rasmussen's opinion than the opinion of Dr. Bellotte, who examined claimant as well as reviewed evidence and found no pneumoconiosis, Director's Exhibit 24; Employer's Exhibit 14, because Dr. Rasmussen's opinion was more recent and based on the most recent objective evidence, whereas Dr. Bellotte failed to acknowledge or discuss the most recent, positive x-ray of record from Dr. Patel and credited by the administrative law judge. Thus, the administrative law judge found the existence of pneumoconiosis also established by the medical opinion evidence pursuant to Section 718.202(a)(4). Moreover, although the administrative law judge noted that employer had contended that all relevant evidence must be weighed together to determine if claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), the administrative law judge also found that such a weighing of the evidence would not change the result, finding that, after reviewing all of the evidence of record relevant to pneumoconiosis, the existence of pneumoconiosis was established by a preponderance of the evidence.

[6] In addition, the administrative law judge also noted the opinion of Dr. Harron, who examined claimant and diagnosed pneumoconiosis, Director's Exhibit 30.

However, as employer contends, the administrative law judge erred in crediting Dr. Rasmussen's opinion over the opinions of Drs. Goodman and Fino merely because they did not examine claimant. The Fourth Circuit Court has held that an administrative law judge should not "mechanistically" credit, "to the exclusion of all other testimony," the testimony of a treating or examining physician solely because the physician examined the claimant, but has a "statutory obligation to consider all of the relevant evidence bearing upon the existence of pneumoconiosis," *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Thus, the administrative law judge did not adequately explain why Dr. Rasmussen's opinion, as an examining physician, was entitled to more weight under Section 718.202(a)(4) than the contrary opinions of Drs. Goodman and Fino.[7] In addition, the administrative law judge did not consider or weigh the CT scan interpretations of Drs. Burton, Director's Exhibit 22, or Wheeler, Employer's Exhibit 8, neither of whom found evidence of pneumoconiosis, when weighing the evidence under Section 718.202(a)(4), *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) as well and remand the case for reconsideration of the relevant evidence pursuant to Section 718.202(a)(1) and (4).

Finally, pursuant to Section 718.204(b), the administrative law judge accorded little weight to the opinions of those physicians who did not diagnose pneumoconiosis, including Drs. Wiot, Goodman, Fino and Bellotte, and credited the opinions of Dr. Rasmussen, who found that coal workers' pneumoconiosis was a significant and aggravating factor in claimant's totally disabling respiratory impairment, Claimant's Exhibit 1, and Dr. Ranavaya, who found that coal workers' pneumoconiosis contributed to claimant's total disability to a "major" extent, Director's Exhibit 10. Decision and Order at 13.[8] The administrative law

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[7] We reject claimant's contention that the opinions of those physicians finding no evidence of pneumoconiosis are all biased for employer. Opinions provided on behalf of a party, prepared in the course of litigation, are probative evidence and are not presumptively biased, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992), *citing Richardson v. Perales*, 401 U.S. 389 (1971); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984), and an administrative law judge is permitted to assign a physician's report prepared at the request of a party determinative weight, *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906, 1-908 (1985); *see also Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992)(the identity of party who hires a medical expert does not, by itself, demonstrate partiality on the part of the physician); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1990).

[8] We note that, although Dr. Wiot found no evidence of pneumoconiosis, he provided

judge found, therefore, that total disability due to pneumoconiosis was established pursuant to Section 718.204(b).

However, the Fourth Circuit Court held in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), that where, as in this case pursuant to Section 718.204(b), a claimant bears the burden of establishing that pneumoconiosis caused his total disability, as opposed to enjoying a presumption of total disability due to pneumoconiosis, once the administrative law judge has found that the claimant suffers from some form of pneumoconiosis, a physician's opinion premised on an understanding that the miner does not suffer from coal workers' pneumoconiosis may hold probative value, *see also Hobbs v. Clinchfield Coal* Co., 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *cf. Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). The Fourth Circuit Court held in *Ballard, supra*, that such an opinion is not necessarily inconsistent with the administrative law judge's decision that the miner suffers from pneumoconiosis as defined in 20 C.F.R. §718.201, inasmuch as the legal definition of pneumoconiosis is broader than the medical definition of coal workers' pneumoconiosis. Moreover, the Fourth Circuit Court held that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability, *id*.

Consequently, we vacate the administrative law judge's findings that the opinions failing to diagnose pneumoconiosis should be discredited under Section 718.204(b) and, inasmuch as we vacate the administrative law judge's findings under Section 718.202(a), we vacate the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(b) and remand the case for reconsideration. Finally, as the administrative law judge's finding under Section 718.203(b) is premised on his finding under Section 718.202(a), we vacate the administrative law judge's finding under Section 718.203(b) as well, in light of our vacating of the administrative law judge's findings under Section 718.202(a), and remand the case for reconsideration.

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no opinion as to whether pneumoconiosis contributed to claimant's disability, Director's Exhibit 27; Employer's Exhibit 7; *see Tackett, supra*.

Accordingly, the Decision and Order of the administrative law judge's awarding benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge