BRB No. 01-0779 BLA

BARBARA SUE JOHNSON (Executrix of the Estate of ALTON W. HOOD)	)	
Claimant-Petitioner	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
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 - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Harry L. Mathison (King, Deep and Branaman), Henderson, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Edward Waldman (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand - Denying Benefits (99-BLA-0210) of Administrative Law Judge Donald W. Mosser 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).[2] This case is before the Board for a fourth time.[3] Pursuant to the most recent appeal of the case, the Board vacated the administrative law judge's finding that the interim presumption was invoked pursuant to Section 727.203(a)(1) and instructed the administrative law judge to consider, on remand, the significance of written comments accompanying the positive x-ray interpretations. The Board affirmed the administrative law judge's finding that the presumption was not rebutted pursuant to Section 727.203(b)(2) and (3), but vacated the administrative law judge's finding on onset of disability, and remanded the case for further consideration of onset date, if reached. Accordingly, the case was remanded for further consideration of the x-ray evidence of record, and for further consideration of the onset date of disability, if reached. *Hood v. Peabody Coal Co.*, BRB No. 99-1299 BLA (Nov. 29, 2000)(unpub.).

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[1] Claimant, Barbara Sue Johnson, is pursuing the claim of Alton W. Hood as executrix of his estate.

[2] 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 Part 718 regulations, unless otherwise noted, refer to the amended regulations. The regulations at 20 C.F.R. §727.203(a), however, are not affected by the revised regulations. 20 C.F.R. §725.2, 725.4(a), (d), (e).

[3] The lengthy history of this case is set forth in the Board's most recent Decision and Order in *Hood v. Peabody Coal Co.*, BRB No. 99-1299 BLA (Nov. 29, 2000).

On remand, having considered the comments accompanying the x-ray readings, the administrative law judge concluded that the preponderance of the x-ray evidence failed to establish the existence of pneumoconiosis and therefore failed to invoke the interim presumption pursuant to Section 727.203(a)(1). Decision and Order on Remand at 2-8. The administrative law judge further found that claimant was unable to establish invocation of the interim presumption pursuant to Section 727.203(a)(2)-(4). Decision and Order at 8-10. Accordingly, benefits were denied pursuant to Part 727. Turning to Part 718, the administrative law judge found that claimant was unable to establish entitlement to benefits pursuant to that Part as claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 11-13. Lastly, the administrative law judge found that the newly amended regulations at Part 718 would not affect the disposition of the case. Decision and Order at 13-15. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding: that the x-ray evidence did not support a finding of invocation at Section 727.203(a)(1); that the weight of the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4); and that the newly amended regulations would not affect the disposition of this case. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand.[4] The Director argues that, pursuant to Board's holding in *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999), the administrative law judge erred in relying on x-ray commentary to find that the interim presumption was not invoked at Section 727.203(a)(1). The Director further argues that the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Part 718 is erroneous.[5]

[4] We consider the Motion to Remand by the Director, Office of Workers' Compensation Programs (the Director), to be his response brief and proceed to address the administrative law judge's Decision and Order on the merits.

[5] We affirm, as unchallenged, the administrative law judge's finding that claimant did not establish invocation of the interim presumption pursuant to Section 727.203(a)(2)-(4) and

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).

Both claimant and the Director assert that the administrative law judge erred in concluding that the x-ray evidence did not establish the existence of pneumoconiosis and did not therefore invoke the presumption at Section 727.203(a)(1). Specifically, claimant asserts that the administrative law judge erred in concluding that x-rays classified as positive were, in fact, negative based on physicians' comments addressing the positive classifications. In his Motion to Remand, citing *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999), the Director asserts that the administrative law judge improperly relied on the physicians' causation comments to preclude invocation of the interim presumption at Section 727.203(a)(1).

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did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We affirm the administrative law judge's determination that the weight of the evidence of record does not support a finding of invocation at Section 727.203(a)(1). In considering the x-ray evidence, on remand, the administrative law judge found that the preponderance of x-rays taken from 1972 to 1980 which were read by dually qualified Board-certified, B-readers were interpreted as negative.[6] Turning to the x-rays taken since 1994, the administrative law judge also found that a preponderance of the x-rays were negative in light of the fact that physicians' comments on the positively classified x-rays, including comments by Board-certified, B-readers, indicated that they did not believe the opacities seen on x-rays were diagnostic of the existence of pneumoconiosis. The administrative law judge, therefore, properly found that the x-ray evidence of record failed to establish the existence of pneumoconiosis and failed, therefore, to invoke the interim presumption at Section 727.203(a)(1). The administrative law judge has thus complied with the Board's remand instructions; having considered all relevant evidence of record, *see* Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see 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). The administrative law judge has also provided an additional bases for the Board to affirm his finding at Section 727.203(a)(1) by concluding that the weight of the readings by physicians with superior qualifications was negative for the existence of pneumoconiosis. This constitutes a correct exercise of the administrative law judge's discretion. *See Staton v. Norfolk & Western Railway 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); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984)(Ramsey, C.J., dissenting); *Horn v. Jewell Ridge Coal Co.*, 6 BLR 1-933 (1984); *Valazak v. Bethlehem Mines Corp.*, 6 BLR 1-282 (1983). Accordingly, we affirm the administrative law judge's finding, on remand, that the weight of the x-ray evidence fails to support a finding of invocation at Section 727.203(a)(1). *Mullins*, *supra*.[7] The

[6] "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 Company, Inc. of Virginia 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 is certified in radiology or diagnostic roentgenology by the American Board of Radiology.

[7] While the Director requests that the case be remanded for further consideration at Section 727.203(a)(1); at the same time, the Director acknowledges that remand "may not be necessary," if the administrative law judge cures other errors in his Section 727.203(a)(1)

administrative law judge has, therefore, properly determined that entitlement under Part 727 was precluded. *See Mullins*, *supra*.

Claimant next contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established by medical opinion evidence at 20 C.F.R. §718.202(a)(4). Claimant asserts that the medical opinions of Drs. Fino and Branscomb, that claimant did not suffer from pneumoconiosis, Employer's Exhibits 2, 4, should have been accorded little weight based on the physicians' failure to examine claimant. Claimant argues, therefore, that these physicians' opinions are based on nothing more than a review of x-ray

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determination. Director's Motion to Remand at 3 n.2. Because we conclude that the administrative law judge has provided a permissible basis for finding that the x-ray evidence does not support invocation of the interim presumption at Section 727.203(a)(1), we will not address the Director's argument concerning the application of *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999), to cases arising under Part 727. Moreover, in light of the administrative law judge's finding that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1), we need not address the Director's request that the Board revisit its holding in *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988)(a finding of invocation at Section 727.203(a)(1) precludes a finding of rebuttal at Section 727.203(b)(4)). *See Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994)(2-2 case with Brown, J. and McGranery, J., concurring and dissenting) *rev'd on other grds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

evidence. We reject claimant's assertion, however, and affirm the administrative law judge's determination that the medical opinion evidence of record did not support a finding of the existence of pneumoconiosis.[8]

After finding that claimant was unable to establish entitlement pursuant to Part 727, the administrative law judge considered the issue of entitlement pursuant to Part 718. Decision and Order at 11-13; *see Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). Determining that claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3), Decision and Order at 11-13; *see* n.4, *supra*, the administrative law judge considered the relevant medical opinion evidence. In considering this evidence, the administrative law judge weighed the opinions of Drs. West, Traughber, Simpao, Gallo and Houser, all of whom diagnosed the presence of pneumoconiosis, Director's Exhibits 8, 23, 24, 34; Claimant's Exhibit 1, against the contrary opinions of Drs. Anderson, Westerfield, Branscomb and Fino. Director's Exhibits 24, 34; Employer's Exhibits 2, 4. In a permissible exercise of his discretion, the administrative law judge found that the opinions of the latter physicians were entitled to greater weight because, on the whole, these physicians' opinions were best-supported by the underlying documentation of record, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also permissibly accorded them greater weight based on the superior credentials of the physicians who rendered them. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Contrary to claimant's assertion, the opinions of Drs. Branscomb and Fino, consulting physicians, Employer's Exhibits 2, 4, were based on a thorough review of the evidence and, therefore constituted well-reasoned medical opinions upon which the administrative law judge could rely. *See Clark*, *supra*; *Peskie*, *supra*; *Lucostic*, *supra*. Accordingly, we affirm the administrative law judge's determination that the medical opinion evidence fails to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4) and

[8] The Director suggests that the Board should remand this case to the administrative law judge with instructions to apply his Section 718.202(a)(4) finding in considering whether rebuttal of the presumption under Section 727.203(b)(4) has been established. *See* Director's Brief at 7-8. Because we have found it unnecessary to reach the issue of rebuttal at Section 727.203(b)(4), however, *see* discussion, *supra*, we need not address this contention.

thus affirm the administrative law judge's determination that claimant is unable to establish entitlement pursuant to Part 718 as claimant has failed to establish the existence of pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Lastly, claimant's assertion, that the opinion of Dr. Simpao, claimant's treating physician, Director's Exhibit 8, is entitled to dispositive weight, is rejected. Contrary to claimant's assertion, the revised regulation at 20 C.F.R. §718.104(d) is not applicable to this case. 20 C.F.R. §§718.101(b), 718.104(d). Further, while the administrative law judge may give greater weight to a medical report based upon the doctor's status as a treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), the administrative law judge must also determine if the physician's conclusions are reasoned. *See Griffith*, *supra*; *see also Peabody Coal Co. v. Groves*, 2002 WL 58545 (6th Cir. 2002). In the instant case, the administrative law judge found that notwithstanding Dr. Simpao's status as claimant's treating physician, his opinion was not well-supported by underlying documentation as it relied primarily upon x-ray evidence, the weight of which was found by the administrative law judge to conflict with a finding of pneumoconiosis. Decision and Order on Remand at 10. Thus the administrative law judge permissibly accorded less weight to the opinion of Dr. Simpao. *See Griffith*, *supra*.

Accordingly, the administrative law judge's Decision and Order on 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