BRB No. 02-0665 BLA

HAROLD LAWSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SILVER EAGLE MINING COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
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 – Denying Benefits of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Harold Lawson, St. Paul, Virginia, *pro se*.[1]

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

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

PER CURIAM:

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (01-BLA-0883) of Administrative Law Judge Stuart A. Levin (the administrative law judge) on a request for modification of the denial of a 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] The administrative law judge found that the newly developed medical evidence, submitted in connection

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[2] Claimant filed a claim on August 14, 1992. Director's Exhibit 1. Subsequent to a hearing, Administrative Law Judge Sheldon R. Lipson denied the claim based on his finding that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 and total respiratory or pulmonary disability at 20 C.F.R. §718.204(c) (2000). Director's Exhibits 47, 48. The Board, in *Lawson v. Silver Eagle Mining Co.,* BRB No. 95-0410 BLA (Sept. 28, 1995)(unpublished), affirmed Judge Lipson's denial of benefits as substantial evidence supported his finding that the evidence failed to establish total disability at 20 C.F.R. §718.204(c) (2000). Director's Exhibit 50.

Claimant requested modification under 20 C.F.R. §725.310 (2000) and submitted additional medical evidence. Director's Exhibit 51. Subsequent to a hearing, Administrative Law Judge Edward J. Murty, Jr. denied claimant's request for modification and the claim based on his finding that the evidence of record failed to show the existence of pneumoconiosis at 20 C.F.R. §718.202 and total disability at 20 C.F.R. §718.204(c) (2000), or to establish a mistake in a determination of fact in the prior denial. Director's Exhibits 73, 80.

Claimant again requested modification under 20 C.F.R. §725.310 (2000) and submitted additional medical evidence. Director's Exhibit 78. Subsequent to a hearing, Administrative Law Judge John C. Holmes denied claimant's request for modification and the claim based on his finding that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 and total disability at 20 C.F.R. §718.204(c) (2000), or to establish a mistake in a determination of fact in the prior denial. Director's Exhibit 105.

Claimant requested modification and submitted additional medical evidence. Director's Exhibit 106. Subsequent to a hearing, Administrative Law Judge Stuart A. Levin granted modification but denied the claim on its merits by Decision and Order dated April 24, 2002 which is the subject of the instant appeal.

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

with claimant's third request for modification, establishes that claimant is now totally disabled due to a respiratory or pulmonary impairment, a fact which employer conceded at the hearing. 2001 Hearing Transcript at 39-40. The administrative law judge found that claimant thereby established a change in his condition under 20 C.F.R. §725.310 (2000).[4] Accordingly, the administrative law judge indicated that he would next evaluate all the evidence of record on the merits of the claim. Considering the evidence under 20 C.F.R. §718.202, the administrative law judge found that it was insufficient to establish the existence of pneumoconiosis. The administrative law judge thus denied the claim. In response to claimant's appeal, employer urges the Board to affirm the decision below as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP,* 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) through (a)(4).[5] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law found that the x-ray evidence of record is, at best, in equipoise as to the existence of pneumoconiosis, and thus, that claimant failed to establish the existence of pneumoconiosis by x-ray evidence.[6] *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 9. The administrative law judge's weighing of the x-ray evidence of record cannot, however, be affirmed.

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[4] Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

[5] The administrative law judge correctly found that the record contains no biopsy or autopsy evidence, *see* 20 C.F.R. §718.202(a)(2), and that the presumptions referred to in 20 C.F.R. §718.202(a)(3) are not applicable in the instant claim. Decision and Order at 8-9. We thus affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(2) and (a)(3).

[6] The record contains seventy-five interpretations of twenty x-rays. There are thirteen positive interpretations of five x-rays. Director's Exhibits 24, 29, 40, 51, 52-1, 78; Claimant's Exhibit 1.

In evaluating the x-ray evidence, the administrative law judge correctly noted that the number of negative x-ray interpretations outweighs the positive interpretations. He also acted within his discretion in determining that where qualified physicians rendered positive readings, "there is no basis for finding their readings more credible than the negative readings by equally-qualified physicians." Decision and Order at 9. The record contains four x-rays which have been interpreted as positive and as negative by dually qualified physicians, namely the x-rays dated January 4, 1993, February 18, 1993, October 16, 1995, and April 13, 1998. Director's Exhibits 24, 29, 40-42, 51, 52-1, 56, 60, 68, 69, 78, 92. In his consideration of these x-rays, the administrative law judge properly found no basis to prefer the positive x-ray interpretations over the negative interpretations since each had been rendered by dually qualified physicians.

The administrative law judge, however, failed to account for the fact that claimant's September 12, 2001 x-ray was not read as both positive and negative by equally qualified physicians. Dr. Ahmed, a Board-certified radiologist and B reader, interpreted claimant's September 12, 2001 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Although Dr. Castle interpreted this x-ray as negative for pneumoconiosis, Dr. Castle is not dually qualified. Employer's Exhibit 7. Dr. Castle is only a B reader. Given the fact that Dr. Ahmed is a dually qualified physician while Dr. Castle is not, Claimant's Exhibit 2; Employer's Exhibit 5, the administrative law judge's reasoning, that there is no basis for finding a positive x-ray reading more credible than a negative reading *by equally-qualified physicians*, does not apply to the September 12, 2001 x-ray. Moreover, the September 12, 2001 x-ray is the most recent of record, a fact that the administrative law judge did not specifically address. *Adkins, supra*.

Inasmuch as the administrative law judge's analysis of the x-ray evidence does not coincide with the record, we vacate his finding at 20 C.F.R. §718.202(a)(1). On remand, the administrative law judge must determine the weight and credibility of all of the x-ray evidence of record, based on an analysis of its qualitative and quantitative nature, as mandated by *Adkins*.[7]

We next address the administrative law judge's finding that the medical opinion evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the opinions of Drs. Paranthaman, Robinette, and Barongan who diagnosed pneumoconiosis, and the opinions of Drs. Dahhan, Wheeler, Castle, Ranavaya and Tuteur who did not. Weighing the medical opinions

[7] The administrative law judge did not address Dr. DePonte's negative readings of the x-rays dated December 26, 1998 and December 28, 1999 contained in Director's Exhibit 106, and must do so on remand at 20 C.F.R. §718.202(a)(1).

pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge stated:

> The claimant argues that there was a mistake of fact in the prior determination that the claimant did not have pneumoconiosis because Dr. Robinette's reports were not accorded proper weight. However, I find no error in the previous determinations because Dr. Robinette did not address any of the findings other than to repeat that the x-rays showed pneumoconiosis. Therefore, his opinion provides no basis for going beyond the x-ray readings.
>
> Dr. Paranthaman's opinion is equivocal on the contribution of coal dust due to emphysema. And since his March 2000 consultative report is not a part of the record, his new diagnosis of coal workers' pneumoconiosis cannot be evaluated.
>
> The other physicians of record concluded that the claimant does not have coal workers' pneumoconiosis. While it may be that their opinions only address the issue of clinical pneumoconiosis, in that they consistently looked for signs and symptoms of fibrosis and did not address the broad legal definition, it is still claimant's burden to present a documented and well-reasoned opinion that he has pneumoconiosis.
>
> For these reasons, I find that the medical opinion evidence does not establish pneumoconiosis under [20 C.F.R.] §718.202(a)(4).

Decision and Order at 10.

We first address the fact that the administrative law judge accorded less weight to Dr. Paranthaman's opinion at 20 C.F.R §718.202(a)(4) because he found that it was equivocal on the issue of what effect claimant's coal dust exposure had on his emphysema. Dr. Paranthaman, by report dated September 30, 1992, diagnosed bullous emphysema with significant airway obstruction and stated that claimant's thirty years of coal mine employment "probably" had aggravated the condition. Director's Exhibit 10. In a supplemental letter dated November 6, 1992, Dr. Paranthaman opined that claimant's lung condition is not coal workers' pneumoconiosis but stated that there was "a possibility of coal dust exposure aggravating the condition." Director's Exhibit 12. The record thus supports the administrative law judge's finding that Dr. Paranthaman's opinion is equivocal as to what effect claimant's exposure to coal dust had on his bullous emphysema. We hold, therefore, that the administrative law judge properly accorded less weight to Dr. Paranthaman's opinion. *U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988).

The administrative law judge's consideration of the medical opinion evidence under 20 C.F.R. §718.202(a)(4) is, however, not without error. The administrative law judge found that Dr. Robinette "did not address any of the findings other than to repeat that the x-rays showed pneumoconiosis" and thus that Dr. Robinette's opinion "provides no basis for going beyond the x-ray readings." Decision and Order at 10. However, a review of the numerous reports submitted by Dr. Robinette [8] reveals that the doctor's diagnosis of pneumoconiosis was not based solely on his interpretation of claimant's x-rays, as the administrative law judge indicated, but was also based on Dr. Robinette's consideration of claimant's CT scan(s), physical

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[8] Dr. Robinette examined claimant on February 18, 1993. At that time, Dr. Robinette took an x-ray, conducted pulmonary function and blood gas studies and obtained an EKG. In a report dated March 2, 1993, in which he set out claimant's work, smoking, and medical histories, Dr. Robinette diagnosed, *inter alia*, coal workers' pneumoconiosis. Director's Exhibit 29.

In a March 2, 1993 letter to claimant, Dr. Robinette indicated that he had reviewed claimant's CT scan report and breathing test abnormalities as well as the x-rays obtained in his office in February, 1993. Dr. Robinette opined that claimant's x-rays showed evidence of "black lung." Director's Exhibit 45. He then stated, "[t]his was confirmed on your CT scan of February, 1992. Your breathing test showed some evidence of mild airflow obstruction which would suggest that your breathing test underestimate (sic) your pulmonary impairment." *Id.*

Dr. Robinette re-examined claimant on September 2, 1993. In his resulting report, Dr. Robinette diagnosed, *inter alia*, coal workers' pneumoconiosis. Director's Exhibit 45.

Dr. Robinette again examined claimant on January 28, 1997, taking an x-ray, conducting pulmonary function and blood gas studies and setting out claimant's medical, social, smoking, and work histories. In a January 28, 1997 report, Dr. Robinette found clinical evidence of chronic airflow obstruction with associated interstitial lung disease and bullous emphysema. Director's Exhibit 67.

[9] Dr. Robinette, in his March 2, 1993 report, indicates that he "recently received a copy of your CT scan report." Subsequently, Dr. Robinette refers to a February 1992 CT scan that he found confirmed the presence of "black lung" and "bullous or large air space emphysema." Director's Exhibit 45. Drs. Wheeler and Templeton both read a March 24, 1992 CT scan. Dr. Wheeler found that the March 24, 1992 CT scan showed no evidence of pneumoconiosis. Director's Exhibit 41. He discussed his findings at his October 22, 1993 deposition. Director's Exhibit 46-

examinations, medical, social, smoking, and work histories, and objective evidence. The administrative law judge's discrediting of Dr. Robinette's opinion under 20 C.F.R. §718.202(a)(4) is based on a mischaracterization of Dr. Robinette's findings and cannot stand. On remand, the administrative law judge must reassess the weight and credibility of Dr. Robinette's opinion, and must further address the CT scan evidence, *see generally Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991), in determining whether the evidence is sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

We next address the administrative law judge's finding, at 20 C.F.R. §718.202(a)(4), that "[t]he other physicians of record concluded that the claimant does not have coal workers' pneumoconiosis." Decision and Order at 10. The record shows that Drs. Dahhan, Wheeler, Templeton, Castle, Ranavaya and Tuteur found that claimant does not have coal workers' pneumoconiosis or any condition related to his coal mine employment. *See* Director's Exhibits 39, 41-43, 46-1, 46-2, 46-4, 59, 63, 75, 88, 99-101; Employer's Exhibits 1, 3, 6. However, the record also shows that Dr. Barongan, in an August 13, 1998 report, listed "pneumoconiosis" among his diagnoses. Director's Exhibit 78. The administrative law judge, in finding that the other physicians of record concluded that claimant does not have coal workers' pneumoconiosis, did not address Dr. Barongan's diagnosis of "pneumoconiosis." We, therefore, remand the case for consideration of Dr. Barongan's opinion.

On remand, the administrative law judge is instructed to first determine whether Dr. Barongan independently diagnosed pneumoconiosis, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), and to next determine whether Dr. Barongan's diagnosis meets the definition of "pneumoconiosis" provided at 20 C.F.R.

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4. Dr. Templeton found that claimant's March 24, 1992 CT scan showed bullous disease, paraseptal emphysema, and 3mm nodules of unknown origin. He also noted, "No background nodularity of the lungs as seen in coal workers' pneumoconiosis or silicosis." Director's Exhibit 42.

[10] In reports dated March 17, 1993 and July 6, 1993, Dr. Barongan also noted that claimant was "known to have pneumoconiosis and emphysema." Director's Exhibits 40, 44.

In a Discharge Summary dated March 14, 2000, Dr. Barongan referred to the fact that a consulting physician, Dr. Paranthaman, diagnosed, *inter alia*, "simple coal workers' pneumoconiosis by chest x-ray and work history." Director's Exhibit 106. The administrative law judge correctly noted that the record does not contain a report from Dr. Paranthaman's apparent consultation. Decision and Order at 10 n.3.

§718.201. If so, the administrative law judge must then determine what weight, if any, he accords to Dr. Barongan's opinion. *See generally Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995).

If, on remand, the administrative law judge finds that the record evidence establishes the existence of pneumoconiosis under both 20 C.F.R. §718.202(a)(1) and 20 C.F.R. §718.202(a)(4), then claimant has met his burden under 20 C.F.R. §718.202(a), and the administrative law judge must then determine whether claimant has established total disability due to pneumoconiosis under 20 C.F.R. §718.204 on the merits of the claim. Alternatively, if, on remand, the administrative law judge finds the existence of pneumoconiosis established under one of these subsections but not under the other, then he must make a finding as to whether claimant has met his burden to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If the administrative finds the existence of pneumoconiosis established at 20 C.F.R. §718.202(a) pursuant to *Compton*, then the administrative law judge must determine whether claimant has established total disability due to pneumoconiosis under 20 C.F.R. §718.204.

[11] We note that claimant testified at the hearing that Dr. Barongan is one of his treating physicians. November 8, 2001 Hearing Transcript at 24-25. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), has held that an administrative law judge may take into consideration the fact that a physician is a treating physician, but may not mechanically credit, to the exclusion of other relevant evidence, a treating physician's opinion based on his status as a treating physician. *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, 441-442, 21 BLR 2-269, 2-274-276 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge