BRB No. 04-0800 BLA

THURMAN E. PROFFITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 06/30/2005
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM**:**

Employer appeals the Decision and Order (03-BLA-6135) of Administrative Law Judge Alice M. Craft 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).[1] This case involves a subsequent claim filed on October 11, 2001.[2] After crediting claimant with at least twenty years of coal mine employment, the administrative law judge found that the newly submitted evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that, pursuant to 20 C.F.R. §725.309, claimant had established that one of the applicable conditions of entitlement had changed since the date upon which his prior 1995 claim became final. Consequently, the administrative law judge considered claimant's 2001 claim on the merits. After finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.§718.202(a)(1) and (a)(4). Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R.

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[1] The Department of Labor (DOL) 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.

[2]Claimant initially filed a claim for benefits on December 20, 1979. Director's Exhibit 34 The district director denied benefits on May 15, 1980. *Id.* By letter dated September 3, 1981, claimant requested a formal hearing on his claim. *Id.* By letter dated September 9, 1981, the district director informed claimant that his 1979 claim file had been administratively closed. *Id.* There is no indication that claimant took any further action in regard to his 1979 claim.

Claimant filed a second claim on March 21, 1995. Director's Exhibit 35. In a Proposed Decision and Order dated June 19, 1996, the district director denied the claim. *Id.* There is no indication that claimant took any further action in regard to his 1995 claim.

Claimant filed a third claim on October 11, 2001. Director's Exhibit 1.

§718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contention that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The Director, however, contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In a reply brief, employer reiterates its previous contentions of error.[3] Claimant has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Employer initially argues that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer argues that the administrative law judge erred in failing to provide a reason for assigning greater weight to the "most recent x-rays." Employer's Brief at 12. We disagree. In her consideration of the x-ray evidence, the administrative law judge acted within her discretion by according greater weight to the interpretations of claimant's most recent x-rays, *i.e.*, the interpretations of x-rays taken after 1996.[4] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992);

[3]Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309 and 718.204(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Employer also contends that claimant, in order to satisfy his burden of proof, must present medical evidence explaining "why [he] developed pneumoconiosis after his last exposure and after previously not having the disease." Employer's Brief at 12-13. Employer's contention has no merit. The Board has held that a miner is not required to separately prove that he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. The Board has further held that:

> Because the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature.

Pate v. Alabama By-Products Corp., 6 BLR 1-636 (1983); Decision and Order at 18.

The administrative law judge also properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 18. In regard to the most recent x-ray evidence (i.e., the interpretations of x-rays taken after 1996), the administrative law judge properly noted that there were three interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. Decision and Order at 18. Dr. Patel, a physician dually qualified as a B reader and Board-certified radiologist, interpreted claimant's January 31, 2002 and May 29, 2003 x-rays as positive for pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 2. Dr. Wheeler, an equally qualified physician, interpreted claimant's January 31, 2002 x-ray as negative for the disease. Employer's Exhibit 1. Because two of the three x-ray interpretations rendered by the best qualified physicians are positive for pneumoconiosis, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis. Decision and Order at 18.

Employer argues that the administrative law judge erred in finding that "there are more dually qualified *physicians* who found the presence of pneumoconiosis on x-ray." Decision and Order at 18 (emphasis added). Employer notes that only one dually qualified physician, Dr. Patel, rendered positive interpretations of claimant's most recent x-rays. Employer has taken the administrative law judge's statement out of context. Before making the above cited statement, the administrative law judge found that:

> There are three positive readings – two performed by dually-qualified physicians, and three negative readings – only one of which was performed by a dually-qualified physician.

Decision and Order at 8.

Thus, the administrative law judge, in her consideration of the x-ray evidence, properly focused upon the number of x-ray *interpretations* rendered by the best qualified physicians of record, rather than upon the number of dually qualified physicians, as employer alleges.[5]

Workman v. Eastern Associated Coal Corp., 23 BLR 1-22, 1-26-27 (2004) (Motion for Recon.) (*en banc*).

[5]We also reject employer's contention that the administrative law judge should have considered Dr. Patel's positive interpretations of claimant's January 31, 2002 and May 29, 2003 x-rays collectively as a single positive x-ray interpretation. *Rankin v.*

Employer finally contends that the administrative law judge erred in not considering Dr. McReynolds' interpretation of claimant's December 26, 2002 x-ray.[6] The administrative law judge did not consider Dr. McReynolds' x-ray interpretation. However, as previously noted, the administrative law judge acted within her discretion in according the greatest weight to the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. Dr. McReynolds' radiological qualifications are not found in the record. In this case, if a physician's qualifications were not found in the record, the administrative law judge noted that she took judicial notice of the physician's qualifications by consulting a list of approved B readers issued by the National Institute of Occupational Safety and Health (NIOSH). Inasmuch as the NIOSH website does not indicate that Dr. McReynolds is qualified as a B reader, we hold that the administrative law judge's failure to consider Dr. McReynolds' x-ray interpretation constitutes harmless error.[7] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer argues that the administrative law judge erred in finding that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In finding the medical opinion

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Keystone Coal Mining Corp., 8 BLR 1-54, 1-56 n.1 (holding that an administrative law judge's treatment of a physician's four negative interpretations as one negative interpretation was arbitrary and irrational).

[6]Dr. McReynolds rendered the following interpretation of claimant's December 26, 2002 x-ray:

> There are scattered interstitial nodular densities throughout both lungs measuring less than 5mm in diameter. However, there is not a typical middle and upper lobe predominance as usually seen with coal workers pneumoconiosis.

Claimant's Exhibit 1.

[7]The Director, Office of Workers' Compensation Programs, accurately notes that, had the administrative law judge considered Dr. McReynolds' x-ray interpretation, it would have exceeded the evidentiary limitations on the x-ray evidence set out at 20 C.F.R. §725.414.

evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge credited that the opinions of Drs. Rasmussen, Robinette and Bailey, that claimant suffered from pneumoconiosis, over the contrary opinions of Drs. Castle, Fino and Iosif. Decision and Order at 19-20.

Employer argues that the administrative law judge erred in according greater weight to Dr. Bailey's opinion, based upon his status as claimant's treating physician, without determining whether his opinion is documented and reasoned.[8] The Director similarly contends that the administrative law judge erred in her consideration of Dr. Bailey's opinion. Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.[9] 20 C.F.R. §718.104(d). Section 718.104(d) further provides that:

> In appropriate cases, the relationship between the miner and his

[8]Employer also contends that the administrative law judge relied upon her "erroneous weighing of the x-ray evidence to discredit the recent findings of no pneumoconiosis made by Drs. Castle and Fino." Employer's Brief at 8. However, in light of our affirmance of the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis, we reject this contention.

[9]Section 718.104(d) specifically provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

> (1) *Nature of relationship.* The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;
>
> (2) *Duration of relationship.* The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;
>
> (3) *Frequency of treatment.* The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and
>
> (4) *Extent of treatment.* The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

20 C.F.R. §718.104(d)(1)-(4).

> treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, *provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.*

20 C.F.R. §718.104(d)(5) (emphasis added).

Dr. Bailey's only diagnosis of pneumoconiosis appears in a letter dated August 26, 2002.[10] This three paragraph, one-page letter provides that:

> [Claimant] is a 60-year-old white male who worked in the mines approximately twenty-eight years. He has a history of progressive shortness of breath requiring oxygen at night. He has dyspnea on exertion.
>
> His chest x-ray shows chronic interstitial changes consistent with black lung disease and pneumoconiosis. He has oximetry at night at three hours and 12.7 minutes with an oxygen saturation of less than 90% which is 30.2% of the time monitored. He had a pulmonary function test which showed moderate obstruction consistent with this pneumoconiosis.
>
> I feel that the patient does have significant pneumoconiosis at this time.

Director's Exhibit 26.

We agree with employer and the Director that the administrative law judge failed to adequately address whether Dr. Bailey's diagnosis of pneumoconiosis is sufficiently documented and reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We similarly hold that the administrative law judge failed to adequately address whether the opinions of Drs. Rasmussen and Robinette are sufficiently documented and reasoned. We, therefore, vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.

On remand, after reconsidering whether the medical opinion evidence is sufficient

[10]The record contains Dr. Bailey's office notes from February of 1997 to April of 2002. *See* Director's Exhibit 14. Although Dr. Bailey consistently lists a diagnosis of chronic obstructive pulmonary disease, he does not diagnose pneumoconiosis in any of his office notes.

to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence is sufficient to establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

In the interest of judicial economy, we will also address employer's contentions of error regarding the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §Section 718.204(c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, pursuant to 20 C.F.R. §718.204(b) (2000),[11] a miner must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

In this case, the administrative law judge found that the opinions of Drs. Rasmussen and Robinette were sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 21-22. Citing the decisions of the Fourth Circuit in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19

[11]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

BLR 2-70 (4th Cir. 1995), the administrative law judge discredited the contrary opinions of Drs. Castle, Fino and Iosif because these physicians did not diagnose legal or clinical pneumoconiosis. Decision and Order at 22.

Employer contends that the administrative law judge erred in finding the opinions of Drs. Rasmussen and Robinette sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer argues that the administrative law judge erred in relying upon Dr. Rasmussen's conclusory and unexplained opinion that claimant's coal mine dust exposure significantly contributed to his pulmonary impairment. In a report dated June 18, 2003, Dr. Rasmussen opined that:

> This patient does not retain the pulmonary capacity to perform his last regular coal mine job.
>
> The patient has a significant history of exposure to coal mine dust including several years prior to the institution of dust suppression in the coal mines. He has x-ray evidence of pneumoconiosis. It is medically reasonable to conclude the patient has coalworkers' pneumoconiosis which arose from his coal mine employment.
>
> The two risk factors for this patient's disabling lung disease are his cigarette smoking and his coal mine dust exposure. Both contribute since both cause the same type of lung tissue destruction. They even share some cellular and biochemical mechanisms causing lung tissue damage. The patient exhibits a rather profound impairment in gas exchange as well, perhaps out of proportion to his ventilatory impairment. This clearly indicates that his coal mine dust exposure is a major contributing factor.

Claimant's Exhibit 2.[12]

Consequently, contrary to employer's contention, we hold that Dr. Rasmussen adequately explained his basis for finding that claimant's coal mine dust exposure significantly contributed to his pulmonary impairment. The administrative law judge,

[12]In an earlier January 31, 2002 report, Dr. Rasmussen similarly opined that claimant did not retain the pulmonary capacity to perform his previous coal mine employment. Director's Exhibit 10. Dr. Rasmussen explained that the two risk factors for his pulmonary impairment were his cigarette smoking and his coal mine dust exposure. *Id.* Dr. Rasmussen explained that both of these factors contributed to his pulmonary impairment. *Id.* Dr. Rasmussen also opined that claimant's "coal mine dust exposure significantly contributes to his pulmonary impairment." *Id.*

therefore, permissibly relied upon Dr. Rasmussen's opinion to support a finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer also contends that Dr. Robinette's opinion does not support a finding that claimant's total disability was due to his pneumoconiosis. In a report dated February 3, 2003, Dr. Robinette opined that:

> Functionally, [claimant] has severe airflow obstruction. The FEV1 was only 0.9 of a liter or 37% of predicted with a corresponding reduction of the FVC and marked airtrapping. An arterial PO 2 was 66. Obviously, [claimant's] pulmonary disease is so severe that he would be unable to work as an underground coal miner. His pulmonary disease is at least partially related to his coal mining employment but it is acknowledged that he has continued to smoke cigarettes and there is an elevation of the patient's carboxyhemoglobin level. These factors are contributing to his worsening airflow obstruction. The condition is chronic and irreversible.

Claimant's Exhibit 1.

Dr. Robinette opined that claimant was totally disabled due to his severe pulmonary disease. Because Dr. Robinette further found that claimant's pulmonary disease was "partially related to his coal mining employment," his opinion supports a finding that claimant's total disability was due to his coal mine employment, thereby satisfying the standard set out at 20 C.F.R. §718.204(c).

Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Castle, Fino and Iosif because these physicians did not diagnose legal or clinical pneumoconiosis. In *Scott*, the Fourth Circuit addressed whether the administrative law judge's crediting of the opinions of Drs. Dahhan and Castle, that the miner's totally disabling impairment was not related to dust exposure in coal mine employment, was appropriate. The court concluded that:

> We are of the opinion that the decisions in *Hobbs II* and *Ballard* are distinguishable from the facts at issue in this case. Instead, the facts in this case are nearly identical to those in *Toler*. Both Dr. Dahhan and Castle opined that [the miner] did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure. Thus their opinions are in direct contradiction to the [administrative law judge's] finding that [the miner] suffers from pneumoconiosis arising out of his coal mine employment, bringing our requirements in *Toler* into play. Under *Toler*, the [administrative law judge] could only give weight to those opinions if he

> provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most.

Scott, 289 F.3d at 269, 22 BLR at 2-383.

Thus, in *Scott*, the Fourth Circuit held that, before an administrative law judge may credit any opinion regarding causation, the physician must expressly diagnose medical or legal pneumoconiosis or link the miner's respiratory symptoms to dust exposure in coal mine employment.

Dr. Castle opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 27. Dr. Castle further opined that claimant did not suffer from any lung disease related to his coal dust exposure.[13] Employer's Exhibit 4 at 27. Dr. Fino similarly opined that claimant did not suffer from coal workers' pneumoconiosis or any other coal mine dust-related lung disease.[14] Employer's Exhibit 3 at 27. Dr. Iosif also found no evidence of pneumoconiosis.[15] Director's Exhibit 35. Moreover, none of these physicians related any of claimant's symptoms to his coal dust exposure.

The administrative law judge acted within her discretion in determining that the shared belief of Drs. Castle, Fino and Iosif that claimant does not suffer from pneumoconiosis detracted from the credibility of their respective opinions regarding the source of claimant's respiratory impairment. *Scott*, *supra*; *Toler*, *supra*. Consequently, should the administrative law judge, on remand, find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), she may elect to reinstate her finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c).

[13]Dr. Castle diagnosed tobacco smoke-induced pulmonary emphysema. Employer's Exhibit 4 at 27.

[14]Dr. Fino diagnosed cigarette smoking-induced severe pulmonary emphysema. Employer's Exhibit 3 at 28.

[15]Dr. Iosif diagnosed chronic bronchitis and COPD, each of which he attributed to claimant's cigarette smoking. Director's Exhibit 35.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge