BRB No. 05-0953 BLA

BILLY J. STEWART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REGAL COALS DIVISION OF REGAL CORPORATION	)	DATE ISSUED: 06/12/2006
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky), Barbourville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (04-BLA-5206) of Administrative Law Judge Rudolph L. Jansen 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). In a decision dated August 9, 2005, the administrative law judge credited claimant with 23.94 years of coal mine employment[1] and found that the record established the existence of pneumoconiosis arising out of coal mine employment, that claimant is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding the deposition testimony of Dr. Wiot, proffered by employer. Employer argues further that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and in finding that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's evidentiary rulings and of his award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response contending that the administrative law judge properly excluded Dr. Wiot's deposition testimony submitted by employer.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising

---

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] We affirm as unchallenged on appeal the administrative law judge's finding that claimant has 23.94 years of coal mine employment, and his findings at 20 C.F.R. §§718.202(a)(1)-(a)(3) and 718.204(b)(2)(i)-(iv). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer initially contends that the administrative law judge abused his discretion in excluding the deposition testimony of Dr. Wiot as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414.[3] The administrative law judge excluded Dr. Wiot's testimony because employer had already submitted its limit of two medical reports in support of its affirmative case. Decision and Order at 4.

The administrative law judge properly excluded Dr. Wiot's deposition testimony. The revised regulation governing witness testimony provides that "[n]o person shall be permitted to testify as a witness at the hearing, or pursuant to deposition . . . unless that person meets the requirements of § 725.414(c)." 20 C.F.R. §725.457(c). Revised Section 725.414(c) provides that "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." 20 C.F.R. §725.414(c). Dr. Wiot did not prepare a medical report; he read claimant's June 1, 2002 chest x-ray.[4] However, Dr. Wiot's deposition testimony could still be admitted "in lieu of" a medical report if employer "submitted fewer than two medical reports as part of [its] affirmative case . . . ." *Id*. In that case, Dr. Wiot's testimony would "be considered a medical report for purposes of the limitations provided by this section."[5] *Id*. Employer, however, had already submitted its limit of two affirmative case medical reports by Dr. Dahhan. 20 C.F.R. §725.414(a)(3)(i); Employer's Exhibits 1-4. Accordingly, the administrative law judge properly excluded Dr. Wiot's deposition testimony pursuant to Section 725.414(c).[6]

---

[3] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on April 8, 2002, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

[4] A "medical report" is "a physician's written assessment of the miner's respiratory or pulmonary condition." 20 C.F.R. §725.414(a). By contrast, "[a] physician's written assessment of a single objective test, such as a chest X-ray . . . shall not be considered a medical report for purposes of this section." *Id*.

[5] While medical evidence exceeding the evidentiary limitations may also be admitted for good cause, 20 C.F.R. §725.456(b)(1), on appeal, employer does not specifically contend that good cause existed for the admission of Dr. Wiot's deposition testimony in excess of the limitations.

[6] In addition, we note that, as the Director asserts, if the administrative law judge had erred in excluding the deposition testimony of Dr. Wiot, any error would be

On the merits of entitlement, employer contends that in evaluating the medical opinion evidence at Sections 718.202(a)(4) and 718.204(c), the administrative law judge impermissibly discredited Dr. Dahhan's opinion, that claimant does not have coal workers' pneumoconiosis and that his disabling chronic obstructive pulmonary disease (COPD) is not due to coal dust exposure, by substituting his own opinion for that of the medical expert.[7] Employer's Brief at 16. We disagree.

---

harmless. Director's Brief at 2. Dr. Wiot, a dually qualified Board-certified radiologist and B reader, re-read claimant's June 1, 2002 film as negative for the existence of pneumoconiosis. Director's Exhibit 24. The administrative law judge credited Dr. Wiot's negative reading, based on the physician's superior credentials, and thus found both the June 1, 2002 x-ray and the weight of the x-ray evidence to be negative for the existence of pneumoconiosis. Decision and Order at 8, 12. As Dr. Wiot's deposition testimony simply reiterates his negative x-ray reading, elaborates on his qualifications and further explains why he concluded that the June 1, 2002 x-ray was negative, his testimony would not affect the administrative law judge's finding that the x-ray evidence of record is sufficient to establish pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-276 (1984).

[7] Dr. Dahhan examined claimant in 2003 and 2005. In his report dated February 14, 2003, he opined that there was insufficient evidence to diagnose coal workers' pneumoconiosis, based on claimant's normal examination, blood gas studies and negative x-ray, and the fact that his pulmonary function study showed significant response to bronchodilators, indicating that his obstructive ventilatory defect was due to smoking and not coal dust exposure. Employer's Exhibit 1. In his subsequent deposition, Dr. Dahhan testified that this "significant" response to bronchodilators was not typical of pneumoconiosis. Employer's Exhibit 2 at 10. He further stated that improvement of ten percent was usually considered the cut off for significant improvement, and that while claimant's FEV1 only rose eight percent following bronchodilator treatment, because his FVC rose ten percent, this result still met the criteria for significant improvement. Employer's Exhibit 2 at 14-15. In his second report dated January 5, 2005, Dr. Dahhan's opinions were largely unchanged, and he again opined that claimant's response to bronchodilators indicated that his COPD was not "fixed," and, therefore, not coal dust related. Employer's Exhibit 3. In the accompanying deposition, Dr. Dahhan acknowledged that claimant's 2005 pulmonary function study results indicated only a two to three percent post-bronchodilator improvement, which was "not an impressive response," and further acknowledged that "you liked to see 10% or better." Dr. Dahhan explained, however, that while not a large response, it was still some, and claimant's partial response, combined with the fact that his physician had prescribed bronchodilator therapy, indicated that his physician also believed his condition was not "fixed." Dr. Dahhan further stated that the fact that claimant was already on bronchodilator therapy

In evaluating Dr. Dahhan's opinion, that claimant does not suffer from any coal dust related condition, the administrative law judge accorded the physician less weight because he based his opinion largely on the fact that claimant had responded to bronchodilators during pulmonary function testing, but had acknowledged that claimant's most recent testing showed only two to three percent improvement, and that he would like to see at least a ten percent post-bronchodilator improvement to indicate a significant improvement and, thus, a non-fixed pattern. Decision and Order at 11, 14. In addition, the administrative law judge permissibly found that Dr. Dahhan's partial reliance on the fact that claimant had been treated with bronchodilator therapy, and that bronchodilator therapy might have muted his test results, was misplaced, as it was directly contradicted by claimant's testimony that the bronchodilators had not helped his breathing and that he had stopped using them in 2002, several years prior to Dr. Dahhan's 2005 testing.[8] Decision and Order at 14. Contrary to employer's argument, the administrative law judge did not substitute his opinion for that of a medical expert, but relied on Dr. Dahhan's own statements, and claimant's testimony, to find Dr. Dahhan's opinion "flawed in its reasoning." Decision and Order at 14-15. As the administrative law judge permissibly found Dr. Dahhan's reasoning "flawed" in light of studies conducted and objective indications upon which his medical conclusion is based, *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983), we affirm the administrative law judge's determination to accord less weight to the opinion of Dr. Dahhan at Section 718.202(a)(4). Consequently, we also affirm the administrative law judge's accordance of little weight to the opinion of Dr. Dahhan as to causation at Section 718.204(c) on the grounds that Dr. Dahhan did not diagnose pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidation Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Employer also contends that the administrative law judge erred in finding Dr. Baker's physical examination report to be a reasoned medical opinion at Sections 718.202(a)(4) and 718.204(b). Employer specifically asserts that Dr. Baker's diagnosis of pneumoconiosis is based solely on a positive x-ray and coal dust exposure, and his disability causation opinion is conclusory and lacks supporting rationale. Employer's Brief at 11, 14-15. We disagree.

---

could possibly have muted the benefit of the bronchodilators given during pulmonary function testing. Employer's Exhibit 4 at 11, 17-18.

[8] The record contains no evidence that claimant resumed taking bronchodilators after stopping their use in 2002.

Contrary to employer's contention, the administrative law judge properly found that, in addition to diagnosing clinical pneumoconiosis based on a positive x-ray and coal dust exposure, Dr. Baker also diagnosed legal pneumoconiosis in the form of COPD and bronchitis due to a combination of smoking and coal dust exposure, based on pulmonary function studies and history, respectively. Director's Exhibit 8; Decision and Order at 10, 14. Furthermore, whether a physician's report is sufficiently documented and reasoned is a credibility determination for the administrative law judge, as trier of fact, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). We, therefore, affirm the administrative law judge's finding, as within his discretion, that Dr. Baker's opinion was entitled to significant probative value on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In addition, as Dr. Baker opined that legal pneumoconiosis contributed equally to claimant's disability, we also affirm the administrative law judge's crediting of Dr. Baker's disability causation opinion as within his discretion. 20 C.F.R. §718.204(c); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Anderson*, 12 BLR at 1-113; *Worley*, 12 BLR at 1-23; Decision and Order at 14.

Employer finally contends that, pursuant to Sections 718.202(a)(4) and 718.204(c), the administrative law judge erred in according significant weight to Dr. Vora's opinion, that claimant is totally disabled due in part to coal dust related pneumoconiosis and COPD, based on his status as claimant's treating physician. Employer's Brief at 11-12, 14-15, 17-18. Specifically, employer contends that the administrative law judge erred in his consideration of the requirements for evaluating a treating physician's opinion, as set forth at Section 718.104(d)(5), and further failed to consider that Dr. Vora's opinion was based in part on an x-ray which is not contained in the record. Employer's Brief at 11-12, 14-15.

We initially note that employer is correct that the administrative law judge credited Dr. Vora's opinion without considering that he relied in part on an x-ray reading that is not contained in the record. Section 725.414 provides that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In his letter dated April 23, 2003, submitted as one of claimant's two affirmative case medical reports, Dr. Vora referenced an x-ray dated October 18, 2002. Dr. Vora does not clearly state what the x-ray revealed, stating only that "Mr. Stewart has Chronic Obstructive Pulmonary Disease. His chest x-ray of 10-18-02 is enclosed." Director's Exhibit 22. As employer correctly asserts, this x-ray is not contained in the record. Therefore, the administrative law judge was required to determine first whether

the x-ray referred to by Dr. Vora constituted inadmissible evidence pursuant to Section 725.414, and, if so, to consider whether to redact the objectionable content, ask Dr. Vora to submit a new report, factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled, or, as a last resort, exclude Dr. Vora's report from the record. *See Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery and Hall, J.J., concurring and dissenting). Accordingly, we hold that the administrative law judge erred in crediting Dr. Vora's opinion on the issues of the existence of pneumoconiosis at Section 718.202(a)(4), and disability causation at Section 718.204(c). We note, however, that this error was harmless in light of our prior holdings that the administrative law judge properly accorded significant probative value to the opinion of Dr. Baker, that claimant is totally disabled due in part to COPD arising out of coal dust exposure, and permissibly accorded little weight to the opinion of Dr. Dahhan, the only contrary medical opinion of record. *See Larioni v. Director, OWCP*, 6 BLR 1-276 (1984). Therefore, the administrative law judge's determination, that claimant has established that he is totally disabled due to pneumoconiosis, continues to be supported by substantial evidence in the record, and is hereby affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir, 1996); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge