BRB No. 08-0650 BLA

K.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 06/29/2009
CALVERT & YOUNGBLOOD COAL COMPANY	)	
	)	
and	)	
	)	
CAPITAL FIRE & MARINE INSURANCE CORPORATION	)	
	)	
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 on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-6437) of Administrative Law Judge Janice K. Bullard rendered 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). This claim was filed on August 19, 2002, Director's Exhibit 2, and is before the Board for the second time. In the initial decision, the administrative law judge credited claimant with sixteen years of coal mine employment,[1] and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). The administrative law judge also found that the evidence established total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

Upon employer's appeal, the Board vacated the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4), 718.204(b)(2), (c). [*K.E.M.*] *v. Calvert & Youngblood Coal Co.*, BRB No. 06-0809 BLA (May 24, 2007)(unpub.). The Board vacated the administrative law judge's finding pursuant to Section 718.202(a)(1) because the administrative law judge erred in her weighing of the x-ray evidence by mischaracterizing Dr. Ballard's radiological qualifications, and by failing to consider Dr. Wiot's additional qualification as a professor of radiology. Pursuant to Section 718.202(a)(4), the Board vacated the administrative law judge's weighing of the opinions of Drs. Dey, Hawkins, Bailey, and Goldstein, and remanded the case to the administrative law judge for a reweighing of these opinions. The Board further vacated the administrative law judge's weighing of the opinions of Drs. Hawkins and Bailey at 20 C.F.R. §718.204(b)(2)(iv), and remanded the case to the administrative law judge to consider whether these opinions are reasoned and documented. If the administrative law judge found that the opinions of Drs. Hawkins and Bailey established a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), the administrative law judge was instructed to weigh together all contrary probative evidence pursuant to Section 718.204(b)(2). Lastly, the Board vacated the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), in light of its decision to vacate the administrative law judge's finding pursuant to Section 718.204(b)(2), and instructed the administrative law judge to reconsider the disability causation issue on remand, if reached.

On remand, the administrative law judge found that the preponderance of the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), taking into account Dr. Ballard's qualifications as a B reader only and Dr. Wiot's additional qualification as a professor of radiology. Additionally, the administrative law

[1] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 7 at 21, 43; Director's Exhibit 13. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

judge reweighed the opinions of Drs. Dey, Hawkins, Bailey, and Goldstein, and credited the opinions of Drs. Dey and Hawkins over those of Drs. Bailey and Goldstein to find that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and she found that employer did not rebut the presumption. Upon reconsideration of the opinions of Drs. Hawkins and Bailey, the administrative law judge found that they established that claimant has a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). The administrative law judge further found that total disability was established pursuant to Section 718.204(b)(2), weighing together all contrary probative evidence. The administrative law judge found that Dr. Hawkins' opinion established that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c).

On appeal, employer contends that the administrative law judge erred in her weighing of the evidence pursuant to Sections 718.202(a)(1), (4), 718.204(b)(2)(iv), (c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs has not filed a response brief. Employer filed a reply brief, reiterating its contentions.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of 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 first contends that the administrative law judge erred in her weighing of the x-ray evidence pursuant to Section 718.202(a)(1) by relying on the preponderance of the x-ray evidence and by rejecting the uncontradicted negative x-ray reading by Dr. Bailey. We disagree. The administrative law judge considered seven readings of three x-rays and considered the readers' radiological qualifications. The October 15, 2002 x-ray was interpreted as positive for pneumoconiosis by Dr. Ballard, a B reader, and by Dr. Ahmed, a Board-certified radiologist and B reader. Director's Exhibits 18, 20. However, Dr. Wiot, a Board-certified radiologist and B reader, additionally qualified as a professor

of radiology, interpreted the same x-ray as negative for pneumoconiosis.[2] Director's Exhibit 19. Evaluating this x-ray, the administrative law judge rationally gave more weight to the positive interpretation rendered by the dually-qualified Dr. Ahmed, as his interpretation was supported by the positive reading of a B reader, Dr. Ballard. The administrative law judge considered that Dr. Wiot is dually-qualified and is a professor of radiology, as instructed by the Board, but acted within her discretion in finding that Dr. Wiot's impressive qualifications did not merit giving his negative reading additional weight when compared with the two positive readings by the other qualified physicians. We affirm the administrative law judge's finding that the October 15, 2002 x-ray was positive for pneumoconiosis, as the administrative law judge based her finding on a proper qualitative analysis of the conflicting readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59-60, 19 BLR 2-271, 2-280-81 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-86 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); Decision and Order on Remand at 6; Director's Exhibits 18-20.

The October 14, 2004 x-ray was read as negative for pneumoconiosis by Dr. Bailey, whose radiological qualifications are not of record. Employer's Exhibit 1. Since there was no positive reading of this x-ray, the administrative law judge rationally found that the October 14, 2004 x-ray does not support a finding of pneumoconiosis. The February 24, 2005 x-ray was read as positive for pneumoconiosis by Dr. Miller, a Board-certified radiologist and B reader, but as negative for pneumoconiosis by Dr. Goldstein, a B reader. Claimant's Exhibit 1; Employer's Exhibit 4. Based on Dr. Miller's credentials as a dually-qualified reader, the administrative law judge reasonably found that Dr. Miller's positive reading outweighed Dr. Goldstein's negative reading, to find that the February 24, 2005 x-ray was positive for pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order on Remand at 6; Claimant's Exhibit 1; Employer's Exhibit 4. Considering all of the x-ray evidence, the administrative law judge found that the preponderance of the x-ray readings established the existence of pneumoconiosis, since there were two positive x-rays, based on the readings of Board-certified radiologists and B readers, and one negative x-ray by a physician who is neither a Board-certified radiologist nor a B reader. We affirm the administrative law judge's Section 718.202(a)(1) finding as it was based on a proper qualitative analysis of the x-ray evidence. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Chaffin*, 22 BLR at 1-300; Decision and Order on Remand at 7; Director's Exhibits 18-20; Claimant's Exhibit 1; Employer's Exhibits 1, 4. Consequently, we reject employer's contentions pursuant to Section 718.202(a)(1). Because we have affirmed the administrative law judge's finding that

[2] Dr. Goldstein, a B reader, reviewed the October 15, 2002 x-ray for its film quality only. Director's Exhibit 18.

claimant established the existence of clinical pneumoconiosis by x-ray evidence pursuant to Section 718.202(a)(1), in view of the alternative methods of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we need not address employer's challenge to the administrative law judge's finding pursuant to Section 718.202(a)(4).[3] *See United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 991, 23 BLR 2-213, 2-237 (11th Cir. 2004); *Dixon v. North Camp Coal Co.*, 8 BLR 1-1-344, 1-345 (1985).

Employer also contends that the administrative law judge erred in finding that the opinions of Drs. Hawkins and Bailey establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv).[4] We disagree. With regard to total disability, Dr. Hawkins opined that claimant has a "mild impairment" and "can't perform manual labor." Director's Exhibit 18 at 4. Dr. Bailey opined that claimant's mixed obstructive and restrictive impairment prevents him from doing some heavy work that he could perform before. Employer's Exhibit 2 at 24-25. On remand, the administrative law judge found that the opinions of Drs. Hawkins and Bailey were well-documented and reasoned, and established that claimant has a totally disabling respiratory impairment. Decision and Order on Remand at 13-14. The administrative law judge found that claimant's description of his usual coal mine employment duties established that he performed "manual labor" or "heavy work"[5] and thus, she found that the opinions of Drs.

[3] We affirm the administrative law judge's findings that claimant is entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut the presumption, as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 12.

[4] In its previous decision, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) as unchallenged on appeal. [*K.E.M.*] *v. Calvert & Youngblood Coal Co.*, BRB No. 06-0809 BLA (May 24, 2007)(unpub.), slip op. at 6 n.5. The administrative law judge found that the pulmonary function studies supported a finding of total disability, that the blood gas studies did not support total disability, and that there was no evidence of cor pulmonale with right-sided congestive heart failure. Additionally, the Board affirmed, as unchallenged, the administrative law judge's finding that Dr. Goldstein's opinion that claimant is not totally disabled merited diminished weight, because he relied on a qualifying, post-bronchodilator pulmonary function study and because he characterized claimant's job duties as less demanding than they actually were. [*K.E.M.*], slip op. at 7 n.6; Claimant's Exhibit 2.

[5] At the hearing, claimant testified that the duties of his usual coal mine employment as a shovel operator required him to grease gears, carry a five-gallon bucket

Hawkins and Bailey, that claimant was unable to perform "manual labor" or "heavy work," respectively, established total respiratory disability. *See* Decision and Order on Remand at 13-14; Hearing Transcript at 25-28; Director's Exhibit 18; Employer's Exhibits 1-3. Moreover, the administrative law judge relied on the opinions of Drs. Hawkins and Bailey to support a finding of total respiratory disability because they were supported by the qualifying[6] pulmonary function studies the doctors performed. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1983); Decision and Order on Remand at 13; Director's Exhibit 18; Employer's Exhibits 1-3. As the administrative law judge permissibly credited the opinions of Drs. Hawkins and Bailey as well-documented and well-reasoned, and their opinions support the administrative law judge's finding of total respiratory disability, we affirm the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(b)(2)(iv).

Employer next contends that the administrative law judge provided no rationale for finding that all the evidence, both like and unlike, establishes total disability. We disagree. The administrative law judge relied on both the pulmonary function study evidence, which she found "weighs heavily in [c]laimant's favor," and the well-documented and well-reasoned medical opinion evidence, to find that claimant established total disability, weighing all the evidence together. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order on Remand at 14; Director's Exhibit 18; Employer's Exhibits 1-3. Consequently, we affirm the administrative law judge's finding of total respiratory disability pursuant to Section 718.204(b)(2).

Employer lastly contends that the administrative law judge erred in crediting Dr. Hawkins's opinion over those of Drs. Bailey and Goldstein to find that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). A miner is totally disabled due to pneumoconiosis if pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(1). Dr. Bailey opined that claimant is not totally disabled due to his coal dust exposure "at all," but explained further that claimant's coal dust exposure made an "insignificant contribution" to his breathing impairment. Employer's Exhibit 2 at 29-30. Dr. Bailey found no evidence of pneumoconiosis by x-ray, and concluded that claimant does not have medical coal workers' pneumoconiosis. Employer's Exhibit 2 at 28, 30. Dr.

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of grease, walk up steep angles, tighten bolts, and carry heavy tools, including a jackhammer and iron wrench, which weighed about ninety to one hundred pounds. Hearing Transcript at 25-28.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Goldstein stated that claimant's restrictive defect is not due to coal dust exposure because claimant does not have severe simple or complicated pneumoconiosis, but rather, his x-ray is normal. Employer's Exhibit 4 at 4; Employer's Exhibit 5 at 16-17. Dr. Goldstein opined that claimant does not have clinical or legal pneumoconiosis. Employer's Exhibit 5 at 18. Dr. Hawkins opined that claimant's chronic bronchitis due to smoking, prior dusts, and atopic-reactive airways disease, contributes seventy percent to claimant's pulmonary impairment, while claimant's clinical pneumoconiosis contributes thirty percent to his pulmonary impairment. Director's Exhibit 18 at 4.

On remand, the administrative law judge permissibly relied on Dr. Hawkins's opinion that claimant is totally disabled due, in part, to clinical pneumoconiosis, because Dr. Hawkins diagnosed clinical pneumoconiosis, consistent with the administrative law judge's finding, and she found that Dr. Hawkins's opinion was well-documented and supported by the record. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006): *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields*, 10 BLR at 1-21; Decision and Order at 17; Director's Exhibit 18; Employer's Exhibits 1-5. Similarly, the administrative law judge permissibly discounted the opinions of Drs. Bailey and Goldstein, that claimant is not totally disabled due to pneumoconiosis, because the latter physicians did not diagnose clinical pneumoconiosis. *Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). As Dr. Hawkins's opinion is sufficient to establish disability causation, we affirm the administrative law judge's finding that claimant is totally disabled due to clinical pneumoconiosis pursuant to Section 718.204(c). *See Jones*, 296 F.3d at 993, 23 BLR at 2-240-41, *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1265, 13 BLR 2-277, 2-283 (11th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

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