BRB No. 08-0652 BLA

J.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/29/2009
	)	
PANTHER BRANCH/LONG BRANCH ENERGY and BIG RIVER MINERALS CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Anthony J. Cicconi (Shaffer & Shaffer, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (06-BLA-6070) of Administrative Law Judge Edward Terhune Miller 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).[1] In his decision, the administrative law judge

[1] Claimant filed a claim on April 8, 1997, which was denied on July 16, 1997, because claimant did not establish any element of entitlement. Claimant requested a hearing on August 15, 1997, and an informal conference was conducted on October 31,

credited claimant with over twenty-five years of coal mine employment,[2] 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), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c).[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis pursuant Section 718.204(c) were established. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief.

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 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).

1997, but no further action was taken on claimant's hearing request. Director's Exhibit 1. Claimant filed another claim on September 12, 2005. Director's Exhibit 3. The administrative law judge found that, because claimant's 1997 claim was still pending, claimant's 2005 claim merged with his 1997 claim. On appeal, no party challenges this aspect of the administrative law judge's decision.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The administrative law judge accepted the parties' stipulations that if pneumoconiosis were found, the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

Pursuant to Section 718.202(a)(1), employer argues that the administrative law judge erred in weighing the x-ray evidence quantitatively without consideration of the readers' radiological qualifications. The administrative law judge considered ten readings of five x-rays and considered the readers' radiological qualifications. The September 27, 1991 and October 6, 1997 x-rays were read as positive for pneumoconiosis by two B readers, Drs. Ranavaya and DeRamos, respectively, and the June 4, 1997 x-ray was read as negative for pneumoconiosis by Dr. Cole, a Board-certified radiologist and B reader, and by Dr. Daniel, a Board-certified radiologist. The November 29, 2005 x-ray was read as positive for pneumoconiosis by Dr. Alexander, a Board-certified radiologist and B reader, and by Dr. Rasmussen, a B reader, but negative for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B reader.[4] Director's Exhibits 12, 13; Claimant's Exhibits 4, 7. Finally, the February 15, 2006 x-ray was read as negative for pneumoconiosis by Dr. Zaldivar, a B reader, but positive for pneumoconiosis by Dr. Alexander, who is dually-qualified. Director's Exhibit 14; Claimant's Exhibits 4, 7.

In reviewing the x-rays, the administrative law judge found that, because there were no conflicting readings of the three earlier x-rays, the September 27, 1991 x-ray was positive for pneumoconiosis, the June 4, 1997 x-ray was negative, and the October 6, 1997 x-ray was positive. In considering the conflicting readings of the November 29, 2005 x-ray, the administrative law judge found that Dr. Wiot's academic credentials and "world renown" did not necessarily render Dr. Wiot more qualified to read the x-rays. Decision and Order at 13 n.7. The administrative law judge found that Dr. Alexander's credentials as a Board-certified radiologist and B reader were sufficient to accord his reading significant weight. *Id*. Moreover, the administrative law judge found that Dr. Alexander's reading was supported by that of Dr. Rasmussen, a B reader, and therefore, he found the November 29, 2005 x-ray to be positive for pneumoconiosis. With respect to the February 15, 2006 x-ray, the administrative law judge accorded greater weight to Dr. Alexander's positive interpretation based on his qualifications as both a Board-certified radiologist and B reader, to find that this x-ray was positive for pneumoconiosis. Decision and Order at 13; Director's Exhibit 14; Claimant's Exhibits 4, 7.

Evaluating all of the x-ray evidence, the administrative law judge found that it established the existence of pneumoconiosis since four of the five x-rays, including the most recent, were interpreted as positive for pneumoconiosis. Contrary to employer's contention, the administrative law judge's finding was based on a qualitative analysis of the x-ray evidence, and is supported by substantial evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave*

[4] Dr. Gaziano, a B reader, interpreted this x-ray for its film quality only. Director's Exhibit 12.

Coal Co., 22 BLR 1-294, 1-302 (2003). Consequently, we reject employer's contention that the administrative law judge erred by resolving the x-rays quantitatively without accounting for the radiological qualifications of the readers, and we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).[5]

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge failed to consider the opinions of Drs. Fino and Zaldivar in their entirety before crediting Dr. Rasmussen's opinion over their opinions. Dr. Rasmussen diagnosed claimant with both clinical pneumoconiosis, based on a positive x-ray and a history of twenty-six years of coal mine employment, and legal pneumoconiosis,[6] in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 12. Drs. Fino and Zaldivar opined that claimant has neither clinical nor legal pneumoconiosis. Director's Exhibit 14; Employer's Exhibits 3, 5.

The administrative law judge considered that Dr. Rasmussen diagnosed both clinical coal workers' pneumoconiosis and legal pneumoconiosis, namely, COPD due to coal dust exposure. Decision and Order at 14. The administrative law judge found that Dr. Rasmussen's opinion established the existence of pneumoconiosis because it was well-reasoned and persuasive in that it was consistent with the positive x-ray evidence, with Dr. Mullins' treatment records,[7] and with other hospital and treatment records in

[5] Even if the administrative law judge erred in utilizing Dr. Rasmussen's reading to break the tie between the readings of the two dually-qualified physicians of the November 29, 2005 x-ray, he permissibly determined that three out of the four other x-rays were positive, including the most recent x-ray. Consequently, substantial evidence supports the administrative law judge's determination that the x-ray evidence supports a finding of pneumoconiosis.

[6] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[7] The administrative law judge found that Dr. Mullins' treatment records establish a diagnosis of pneumoconiosis because they are based on extensive notes and numerous objective tests and studies, despite her opinion letters diagnosing claimant only with a pulmonary disease "consistent with" pneumoconiosis. Decision and Order at 14. Dr. Mullins diagnosed claimant with pneumoconiosis, coal workers' pneumoconiosis (CWP), or black lung in her treatment notes dating from May 6, 1997 through April 10, 2007. Employer's Exhibit 4; Claimant's Exhibit 1. On March 31, 2007, Dr. Mullins stated that

evidence.[8] We affirm the administrative law judge's reliance on Dr. Rasmussen's opinion to establish the existence of clinical pneumoconiosis. The administrative law judge found that it was well-reasoned and persuasive, and this finding is rational and supported by substantial evidence as Dr. Rasmussen's diagnosis of clinical pneumoconiosis is based on a positive x-ray, consistent with the administrative law judge's weighing of the x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000). The administrative law judge rejected the opinions of Drs. Zaldivar and Fino, that claimant does not have clinical pneumoconiosis, because they were based on negative x-rays, contrary to the weight of the x-ray evidence. Decision and Order at 14. This is a permissible weighing of the opinions of Drs. Zaldivar and Fino with regard to their opinion that claimant does not have clinical pneumoconiosis, and thus this finding is also affirmed. *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175. Consequently, we affirm the administrative law judge's finding that claimant has clinical pneumoconiosis.

With respect to the existence of legal pneumoconiosis, employer argues that the administrative law judge failed to explain his reasons for relying on Dr. Rasmussen's opinion. We agree. The administrative law judge did not explain his determination that Dr. Rasmussen's opinion diagnosing legal pneumoconiosis is well-reasoned and persuasive. Decision and Order at 14. We therefore vacate the administrative law judge's finding that Dr. Rasmussen's opinion established legal pneumoconiosis, and remand this case to the administrative law judge to explain his finding that Dr. Rasmussen's opinion is well-reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(*en banc*).

Moreover, employer argues that the administrative law judge selectively analyzed the evidence in finding that the opinions of Drs. Zaldivar and Fino were not well-reasoned. Employer's contention has merit. The administrative law judge found that the opinions of Drs. Zaldivar and Fino, that claimant does not have legal pneumoconiosis,

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she had followed claimant from May 6, 1997, that he has significant respiratory problems, that he came to her with diagnoses of chronic obstructive pulmonary disease (COPD) and CWP, and that he has changes and symptoms consistent with CWP. Claimant's Exhibit 5. Dr. Mullins rendered a similar opinion letter on October 15, 1997. Director's Exhibit 1.

[8] The record contains the treatment records of Dr. Thomas from February 15, 2005 through April 30, 2007. Decision and Order at 11; Employer's Exhibit 2. Dr. Thomas diagnosed claimant with COPD and pneumoconiosis. *Id.*

were not well-reasoned since the doctors referred to negative x-rays to support their opinions. Decision and Order at 14. However, the record reflects that both Drs. Zaldivar and Fino relied on other factors, in addition to the negative x-rays, to support their opinions that claimant does not have legal pneumoconiosis. Dr. Zaldivar based his opinion not only on a negative x-ray, but also on claimant's lifelong history of smoking, claimant's use of bronchodilators which, the doctor explained, are not used in treating coal workers' pneumoconiosis, and claimant's symptoms of wheezes and bronchospasm, not found in pneumoconiosis. Employer's Exhibit 5 at 10-11, 19-20, 25. Additionally, Dr. Zaldivar explained that claimant's obstruction has progressed due to smoking and not coal dust exposure, since claimant continues to smoke but ceased coal mine employment in 1997, and because there is a bronchospastic component to the obstruction. Employer's Exhibit 5 at 12.

Similarly, Dr. Fino's opinion that claimant does not have legal pneumoconiosis was based on a negative x-ray, in addition to the reversibility seen on claimant's pulmonary function studies, demonstrating possible asthma unrelated to coal dust, and the fact that claimant has no clinically significant loss in FEV1. Employer's Exhibit 3 at 8, 14. Therefore, we remand this case to the administrative law judge to reconsider whether the opinions of Drs. Zaldivar and Fino are reasoned and documented with regard to the issue of legal pneumoconiosis, taking into account the entirety of their opinions, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses, in conjunction with the other evidence of record.[9] *Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Hughes*, 21 BLR at 1-139-40. Before finding the existence of pneumoconiosis established on remand, the administrative law judge must weigh together all of the relevant evidence. *See Compton,* 211 F.3d at 211, 22 BLR at 2-174.

Pursuant to Section 718.204(c), the administrative law judge rejected the opinions of Drs. Zaldivar and Fino because they did not diagnose clinical or legal

[9] Dr. McDaniel rendered a report on June 4, 1997, stating that claimant does not have clinical or legal pneumoconiosis. Director's Exhibit 1. The administrative law judge rejected this report because it was based on a negative x-ray, contrary to the weight of the x-ray evidence, and because the doctor provided no reasoning to support his opinion that claimant's COPD was due solely to smoking. Decision and Order at 14. We affirm the administrative law judge's treatment of Dr. McDaniel's opinion pursuant to Section 718.202(a)(4) because it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis.[10] Decision and Order at 16. The administrative law judge relied on Dr. Rasmussen's opinion to establish disability causation, finding that Dr. Rasmussen's opinion was persuasive and thus establishes that claimant's total disability is due to "coal workers' pneumoconiosis." *Id.* It is unclear from the administrative law judge's disability causation finding whether he found claimant to be totally disabled due to clinical pneumoconiosis, legal pneumoconiosis, or both.

Because we have vacated the administrative law judge's finding of legal pneumoconiosis pursuant to Section 718.202(a), we also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instruct him to reconsider this issue on remand, if reached. On remand, the administrative law judge must determine whether claimant is totally disabled due to clinical pneumoconiosis, legal pneumoconiosis, or both, after assessing whether each medical opinion is adequately reasoned and documented, and he must explain his findings.[11] *Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Hughes*, 21 BLR at 1-139-40.

[10] The administrative law judge found that the opinion of Dr. Mullins, providing no opinion as to total disability or disability causation, and that the opinion of Dr. McDaniel attributing claimant's mild impairment solely to COPD from smoking, are not probative pursuant to Section 718.204(c). These findings are affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[11] If the administrative law judge finds that legal pneumoconiosis is established on remand, he has the discretion to discount the opinions of Drs. Zaldivar and Fino at disability causation because they do not diagnose clinical or legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 267, 269, 22 BLR 2-372, 2-379-80, 2-384 (4th Cir. 2002); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008).

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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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JUDITH S. BOGGS
Administrative Appeals Judge