BRB No. 98-1213 BLA

JERRY E. LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED:
	)	
	)	
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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane), Charleston, West Virginia, for claimant.

Lawrence C. Renbaum and Gregory S. Feder (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1625) of Administrative Law Judge Gerald M. Tierney awarding benefits, the Supplemental Decision and Order Granting Attorney Fees and Order Denying Employer's Motion for Reconsideration of Fee Award 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). The administrative law judge found thirty-seven years of coal mine employment established, as stipulated by the

parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4), and pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found total disability established pursuant to 20 C.F.R. §718.204(c) and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. Subsequently, the administrative law judge issued a Supplemental Decision and Order Granting Attorney Fees to claimant's counsel for services performed before the administrative law judge and an Order Denying Employer's Motion for Reconsideration of Fee Award.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and (4) and total disability due to pneumoconiosis established pursuant to Section 718.204(b). Alternatively, employer also contends on appeal that the administrative law judge erred in failing to reduce the hourly rate requested by claimant's counsel in granting attorney fees to claimant's counsel. Claimant responds, urging the Board to affirm the administrative law judge's award of benefits and granting of attorney fees to claimant's counsel. Employer has filed reply briefs, reiterating its contentions. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to employer's appeals.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

[1] Claimant filed a claim on January 25, 1996, Director's Exhibit 1.

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).[2] Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204(b), in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment, *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the relevant x-ray evidence which consisted of eighteen readings of the three x-rays of record dating from March, May and July, 1996. The administrative law judge gave greater weight to the readings of those physicians who were both board-certified radiologists and B-readers,[3] due to their superior qualifications, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent, supra*. Decision and Order at 7-8. Thus, the administrative law judge found that the March, 1996, x-ray was negative, as it was read exclusively as negative by physicians who were both board-certified radiologists and B-readers, *see* Director's Exhibit 11; Employer's Exhibit 3, and found the May, 1996, x-ray was positive, as it was read exclusively as positive by physicians who were both board-certified radiologists and B-readers, *see* Claimant's Exhibit 2. Finally, contrary to employer's contention that the administrative law judge found that the August, 1996, x-ray was positive based merely on "counting heads," the administrative law judge permissibly found the August, 1996, x-ray was positive based on the weight, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), of the positive readings from physicians who were both board-certified radiologists and B-readers, *see* Claimant's Exhibit 2;

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[2] The presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim, filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1; *see also* 20 C.F.R. §718.202(a)(3).

[3] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Employer's Exhibit 3, due to their superior qualifications, *see Clark, supra*; *Trent, supra*. Consequently, giving more weight to the two most recent positive x-rays, the administrative law judge found the existence of pneumoconiosis established by a preponderance of the x-ray evidence pursuant to subsection (a)(1).

Employer's contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) based merely on the most recent x-ray evidence. Contrary to employer's contention, inasmuch as the administrative law judge found the existence of pneumoconiosis established by a preponderance of the most recent x-ray evidence which the administrative law judge found was positive, the administrative law judge's finding is in accord with the holding of the Fourth Circuit Court in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992)(inasmuch as pneumoconiosis is a progressive disease, it is rational to credit more recent evidence if it shows that the miner's condition has progressed or worsened), *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). Moreover, inasmuch as the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, but may only inquire into whether there is substantial evidence in the record considered as a whole to support the findings of the administrative law judge, the administrative law judge has great leeway in evaluating the record evidence, 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1) as supported by substantial evidence.[4]

[4] Inasmuch as the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1) is affirmed, we need not address the administrative law judge's findings and employer contentions under Section 718.202(a)(4), *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). In addition, the administrative law judge's findings that pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(b) and that total disability was established pursuant to Section 718.204(c) are also affirmed as unchallenged on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, the administrative law judge considered the three physicians of record who provided relevant opinions pursuant to Section 718.204(b), including Dr. Rasmussen, a board-certified physician in internal medicine and claimant's treating physician, who examined claimant. Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on a positive x-ray and claimant's coal mine employment history, chronic obstructive pulmonary disease due, in part, to coal mine dust exposure, and found that claimant was totally disabled and that his coal mine dust exposure was at least a significant and major contributing factor in his respiratory disability, Director's Exhibit 9; Claimant's Exhibits 1, 3; Employer's Exhibit 2. Contrary opinions were provided by Drs. Fino and Zaldivar. Dr. Fino, a board-certified physician in internal medicine and pulmonary disease and a B-reader, reviewed the evidence of record and found no evidence of coal workers' pneumoconiosis or occupationally related pulmonary condition, Employer's Exhibit 4. Although Dr. Fino found claimant was totally disabled, he found that, even if it was assumed that claimant had coal workers' pneumoconiosis, claimant's total disability was not caused by coal workers' pneumoconiosis or coal mine dust exposure, but asthma or smoking. Finally, Dr. Zaldivar, a board-certified physician in internal medicine and pulmonary diseases and a B-reader, examined claimant and reviewed the evidence of record and found no coal workers' pneumoconiosis or dust disease of the lungs, but found that claimant was totally disabled due to asthma, not coal workers' pneumoconiosis, coal mine employment or coal dust disease, Employer's Exhibits 1, 5.

The administrative law judge noted that little weight may be given to opinions of the physicians who did not diagnose pneumoconiosis under Section 718.204(b) and gave most weight to Dr. Rasmussen's opinion as claimant's treating physician, Decision and Order at 11. The administrative law judge found, therefore, that total disability due to pneumoconiosis was established pursuant to Section 718.204(b). However, as employer properly notes, the Fourth Circuit Court has held that an administrative law judge should not "mechanistically" credit, "to the exclusion of all other testimony," the testimony of a treating physician solely because the physician treated the claimant, but has a "statutory obligation to consider all of the relevant evidence bearing upon the existence of pneumoconiosis and its contribution to the claimant's disability, *see 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, 21 BLR 2-269 (4th Cir. 1997); *see also Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Thus, the administrative law judge did not adequately explain why Dr. Rasmussen's opinion, as claimant's treating physician, was entitled to more weight under Section 718.204(b) than the contrary opinions of Drs. Fino and Zaldivar.

In addition, although the administrative law judge noted that little weight may be given to opinions of the physicians who did not diagnose pneumoconiosis pursuant to Section 718.204(b), Dr. Fino found that, even if it was assumed that claimant had coal workers'

pneumoconiosis, claimant's total disability was not caused by coal workers' pneumoconiosis or coal mine dust exposure, *see* Employer's Exhibit 4. Consequently, we vacate the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(b) and remand the case for reconsideration. On remand, the administrative law judge must provide a full, detailed opinion which complies with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and which fully explains the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).[5]

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

SO ORDERED.

[5] Finally, employer has also appealed the administrative law judge's Supplemental Decision and Order Granting Attorney Fees and subsequent Order Denying Employer's Motion for Reconsideration of Fee Award. However, inasmuch as we remand the case to the administrative law judge for further consideration on the merits, employer's contentions as to the administrative law judge's award of attorney fees are premature, for an award of attorney fees is not enforceable and payable until there is a successful prosecution of the claim by claimant's counsel, all appeals are exhausted and an award of benefits becomes final, *see* 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993); *Yates v. Harman Mining Corp.*, 12 BLR 1-175 (1989), *reaff'd on recon. en banc*, 13 BLR 1-56 (1989); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge