BRB No. 01-0605 BLA

HAYWARD R. FARMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN CONSTRUCTION COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-BLA-0640) of Administrative Law Judge Thomas F. Phalen, Jr. 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] Claimant filed a claim on April 3, 1997. By

[1]The Department of Labor 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Decision and Order dated February 22, 1999, the administrative law judge, after crediting claimant with at least fifteen years of coal mine employment, found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge further found that the medical opinion evidence corroborated the finding of pneumoconiosis. The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c) (1) and (c)(4) (2000). Weighing all of the evidence together, the administrative law judge found it sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge also found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[2] Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated September 29, 2000, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4) (2000) as unchallenged on appeal. *Farmer v. Mountain Construction Co.*, BRB No. 99-0640 BLA (Sept. 29, 2000) (unpublished). The Board, however, vacated the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* The Board also held that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.* Consequently, the Board instructed the administrative law judge that if, on remand, he found the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000), he must consider whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.* The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) (2000) and 718.204(b) (2000) and remanded the case for further consideration. *Id.*

[2]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).

On remand, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence was sufficient to establish 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 challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and (a)(4) and 718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has 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 contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis. In its September 9, 2000 Decision and Order, the Board stated that:

> The administrative law judge concluded that of the ten x-rays of record, six are positive for the existence of pneumoconiosis and that, even excluding Dr. Myers' interpretation, the preponderance of the x-ray evidence submitted by physicians with superior credentials is positive for the existence of pneumoconiosis. Decision and Order at 11. Contrary to the administrative law judge's findings, however, the record contains five x-rays which were read as positive by physicians with superior credentials and five x-rays which were read as negative by physicians with superior credentials. Director's Exhibits 13, 15, 16, 27, 29, 33-37, 40; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3. In making his findings regarding the x-ray evidence, the administrative law judge mistakenly stated that the April 18, 1997 x-ray was read as negative by Drs. Dahhan, Sargent, Wiot and Spitz. Decision and Order at 10. However, the April 18, 1997 x-ray was only read by Drs. Dahhan and Sargent, while Drs. Wiot and Spitz read an x-ray dated April 21, 1997 as negative for the existence of pneumoconiosis. Director's Exhibits 15, 16; Employer's Exhibits 2, 3. There is no other contradictory interpretation of the April 21, 1997 x-ray in the record. Inasmuch as the administrative law judge did not consider the April 21, 1997 x-ray in making his finding that the preponderance of the x-ray evidence is positive for the existence of pneumoconiosis, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and remand the case to the

> administrative law judge for further findings on this issue. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Farmer v. Mountain Construction Co., BRB No. 99-0640 BLA (Sept. 29, 2000) (unpublished).

> On remand, the administrative law judge stated that:
>
> The only change since my previous finding of pneumoconiosis is that there is one additional x-ray. The number of interpretations have remained the same. Therefore, I find that pneumoconiosis is present based upon the x-ray evidence of record.

Decision and Order on Remand at 4.

Employer argues that the administrative law judge, on remand, failed to adequately review the x-ray evidence. We agree. In evaluating x-ray evidence, an administrative law judge should focus on the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988).

Of the eleven x-rays of record, ten were interpreted by physicians qualified as B readers and/or Board-certified radiologists.[3] Four of these x-rays were uniformly read as positive for pneumoconiosis (February 11, 1994, July 8, 1994, June 16, 1997 and April 16, 1998), while four were uniformly read as negative for pneumoconiosis (April 18, 1997, April 21, 1997, June 9, 1997 and June 24, 1997). The remaining two x-rays, taken on October 2, 1996 and August 25, 1998, were read as both positive and negative for pneumoconiosis by physicians qualified as B readers and/or Board-certified radiologists. In his initial decision, the administrative law judge, after weighing the evidence, found that claimant's October 2, 1996 x-ray was positive for pneumoconiosis and that claimant's August 25, 1998 x-ray was negative for pneumoconiosis. Decision and Order at 11.

Thus, the administrative law judge found that five of the x-rays of record were

[3]Dr. Myers was the only physician to provide an interpretation of claimant's December 3, 1996 x-ray. The administrative law judge acknowledged that this interpretation was not entitled to "great weight" because Dr. Myers was not qualified as either a B reader or a Board-certified radiologist. Decision and Order at 10.

interpreted by the most qualified physicians as negative for pneumoconiosis and five of the x-rays of record were interpreted by the most qualified physicians of record as negative for pneumoconiosis.[4] Despite such a finding, the administrative law judge concluded, without explanation, that the x-ray evidence was sufficient to establish the existence of pneumoconiosis. The administrative law judge's conclusory analysis that the x-ray evidence is sufficient to establish the existence of pneumoconiosis does not comply with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[4]Of the nineteen x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists, seven are positive for pneumoconiosis. Director's Exhibits 15, 16, 27, 29, 33-37, 40; Claimant's Exhibit 1; Employer's Exhibits 2, 3.

Consequently, we vacate 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) and remand the case for further consideration.[5]

[5]Employer also contends that the administrative law judge erred in relying on the physicians' ILO classifications of the x-rays without considering additional diagnoses on the x-ray forms. The Board previously rejected this contention. *Farmer v. Mountain Construction Co.*, BRB No. 99-0640 BLA (Sept. 29, 2000) (unpublished).

Employer also contends that the x-ray interpretations of Drs. Myers and Powell are inconsistent. Employer notes that Dr. Powell interpreted a February 11, 1994 x-ray as having a profusion of 1/1, but interpreted a subsequent June 16, 1997 x-ray as having a profusion of only 1/0. Similarly, employer notes that Dr. Myers interpreted a February 11, 1994 x-ray as having a profusion of 1/1, but interpreted a subsequent December 3, 1996 x-ray as having a profusion of only 1/0. Contrary to employer's contention, these x-ray interpretations are not inconsistent inasmuch as profusions of 1/0 and 1/1 are both considered positive for the existence of pneumoconiosis. *See* 20 C.F.R. §718.102.

Moreover, each x-ray of record should be evaluated independently. In the instant

case, the interpretations of Drs. Myers and Powell are consistent in that they independently interpreted claimant's February 11, 1994 x-ray as having a profusion of 1/1. Director's Exhibit 29.

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. In his initial decision, the administrative law judge found that the opinions of Drs. Myers, Powell and Vuskovich corroborated his finding regarding the x-ray evidence. Decision and Order at 11. The Board, however, noted that the administrative law judge failed to discuss the contrary opinions of Drs. Dahhan and Broudy. *Farmer*, *supra*. Consequently, the Board instructed the administrative law judge that if, on remand, he found the x-ray evidence insufficient to support a finding of pneumoconiosis, he must weigh the relevant medical opinion evidence to determine if it was sufficient to establish the existence of pneumoconiosis. *Id.*

On remand, the administrative law judge found that the opinions of Drs. Broudy and Dahhan were "well documented and reasoned and thus entitled to weight in determining whether or not [c]laimant suffers from pneumoconiosis." Decision and Order on Remand at 4. The administrative law judge, however, further found that:

> Drs. Powell and Myers concluded that Claimant was suffering from pneumoconiosis. Dr. Vuskovich concluded that claimant was suffering from silicosis attributable to coal mine employment. I previously found that the opinions of Drs. Powell, Myers and Vuskovich are well documented and reasoned. I now find that, even considering the opinions of Drs. Dahhan and Broudy, the weight of the medical opinion evidence establishes the existence of pneumoconiosis. Furthermore, I do not believe [c]laimant's twenty-five pack year smoking history requires a different finding.

Decision and Order on Remand at 4.

The administrative law judge's cursory analysis does not comply with the APA. *See Wojtowicz*, *supra*. Consequently, we 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).[6]

Employer next contends that the administrative law judge erred in finding that the

[6]Dr. Powell diagnosed, *inter alia*, category 1 coal workers' pneumoconiosis. Employer's Exhibit 1 at 28; *see also* Director's Exhibit 29. On remand, the administrative law judge is instructed to address whether Dr. Powell's diagnosis of pneumoconiosis was merely a restatement of his x-ray interpretation and, therefore, insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(4). *See generally Anderson v. Valley Camp of Utah,* Inc., 12 BLR 1-111 (1989).

opinions of Drs. Myers and Vuskovich support a finding of total disability. In its Decision and Order dated September 29, 2000, Board affirmed the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) as unchallenged on appeal. *Farmer*, *supra*. The Board's previous holding on this issue constitutes the law of the case and governs its determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990)*; Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address employer's contentions of error in regard to the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability. *See* 20 C.F.R. §718.204(b).

Employer finally argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis. On remand, the administrative law judge, after noting that the disability causation standard had been revised,[7] stated that:

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[7]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

> The cause of a miner's disability must be established by means of a physician's documented and reasoned medical report. §718.204(c)(2). Drs. Vuskovich and Myers causally related [c]laimant's disability to coal dust exposure. Drs. Dahhan, Broudy and Powell related his disability to cigarette smoking. The opinions of Drs. Vuskovich and Myers are substantiated by the extensive medical data, symptomatology and coal mine history. Therefore, I find their opinions are well documented and reasoned and thus entitled to more weight. In addition, I find that [c]laimant's substantial length of coal mine employment corroborates the physicians' determinations that coal dust contributed, at least in part, to his disability, despite [c]laimant's twenty-five year smoking history. Work history is an important diagnostic tool in determining the etiology of a miner's impairment. *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984).
>
> Dr. Dahhan concluded that [c]laimant does not suffer from pneumoconiosis and yet never provided a sound medical basis for *entirely* rejecting coal dust exposure as a contributing factor. I therefore give his opinion less weight. Likewise, I give the opinions of Drs. Broudy and Powell less weight not only because they did not diagnose pneumoconiosis or provide a sound medical basis for entirely rejecting coal dust exposure as a contributing factor, but also because they are both of the opinion that pneumoconiosis is a restrictive [sic] disease, not a restrictive disease. I find such statements contrary to the Act and the regulations, which now specifically state that the legal definition of pneumoconiosis includes any chronic "restrictive or obstructive pulmonary disease arising out of coal mine employment." §718.201 (a)(2).
>
> Based on the foregoing, I find that [c]laimant has established, by a preponderance of the evidence, that his disability is "due at least in part" to pneumoconiosis.

> impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

Decision and Order on Remand at 5-6.

Because we have vacated the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis, we also vacate 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. §718.204(c). We further note that the Board, in its previous decision, instructed the administrative law judge to make a finding regarding the length of claimant's smoking history and determine if this finding affected his consideration of the evidence pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge found that claimant had a twenty-five year pack year smoking history. Decision and Order on Remand at 3. The administrative law judge, however, failed to address whether this finding affected his weighing of the medical evidence. Specifically, in crediting the opinions of Drs. Vuskovich and Myers, the administrative law judge failed to address whether these physicians relied upon inaccurate smoking histories.[8]

The administrative law judge also failed to adequately explain his basis for finding that the opinions of Drs. Vuskovich and Myers regarding the cause of claimant's total disability were "well reasoned." Decision and Order on Remand at 5. Dr. Vuskovich merely checked a box on a medical form indicating that claimant's pulmonary impairment was caused in part by factors in his work environment. Director's Exhibit 29. Dr. Myers similarly indicated, without explanation, that claimant's pulmonary impairment was caused by "chronic dust exposure." *Id.* Moreover, neither of these physicians addressed the effect of claimant's smoking history, if any, on his pulmonary impairment. Consequently, on remand, the administrative law judge is instructed to reconsider whether the opinions of Drs. Vuskovich and Myers are sufficiently reasoned.

[8]Dr. Vuskovich noted that claimant smoked one pack of cigarettes a day for fifteen years and was still smoking three cigarettes a day, while Dr. Myers indicated that claimant smoked a pack a day for ten years. *See* Director's Exhibit 29.

The administrative law judge discredited the opinions of Drs. Broudy and Powell because they opined that pneumoconiosis was a restrictive disease, not an obstructive disease. However, because the opinions of Drs. Broudy and Powell, that claimant's total disability was due to his cigarette smoking, were not based upon an erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease,[9] the administrative law judge erred in discrediting their opinions on this basis. *See generally Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).

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

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[9]Dr. Broudy explained that it was possible to distinguish the effects of coal workers' pneumoconiosis as opposed to the effects of other respiratory diseases. Dr. Broudy explained that:

> [I]n the case of asthma and obstructive airways disease from smoking, one is looking for the characteristic and the type of impairment on spirometry that reverses at least partially with bronchodilation, along with the characteristic physical examination, the findings of obstructive airways disease. Both of these findings on spirometry and physical exam are quite different than what one would expect to see with coal workers' pneumoconiosis where if an individual had impairment due to coal workers' pneumoconiosis, one would expect to see a largely restrictive defect and find perhaps crepitations on physical exam, but not the expiratory delay and wheezing that one sees in this case. Furthermore, on x-ray one would expect to see evidence of coal workers' pneumoconiosis in the fairly advanced stage when one would have impairment of this degree.

Director's Exhibit 32 at 17-18.

Dr. Powell explained that:

> The changes caused by cigarette smoking are productive cough, and they meet the criteria of chronic bronchitis or an obstructive defect, which is obstruction in flow. The changes associated with coal workers' pneumoconiosis are a restrictive defect or a restriction in volume available for use in breathing.

Employer's Exhibit 1 at 21.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge