BRB No. 03-0445 BLA

HAYWARD R. FARMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CONSTRUCTION COMPANY	)	
	)	
	)	DATE ISSUED: 03/23/2004
Employer-Respondent	)	
	)	
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 – Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Hayward R. Farmer, Baxter, Kentucky, *pro se*.

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:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Remand – Denying Benefits (98-BLA-0640) of Administrative Law Judge Thomas F. Phalen, Jr., on a claim filed pursuant to the provisions of Title IV of the Federal Coal

[1] Claimant's Notice of Appeal was filed by Ron Carson of Stone Mountain Health Services. In an Order issued on July 7, 2003, the Board advised the parties that claimant would be considered to be representing himself. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995).

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] This case has been before the Board previously. The procedural history of this case is set forth in the Board's Decision and Order issued on March 29, 2002. *See Farmer v. Mountain Construction Co.*, BRB. No. 01-0605 BLA (Mar. 29, 2002) (unpub.). In the Board's 2002 Decision and Order, the Board held that the administrative law judge's analysis of the x-ray evidence did not comply with the Administrative Procedure Act (APA), 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 the Board vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(1). The Board also held that the administrative law judge's cursory analysis of the medical opinions at 20 C.F.R. §718.202(a)(4) did not comply with the APA. Consequently, the Board vacated the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). However, the Board rejected employer's challenge regarding the extent of claimant's disability. In addition, because the Board had vacated the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis, the Board also vacated 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). *Farmer v. Mountain Construction Co.*, BRB No. 01-0605 BLA (Mar. 29, 2002)(unpub.).

On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). The administrative law judge, therefore, denied benefits.

Employer responds to claimant's appeal, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief on appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be

---

[2] 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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).

In considering whether the evidence establishes the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge accurately summarized the x-ray evidence of record, noting that the record contains twenty-one interpretations of eleven films. The administrative law judge then discussed each film and, based on the quality and quantity of the interpretations, he determined whether each film was positive or negative for the existence of pneumoconiosis. Decision and Order at 4-5; Director's Exhibits 13, 15, 16, 27, 29, 33-37; Employer's Exhibits 2, 3. The administrative law judge then stated:

> I have determined that six of the eleven films are positive for the existence of pneumoconiosis. There are a total of nine positive interpretations and twelve negative interpretations. Of the two most recent x-rays, one film was positive and one film was negative. There were thirteen interpretations offered by dually-certified physicians; ten out of the thirteen were negative. Four out of the five interpretations by B-readers were positive. Eleven out of the fourteen interpretations by dually-certified physicians were negative. There is more to consider than mere numerical superiority. The Sixth Circuit advises administrative fact-finders to also consider the difference in the qualifications of the readers as well as an examination of the party affiliation of the experts. *See Woodward v. Director, OWCP*, 991 F.2d 313 (6th Cir. 1993). Furthermore, it is appropriate to credit the interpretation of a dually-certified physician over the interpretation of a B-reader. *See Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999)(en banc on recon.). A clear majority of the interpretations issued by the best-qualified physicians found the x-rays to be negative. Employer did not stack the record with needless negative interpretations. Assuming, *arguendo*, that the number of x-ray interpretations admitted into the record were limited in accordance with the amended regulations. Claimant could, at best, adduce evidence creating an equipoise situation. It is the claimant's burden to establish pneumoconiosis by a preponderance of the x-ray evidence. Both parties have presented strong evidence. However, Claimant has not adduced sufficient probative evidence to outweigh the evidence submitted by Employer. Therefore, I find that Claimant has not established the existence of pneumoconiosis by x-ray evidence under §718.202(a)(1).

Decision and Order on Remand at 5.

The administrative law judge thoroughly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). We affirm the administrative law judge's weighing of the x-ray evidence as it is supported by substantial evidence.

Turning to the medical opinion evidence, the administrative law judge reviewed the opinions of Drs. Powell, Vuskovich, Myers, Dahhan, and Broudy.[3] The administrative law judge noted that Dr. Powell diagnosed the existence of pneumoconiosis by x-ray, but found that because the physician "did not attribute Claimant's chronic lung conditions to exposure to coal mine dust, Dr. Powell's narrative opinions cannot support a finding of pneumoconiosis. It also may not be found to be a determination against coal workers' pneumoconiosis, since he did not evaluate the effect of claimant's coal dust exposure." Decision and Order on Remand at 6. The administrative law judge found that although there is adequate data to support Dr. Vuskovich's diagnosis of pneumoconiosis, the physician "does not identify what he relied upon to make the determination of silicosis/pneumoconiosis, although it appears obvious that he relied primarily upon his x-ray interpretation and coal dust exposure." *Id.* Therefore, the administrative law judge found that his opinion is not sufficiently well-reasoned and well-documented, and that it is entitled to a "lesser degree of probative weight." *Id.* The administrative law judge considered Dr. Myers' opinion and noted that "his opinion contains adequate objective data to support his diagnosis." *Id.* However, the administrative law judge found that Dr. Myers "did not identify what medical symptoms related to coal dust exposure that he relied upon to diagnose COPD….[H]is narrative opinion is insufficiently reasoned and well-documented." *Id.* The administrative law judge considered Dr. Dahhan's opinion and noted that Dr. Dahhan did

---

[3] Dr. Dahhan examined claimant and opined that claimant suffers from chronic obstructive lung disease due to cigarette smoking, and he stated that claimant does not have any lung disease caused by his coal mine employment. Director's Exhibit 13. Dr. Broudy examined claimant and opined that claimant does not have coal workers' pneumoconiosis or any respiratory disease or pulmonary impairment arising from his occupation as a coal miner. Director's Exhibits 27, 32. Dr. Vuskovich examined claimant and diagnosed silicosis related to claimant's coal mine employment. Director's Exhibit 29. Dr. Myers examined claimant and diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to claimant's dust exposure. Director's Exhibit 29. Dr. Powell examined claimant and diagnosed coal workers' pneumoconiosis. Director's Exhibit 29. Based on a subsequent examination of claimant, Dr. Powell diagnosed occupational pneumoconiosis. Director's Exhibit 29; Employer's Exhibit 1.

not provide the basis for his diagnosis of chronic obstructive pulmonary disease, and that Dr. Dahhan did not provide any reasoning for his determination that it was due to smoking rather than claimant's coal mine employment. The administrative law judge therefore found that this opinion is not well-reasoned or well-documented, and that it is entitled to a lesser degree of probative weight. *Id*. The administrative law judge found Dr. Broudy's opinion to be well-reasoned and well-documented, and found that it is entitled to probative weight enhanced by his credentials a board-certified pulmonologist. *Id*. The administrative law judge concluded:

> Dr. Broudy's opinion, as the only well-reasoned and well-documented opinion in the record, is controlling. He provided substantial reasoning to support his conclusion that Claimant's COPD, a condition which was diagnosed by the rest of the physicians, was caused by Claimant's lengthy smoking history. I find that claimant has not established the existence of pneumoconiosis by narrative evidence under subsection (a)(4). As Claimant has not proven the existence of pneumoconiosis under any of the applicable subsections, I find that Claimant does not suffer from pneumoconiosis.

Decision and Order on Remand at 8.

We affirm the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4). A medical opinion which merely restates an x-ray opinion may not establish the existence of pneumoconiosis at Section 718.202(a)(4). *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Consequently, it was proper for the administrative law judge to find that the diagnoses of coal workers' pneumoconiosis provided by Drs. Powell and Meyer do not constitute reasoned and documented medical opinions because each of these physicians referred solely to a positive x-ray interpretation in their diagnosis of coal workers' pneumoconiosis.[4] Moreover, we affirm the finding of the administrative law judge, who is charged with determining whether the medical opinions are well-documented and reasoned, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), that Drs. Vuskovich and Meyers do not adequately explain their

[4] In a 1994 report, Dr. Powell stated "Chest x-ray consistent with a Category 1/1, Q/Q coal pneumoconiosis." Director's Exhibit 29. In a subsequent report, Dr. Powell stated "Abnormal chest x-ray consistent with a category 1/0, P/Q occupational pneumoconiosis." Director's Exhibit 29. Dr. Meyers diagnosed "Coal workers' pneumoconiosis, category 1/0-p/s, both mid lung zones, Class III." Director's Exhibit 29.

evaluation of the effect of claimant's coal dust exposure.[5] We also affirm the administrative law judge's finding that Dr. Powell's diagnoses do not constitute diagnoses of coal workers' pneumoconiosis, because Dr. Powell did not attribute the lung conditions he found to coal dust exposure. Director's Exhibit 29; Employer's Exhibit 1. These findings are supported by substantial evidence.

In addition, we affirm the administrative law judge's finding that Dr. Broudy's opinion is well-reasoned and well-documented, and the administrative law judge's determination that this opinion is entitled to determinative weight. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis under Section 718.202(a).

Because we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), one of the essential elements of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

[5] On a report form, Dr. Vuskovich checked the box indicating that claimant's disease is due to his work environment. Dr. Vuskovich did not provide any explanation for his opinion. Director's Exhibit 29. Similarly, Dr. Myers checked a box on the report form indicating that claimant's disease is related to his work environment, and in the space provided to explain the causal relationship, stated only "chronic dust exposure." Director's Exhibit 29.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge