BRB No. 10-0357 BLA

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| CHARLES E. FOLEY | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| APOGEE COAL COMPANY c/o MAGNUM COAL COMPANY | ) | |
| | ) | DATE ISSUED: 03/30/2011 |
| 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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Charles E. Foley, Harlan, Kentucky, *pro se.*

Paul E. Jones/James W. Herald, III (Jones, Waters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits in a Subsequent Claim (08-BLA-5200) of Larry S. Merck, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C.

§§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited claimant with twenty-two years of coal mine employment,[2] based on the parties' stipulation. Decision and Order at 4. The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in the applicable condition of entitlement pursuant to 20 C.F.R. §735.309(d). In considering the claim on the merits, based on all the evidence, the administrative law judge found that the x-rays established the existence of clinical pneumoconiosis,[3] arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). Additionally, the administrative law judge found that claimant is totally disabled from a respiratory impairment, and that his disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the existence of clinical pneumoconiosis was established pursuant to Section 718.202(a)(1), and erred in his analysis of the medical opinion evidence in determining that total disability due to pneumoconiosis was established pursuant to Section 718.204(c). Claimant responds, generally contending he is entitled to benefits. The

[1] Claimant filed his first claim for benefits on February 26, 2002, which was denied by the district director in a proposed decision and order issued September 13, 2003, based on claimant's failure to establish total disability. Director's Exhibit 1. The district director's denial became final and the claim was administratively closed. *Id.* Claimant filed this current claim for benefits on February 5, 2007. Director's Exhibit 3. The district director issued a proposed decision and order on September 24, 2007 awarding benefits. Director's Exhibit 55. Employer requested a hearing before the Office of the Administrative Law Judges, which was held on May 12, 2009. Director's Exhibit 62.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 6, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Director, Office of Workers' Compensation Programs (the Director), did not file a substantive response to employer's appeal.[4]

By Order dated September 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The parties have responded.

The Director states that, although the Section 1556 amendments apply to this claim, the Board need not address their impact if the Board affirms the administrative law judge's award of benefits. The Director further asserts, however, that if the Board does not affirm the award of benefits, the case must be remanded to the administrative law judge for consideration pursuant to the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[5] Employer agrees with the Director that, while applicable, the Section 1556 amendments need not be addressed if the award of benefits is affirmed.

As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried his burden to establish each element of entitlement by a preponderance of the evidence, we hold that there is no need to consider whether he could establish entitlement with the aid of the rebuttable presumption reinstated by Section 1556.

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. *Trent v. Director*, 11 BLR 1-26 (1987).

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[4] We affirm the administrative law judge's findings that total disability was established pursuant to 20 C.F.R. §718.204(b)(2), and that, therefore, claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

Employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). There are ten readings of six x-rays of record. The x-ray dated November 1, 2006 was read by Dr. Cappiello, a B reader and Board-certified radiologist, as positive for pneumoconiosis, while Dr. Wheeler, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 2; Claimant's Exhibit 7. The administrative law judge permissibly found the x-ray to be inconclusive for the existence of pneumoconiosis, based on the contrary findings of the equally qualified readers. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). The x-ray dated February 22, 2007[6] was read by Dr. Baker, a B reader, and by Dr. Alexander, a B reader and Board-certified radiologist, as positive for pneumoconiosis, while Dr. Wheeler, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 10, 12, 17. Noting that that the dually qualified readers disagreed on whether clinical pneumoconiosis was present on the x-ray, the administrative law judge permissibly found that the readings of the February 22, 2007 x-ray are also inconclusive for the existence of pneumoconiosis. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *White*, 23 BLR at 1-4-5; Decision and Order at 7. The x-ray dated June 28, 2007, was read by Dr. Dahhan, a B reader, as negative for pneumoconiosis, while Dr. Ahmed, a B reader and Board-certified radiologist, read the same x-ray as positive for pneumoconiosis. Director's Exhibit 14; Claimant's Exhibit 2. The administrative law judge acted within his discretion in according greater weight to the reading of Dr. Ahmed, than to that of Dr. Dahhan, based on Dr. Ahmed's superior radiological qualifications. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Thus, the administrative law judge permissibly found the June 28, 2007 x-ray to be positive for pneumoconiosis. Decision and Order at 7. The x-ray dated August 10, 2007 was read by Dr. Alexander, a B reader and Board-certified radiologist, as positive for pneumoconiosis. Employer's Exhibit 6. The administrative law judge properly found this x-ray to be positive based on Dr. Alexander's uncontradicted reading. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 8. The x-ray dated July 28, 2008 was read by Dr. Rosenberg, a B reader, as negative for pneumoconiosis. Employer's Exhibit 6. The administrative law judge properly found this x-ray to be negative, based on Dr. Rosenberg's uncontradicted reading. *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 8. Finally, the administrative law judge considered a March 15, 2007 x-ray contained in claimant's medical treatment notes, read

[6] The x-ray dated February 22, 2007 was read by Dr. Barrett for quality purposes only. Director's Exhibit 11.

by Dr. Tiu, a radiologist. Decision and Order at 8. Dr. Tiu opined that "the chest shows a normal sized heart with clear lungs. No pneumothorax is identified. The lateral ostophrenic sulci are intact. The visualized bony structure are [sic] unremarkable." Employer's Exhibits 3, 4. The administrative law judge permissibly accorded little weight to this x-ray reading as it is unclear whether it was done for the purpose of diagnosing pneumoconiosis, and because Dr. Tiu's radiological credentials are not contained in the record. *See Sacolick v. Rushton Mining Co.*, 6 BLR 1-930 (1984); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730, 1-733 (1983); Decision and Order at 8.

Weighing the x-ray evidence together, the administrative concluded that the November 1, 2006 and February 22, 2007 x-rays are inconclusive for pneumoconiosis, and the x-rays dated June 28 and August 10, 2007, are positive for pneumoconiosis, while the x-ray dated July 28, 2008 is negative for pneumoconiosis. Contrary to employer's argument, according less weight to the inconclusive x-rays, and to the March 15, 2007 x-ray read by Dr. Tiu, the administrative law judge acted with his discretion in finding that the positive readings of the June 28 and August 10, 2007 x-rays outweighed the negative reading of the July 28, 2008 x-ray by Dr. Rosenberg, based on the superior qualifications of the interpreting physicians. Decision and Order at 8; Employer's Brief at 18-19. Thus, the administrative law judge permissibly concluded that claimant established the existence of pneumoconiosis by a preponderance of the credible x-ray evidence, pursuant to 20 C.F.R. §718.202(a)(1). *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *White*, 23 BLR at 1-4-5; Decision and Order at 8.

Contrary to employer's contention, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record. Decision and Order at 7-8; Employer's Brief at 18-19. As substantial evidence supports the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis, we affirm the administrative law judge's finding pursuant to 20 C.F.R.§718.202(a)(1). *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. We therefore affirm the administrative law judge's finding that the x-ray evidence establishes the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1).

Employer next contends that the administrative law judge erred in his analysis of the computerized tomography (CT) scans and perfusion lung scan of record. Dr. Wheeler, reading a CT scan dated April 25, 2007, found "no silicosis or [coal workers' pneumoconiosis]." Claimant's Exhibit 7. Dr. Tiu read the same CT scan and found "no evidence of pulmonary interstitial lung disease." Claimant's Exhibit 3. Dr. Tiu also read the perfusion lung scan, dated April 22, 2005, as normal. Claimant's Exhibit 4. Finally,

Dr. Tiu opined that a CT scan dated April 12, 2005 revealed no pulmonary masses or infiltrates. Claimant's Exhibit 4.

Reviewing this evidence, the administrative law judge properly noted that CT scans and perfusion lung scans constitute "other medical evidence," the admissibility of which is governed by 20 C.F.R. §718.107. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007)(*en banc*); Decision and Order at 21. The administrative law judge further properly found that the regulation provides that "[t]he party submitting the test or the procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b); *see Webber*, 23 BLR at 1-133; Decision and Order at 21. Finding that "[t]here is no evidence in the record addressing whether these CT scans or perfusion lung scan interpreted by Dr. Tiu, and the CT scan interpreted by Dr. Wheeler, satisfy the criteria in §718.107(b)," the administrative law judge accorded the studies little weight. Decision and Order at 21. Employer's assertion that the record contains no evidence that the CT scans or perfusion lung scan "are medically unacceptable or insufficient" for determining the existence of pneumoconiosis, is unavailing, because there is no presumption in favor of the admissibility of such evidence. Instead, the regulations put the burden on the parties to obtain and submit evidence affirmatively establishing the acceptability and relevance of the tests. *See* 20 C.F.R. §718.107(b); Employer's Brief at 22. As substantial evidence supports the administrative law judge's determination that the record does not contain evidence relevant to the criteria of 20 C.F.R. §718.107(b), we affirm the administrative law judge's finding that the CT scans and perfusion lung scan are entitled to little weight. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Employer next challenges the administrative law judge's determination, pursuant to 20 C.F.R §718.204(c), that the medical opinion evidence establishes that claimant's total disability is due to pneumoconiosis. Employer asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Dye, that claimant's disability is due in part to clinical pneumoconiosis, than to the contrary opinions of Drs. Rosenberg and Dahhan, that coal dust exposure played no role in claimant's impairment.[7] Employer's Brief at 22-27. Employer's contentions lack merit.

[7] The record also contains the opinion of Dr. Baker, that clinical pneumoconiosis, hypoxemia, hypercarbia, and ischemic heart disease "fully" contributed to claimant's disabling respiratory impairment. Director's Exhibit 10. The administrative law judge found Dr. Baker's opinion to be inadequately documented on the issue of disability causation, and accorded it little weight. Decision and Order at 28. Employer raises no

In a letter dated July 25, 2008, Dr. Dye, claimant's treating physician, who is Board-certified in Family Practice, noted claimant's twenty-three year history of coal mine employment, and eight pack-year smoking history, and opined that claimant's "Coal Workers' Pneumoconiosis, 1/0, his moderately severe restrictive defect and severely abnormal arterial blood gas studies have all contributed to his pulmonary impairment." Claimant's Exhibit 6. Dr. Dye clarified his opinion, stating that claimant's "disabling respiratory impairment is significantly related to and was substantially aggravated by his exposure to coal dust during his coal mine employment," but that his pulmonary impairment was caused "to some extent" by heart disease as well. Claimant's Exhibit 6.

By contrast, Dr. Rosenberg opined that claimant's disabling respiratory impairment is due to obesity and "multiple other whole person disorders, including chronic back problems, coupled with diabetes, coronary artery disease and hypertension." Employer's Exhibit 6. Dr. Dahhan similarly opined that claimant's disabling respiratory impairment is due to "severe obesity and coronary artery disease with its complications." Director's Exhibit 14.

Contrary to employer's argument, in crediting Dr. Dye's opinion, that claimant's respiratory disability is due in part to clinical pneumoconiosis at Section 718.204(c), the administrative law judge properly considered the nature, duration, frequency, and extent of Dr. Dye's treatment of claimant, pursuant to 20 C.F.R. §718.104(d)(1)(4), and concluded that his opinion qualified as that of a treating physician. *Williams*, 338 F.3d at 501, 22 BLR at 2-625; Decision and Order at 29; Employer's Brief at 23. Moreover, the administrative law judge considered the credibility of the physician's opinion in light of its documentation and reasoning and permissibly concluded that Dr. Dye's opinion is "well-reasoned and well-documented" and "entitled to full probative weight." *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*banc*); Decision and Order at 29.

In addition, the administrative law judge rationally discounted the opinions of Drs. Rosenberg and Dahhan because they did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom., Consolidation Coal Co. v.*

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arguments with respect to the administrative law judge's discrediting of Dr. Baker's opinion.

*Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818,826, 13 BLR 252, 263-64 (6th Cir. 1989). Thus, there is no merit to employer's contention that the administrative law judge erred in according their opinions less probative weight. Employer's Brief at 26-27.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. The administrative law judge correctly analyzed the medical evidence, and adequately explained his determination to credit the opinion of Dr. Dye, over the opinions of Drs. Rosenberg and Dahhan. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence establishes that claimant's disabling respiratory impairment is due, in part, to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Martin*, 400 F.3d at 302, 305, 23 BLR at 2-261, 2-283.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge