BRB No. 98-0875 BLA

NICHOLAS R. CAROSY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
OLD BEN COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (86-BLA-1774) of Administrative Law Judge Daniel L. Stewart denying 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). This case is before the Board for the third time. Initially, Administrative Law Judge Glenn Robert Lawrence credited claimant with thirty-one years of coal mine employment, found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and found that the evidence established the

existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, he awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that pneumoconiosis was established pursuant to Section 718.202(a)(4), specifically approving the administrative law judge's decision to discount the medical opinions by physicians who did not examine claimant. *Carosy v. Old Ben Coal Co*., BRB No. 88-2245 BLA at 2-3 (Jun. 28, 1993)(unpub.). Because the Board affirmed the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), there was no need to address employer's allegations of error in the administrative law judge's weighing of the x-ray readings at Section 718.202(a)(1). However, employer also challenged the administrative law judge's findings pursuant to Section 718.204(c), and the Board concluded that the administrative law judge failed to weigh together all of the relevant evidence. Therefore, the Board vacated the administrative law judge's finding pursuant to Section 718.204© and remanded the case for him to reconsider whether total respiratory disability was established, and if so, to determine whether claimant's pneumoconiosis was a necessary cause of his disability pursuant to Section 718.204(b). [1993] *Carosy*, slip op. at 3-4.

On remand, Judge Lawrence found that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204, again rejecting the medical opinions by non-examining physicians. Accordingly, he awarded benefits.

Employer appealed and, in light of intervening case law disapproving the rejection of a medical opinion solely because a physician did not examine the claimant, *see Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992), the Board vacated the administrative law judge's findings pursuant to Sections 718.204(c)(4) and 718.204(b), as well as its earlier affirmance of the administrative law judge's finding that pneumoconiosis was established pursuant to Section 718.202(a)(4). *Carosy v. Old Ben Coal Co*., BRB No. 94-0352 BLA (Jun. 14, 1995)(unpub.). The Board then turned to the administrative law judge's previously unaddressed finding at Section 718.202(a)(1), and, after considering employer's allegations of error, held that the administrative law judge had permissibly relied upon the most recent positive x-ray readings to find the existence of pneumoconiosis established at Section 718.202(a)(1). [1995] *Carosy*, slip op. at 6. Therefore, the Board affirmed the administrative law judge's initial finding at Section 718.202(a)(1) and remanded the case for him to reconsider disability and causation pursuant to Section 718.204.

On remand, because Judge Lawrence was no longer with the Office of the

Administrative Law Judges, the case was reassigned, without objection, to Administrative Law Judge Daniel L. Stewart. Judge Stewart acknowledged that the Board had affirmed Judge Lawrence's finding pursuant to Section 718.202(a)(1), but concluded that Judge Lawrence's finding contained a mistake in a determination of fact. *See* 33 U.S.C. §922; 20 C.F.R. §725.310. Specifically, he accurately noted that in weighing the x-ray readings, Judge Lawrence mischaracterized the radiological qualifications of Dr. Myers, the physician whose x-ray reading Judge Lawrence credited to find the existence of pneumoconiosis established. [1996] Decision and Order on Remand at 6; [1988] Decision and Order at 4. The parties had not brought this mistake to the Board's attention on appeal. Viewing the readings of the most recent x-ray in light of Dr. Myers' correct qualifications, Judge Stewart found the weight of the readings by Board-certified radiologists and B-readers to be negative for pneumoconiosis. He therefore concluded that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Turning to Section 718.202(a)(4), the administrative law judge relied upon the reports of the most highly qualified physicians to conclude that the medical opinions did not establish the existence of pneumoconiosis. Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge exceeded the scope of his authority on remand when he revisited the existence of pneumoconiosis at Section 718.202(a)(1). Claimant further asserts that even if the administrative law judge did possess the authority to address Section 718.202(a)(1), he failed to identify a mistake in a determination of fact sufficient to justify reopening the prior administrative law judge's Section 718.202(a)(1) finding. Additionally, claimant argues that the administrative law judge lacked the authority to address Section 718.202(a)(4), and erred in his weighing of the medical opinions. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Claimant contends initially that because the Board reviewed and affirmed Judge Lawrence's finding of pneumoconiosis at Section 718.202(a)(1), Judge Stewart lacked the authority on remand to revisit Section 718.202(a)(1). Claimant's Brief at 6. Were it not for Section 22 of the Act, the Board's affirmance at Section 718.202(a)(1) would constitute the law of the case, absent exceptional

circumstances. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting); *Gillen v. Peabody Coal Co*., 16 BLR 1-22 (1991)(Stage, J., dissenting). Here however, the administrative law judge acted pursuant to Section 22, which displaces traditional notions of finality. *Branham v. BethEnergy Mines, Inc.*, 20 BLR at 1-27, 1-32 (1996); *Coats v. Newport News Shipbuilding and Dry Dock Co*., 21 BRBS 77, 81 (1988). Section 22 provides the administrative law judge with broad discretion to correct mistakes of fact contained in a previous decision. *See O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971). Moreover, Section 22 gives the administrative law judge the authority to identify and correct such mistakes *sua sponte*.[1] 33 U.S.C. §922; 20 C.F.R. §725.310. Therefore, Judge Stewart possessed the authority to correct all mistakes in fact contained in Judge Lawrence's previous decisions, including those not specifically alleged by the parties. We accordingly reject claimant's argument that Judge Stewart lacked the authority to reach Section 718.202(a)(1) on remand.

We also reject claimant's contention that Judge Stewart failed to identify a factual mistake that actually affected Judge Lawrence's Section 718.202(a)(1) finding in the first decision. Claimant's Brief at 6. Review of Judge Lawrence's language in the initial decision indicates that his mistaken belief that Dr. Myers was both a Board-certified radiologist and B-reader, and not merely a B-reader, was an important part of his analysis at Section 718.202(a)(1). [1988] Decision and Order at 4. Therefore, we conclude that the administrative law judge did not abuse his discretion in determining that Judge Lawrence's decision contained a mistake in a determination of fact.

Nevertheless, we are unable to affirm Judge Stewart's finding pursuant to Section 718.202(a)(1) because it is not in accordance with law. The record contains

[1] Section 22 provides in part that "[u]pon his own initiative," the deputy commissioner (now referred to as the district director) may review a case on the grounds that a mistake in a determination of fact was made. 30 U.S.C. §922. An administrative law judge has the authority under Section 22 to review the findings of another administrative law judge. *See Director, OWCP v. Peabody Coal Co*., 837 F.2d 295, 11 BLR 2-31 (7th Cir. 1988).

twenty-seven readings of four x-rays. As had Judge Lawrence before him, Judge Stewart focused on the four readings of the June 9, 1987 x-ray, because it was "one year and eight months more recent," than the previous x-ray. [1996] Decision and Order on Remand at 7. Judge Stewart then recognized Judge Lawrence's error in believing Dr. Myers to be both a Board-certified radiologist and B-reader at the time of the reading when the record indicated he was not a Board-certified radiologist although he was a B-reader at the time, (Decision and Order at 6). When considering the credentials of the other three doctors, Marshall, Castle and Hippensteel, Judge Stewart relied upon Dr. Lawrence's finding that they were all both Board-certified and B-readers, crediting the readings by the three doctors with superior credentials, two of whom read the x-ray as negative, Judge Stewart concluded that the negative evidence outweighed the positive and determined that the recent x-ray evidence failed to establish the existence of pneumoconiosis. Claimant's Exhibits 1, 2; Employer's Exhibits 30, 31.

An administrative law judge may accord greater weight to the more recent positive x-ray evidence because this practice is consistent with the view that pneumoconiosis is a progressive disease, *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1139 (7th Cir. 1988), and therefore, more recent positive x-ray readings tend to indicate the expected deterioration in a miner's condition. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Here however, Judge Stewart relied on the most recent x-ray but credited the negative readings, which is inconsistent with the reason for according greater weight to the more recent medical evidence. *See Dotson, supra*; *Woodward, supra*; *Adkins, supra*. In addition, while Judge Stewart correctly noted that an administrative law judge may accord greater weight to the readings of physicians qualified as both Board-certified radiologists and B-readers, *see Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276, 18 BLR 2-42, 2-45 (7th Cir. 1993), he was mistaken in his belief that Drs. Hippensteel and Castle possess both of these radiological credentials, and therefore erred in crediting them for this reason. Additionally, Judge Stewart discounted Dr. Marshall's positive reading as "completely at variance" from the readings of the three later x-rays by any other Board-certified radiologist and B-reader, when in fact, Dr. Pitman, who is a Board-certified radiologist and B-reader, read the July 15, 1985 x-ray as positive. [1996] Decision and Order on Remand at 7; Director's Exhibit 13. Because the administrative law judge's finding is not in accordance with law and is not supported by the record, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*), we must vacate the administrative law judge's finding and remand this case for him to reweigh the x-ray evidence pursuant to Section 718.202(a)(1). Because Judge Lawrence incorrectly summarized the x-ray evidence in his initial decision and Judge Stewart incorporated by reference Judge Lawrence's incorrect chart, we summarize

the x-ray readings as follows:

Exhibit	X-ray	Physician	Qualifications	Reading
DX 14	5/9/83	Minetree		2/2
DX 12	5/9/83	Gordonson	BCR/B	Negative
EX 16	5/9/83	Stewart	B	0/1
EX 17	5/9/83	Jennings	BCR/B	Negative
EX 18	5/9/83	Castle	B	0/1
EX 19	5/9/83	Renn	B	Negative
EX 20	5/9/83	O'Neill	B	0/1
EX 21	5/9/83	Wheeler	B	0/1
DX 13	7/15/85	Pitman	BCR/B	1/1
DX 15	7/15/85	Sloan	Bd Elig. Rad.	2/1
EX 15	7/15/85	Jennings	BCR/B	Negative
EX 11	7/15/85	Hippensteel	B	Negative
EX 12	7/15/85	Stewart	B	Negative
EX 13	7/15/85	Castle	B	Negative
EX 14	7/15/85	Renn	B	Negative
EX 9	10/7/85	Jennings	BCR/B	Negative
EX 3	10/7/85	Hendershot	BCR	Negative
EX 4	10/7/85	Selby	B	0/1
EX 5	10/7/85	Castle	B	Negative
EX 6	10/7/85	Stewart	B	0/1
EX 7	10/7/85	Hippensteel	B	Negative
EX 8	10/7/85	O'Neill	B	0/1
EX 10	10/7/85	Renn	B	Negative
CX 2	6/8/87	Marshall	BCR/B	2/1
CX 1	6/8/87	Myers	B	½
EX 30	6/8/87	Hippensteel	B	Negative
EX 31	6/8/87	Castle	B	Negative

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred by reweighing all of the medical opinion evidence. Claimant's Brief at 7. Contrary to claimant's contention, Judge Stewart was not bound by Judge Lawrence's weighing of the evidence at Section 718.202(a)(4) because the Board vacated Judge Lawrence's finding. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). Nothing in the Board's remand language specifically limited Judge Stewart to crediting the same reports which Judge Lawrence had credited. Therefore, we reject claimant's contention.

Claimant additionally contends that the administrative law judge erred by

crediting the opinions of Drs. Renn and Castle that claimant does not have pneumoconiosis, despite claimant's assertions that their opinions are not well-reasoned because the physicians relied upon the numerical superiority of the negative x-ray readings and did not adequately explain their opinions. Claimant's Brief at 7; Claimant's Brief on Remand at 5-7. A reasoned medical opinion rests on documentation adequate to support the physician's conclusions. *Migliorini v. Director, OWCP*, 898 F.2d 1292, 1295, 13 BLR 2-418, 2-423 (7th Cir. 1990); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-22 (1987). Drs. Renn and Castle, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and submitted detailed opinions. Employer's Exhibits 1, 28, 29. In addition to reviewing the x-ray readings, both physicians indicated that they based their opinions on the physical examination results, medical histories, pulmonary function studies, and blood gas studies. *Id*. Under these circumstances, we hold that the administrative law judge acted within his discretion in considering their opinions to be adequately documented and reasoned at Section 718.202(a)(4). *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). Additionally, in finding that pneumoconiosis was not established, the administrative law judge permissibly credited the opinion of examining physician Dr. Selby, and those of Drs. Renn and Castle, because these three physicians are the most highly qualified of record. *See Battram, supra*. Substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(4), which we therefore affirm.

Therefore, on remand the administrative law judge must reweigh the x-ray evidence pursuant to Section 718.202(a)(1). If he finds the existence of pneumoconiosis established, he must weigh the medical opinions at Section 718.204(c)(4), then weigh all of the contrary probative evidence together to determine whether it establishes total respiratory disability pursuant to Section 718.204(c). *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991), aff'd 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986). If total respiratory disability is found established, the administrative law judge must then determine whether all of the relevant evidence establishes pursuant to Section 718.204(b) that claimant's pneumoconiosis is a contributing cause of his total disability. *See Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990)(pneumoconiosis must be a necessary cause, but need not be a sufficient cause of disability).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge