

BRB No. 02-0742 BLA

JOHN BILL FOLEY))
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Claimant-Petitioner))
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v.))
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P & M COAL, INCORPORATED)	DATE ISSUED:
))
and))
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EMPLOYERS INSURANCE OF WAUSAU))
))
Employer/Carrier-))
Respondents))
))
LAST CHANCE TRUCKING COMPANY)))
))
and))
))
KENTUCKY COAL PRODUCERS SELF))
INSURANCE FUND))
))
Employer/Carrier-))
Respondents))
))
DIRECTOR, OFFICE OF WORKERS'))
COMPENSATION PROGRAMS, UNITED)))
STATES DEPARTMENT OF LABOR))
))
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

Philip J. Reverman (Boehl, Stopher & Graves, LLP), Louisville, Kentucky, for P & M Coal Company, Incorporated.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for Last Chance Trucking Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0304) of Administrative Law Judge Thomas F. Phalen, Jr. 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).¹ The instant case involves a duplicate claim filed on April 28, 1999.² After designating P & M Coal Company (P & M) as the responsible operator and crediting claimant with fourteen years and ten months of coal mine employment, the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). However, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). P & M responds in support of the administrative law judge's denial of benefits. Last Chance Trucking Company provided notice that it adopted P & M's response brief. The Director,

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

² The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on March 5, 1991. Director's Exhibit 31-216. By Order dated August 29, 1991, the district director ordered claimant to show cause, within thirty days, why his claim should not be denied by reason of abandonment. Director's Exhibit 31-145. On November 29, 1991, the district director denied benefits, noting that "[o]ur initial finding [on August 29, 1991] that you cannot be found entitled to benefits for the reason(s) previously given remains unchanged by the additional evidence and information." Director's Exhibit 31-144. The district director subsequently denied benefits on January 25, 1993. Director's Exhibit 31-143. There is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a second claim on April 28, 1999. Director's Exhibit 1.

Office of Workers' Compensation Programs, has not filed a response brief.³

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).

³ Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309 (2000), 718.202(a)(2), (a)(3) and 718.204(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant argues that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant contends that it was unfair for the administrative law judge to rely upon the preponderance of the negative x-ray interpretations given the fact that claimant's "limited financial resources" precluded him from submitting as many x-ray interpretations as employer. See Claimant's Brief at 9-10. In his consideration of the x-ray evidence, the administrative law judge noted that an x-ray interpretation rendered by a physician dually qualified as a B reader and Board-certified radiologist was entitled to greater weight than an interpretation rendered by a physician qualified as only a B reader. See *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 17. The administrative law judge also properly found that inasmuch as the preponderance of the x-ray readings rendered by the best qualified physicians (*i.e.*, physicians qualified as B readers and/or Board-certified radiologists) is negative for pneumoconiosis, the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).⁴ *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); Decision and Order at 17. In light of the fact that the administrative law judge did not rely solely upon the numerical superiority of the readings submitted by employer, but also considered the qualifications of the physicians submitting the interpretations, claimant's allegation of error regarding employer's superior resources is without merit. See *generally Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Therefore, we affirm the administrative law judge's finding that the x-ray

⁴ The administrative law judge found that of the twenty-eight x-ray interpretations of record, only six are positive for pneumoconiosis. Decision and Order at 17. The administrative law judge further found that of the fifteen x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists, only three are positive for pneumoconiosis. *Id.* Of the eight x-ray interpretations rendered by physicians qualified as B readers, the administrative law judge found that only two are positive for pneumoconiosis. *Id.* Although the administrative law judge found that claimant's x-rays taken on May 13, 1992 and November 2, 1992 are positive for pneumoconiosis, the administrative law judge found that claimant's x-rays taken on July 8, 1991, August 1, 1991, October 7, 1991, March 10, 1992, August 28, 1992, September 17, 1992, October 23, 1992, May 14, 1999 and June 29, 2000 are negative for pneumoconiosis. *Id.* at 17. Because claimant's June 20, 2000 x-ray was read as both positive and negative by equally qualified physicians, the administrative law judge found that it is insufficient to support a finding of pneumoconiosis. *Id.* The administrative law judge also noted that Dr. Umer interpreted claimant's May 25, 1999 x-ray and did not indicate whether he found the presence of pneumoconiosis. *Id.*

evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant contends that the administrative law judge erred in his consideration of Dr. Eubank's opinion. During an August 14, 2001 deposition, Dr. Eubank opined that claimant suffered from chronic obstructive pulmonary disease attributable to his coal dust exposure, cigarette smoking, and fumes from an auto body job. Claimant's Exhibit 3 at 8. Although Dr. Eubank could not quantify the relative contribution of these causes, she opined that claimant's coal dust exposure was a "significant contributive cause to his chronic obstructive pulmonary disease."⁵ *Id.*

Claimant argues that the administrative law judge erred in not according greater weight to Dr. Eubank's opinion based upon her status as his treating

⁵ Notwithstanding the fact that claimant had an x-ray interpreted as negative for coal workers' pneumoconiosis, Dr. Eubank opined that claimant's coal dust exposure was "quite likely" a significant contributing factor to his chronic obstructive pulmonary disease. Claimant's Exhibit 3 at 8-9. Dr. Eubank further opined that claimant was totally disabled as a result of his respiratory impairment and that his totally disabling respiratory impairment was significantly related to his chronic obstructive pulmonary disease. *Id.* at 9-10. Although Dr. Eubank conceded, on cross-examination, that it was possible that claimant's entire chronic obstructive pulmonary disease, and the impairment therefrom, were related solely to cigarette smoking, she further stated that she believed that claimant's coal dust exposure was a "significant additive factor" in the cause of his current condition. *Id.* at 31-32.

physician.⁶ The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has indicated that a treating physician's opinion may be entitled to more weight than the report of a non-treating or non-examining physician. See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In the instant case, although the administrative law judge recognized that Dr. Eubank diagnosed chronic obstructive pulmonary disease due in part to coal dust exposure, he noted that Dr. Eubank also stated that she did not diagnose coal workers' pneumoconiosis. Decision and Order at 18. Therefore, the administrative law judge found that Dr. Eubank's opinion was "internally inconsistent" and accorded it "no weight." *Id.*

⁶ Dr. Eubank testified that she had been treating claimant for nine years. Claimant's Exhibit 3 at 6.

Contrary to the administrative law judge's finding, Dr. Eubank's diagnosis of chronic obstructive pulmonary disease attributable in part to coal dust exposure is not "internally inconsistent" with her finding that claimant did not suffer from coal workers' pneumoconiosis. A finding of either clinical pneumoconiosis, see 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, see 20 C.F.R. §718.201(a)(2),⁷ is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁸ Dr. Eubank's diagnosis of chronic obstructive pulmonary disease attributable in part to coal dust exposure, if credited, is sufficient to establish a finding of "legal" pneumoconiosis. Consequently, we vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration. On remand, the administrative law judge is instructed to address whether Dr. Eubank's opinion, when weighed along with the other relevant medical opinion

⁷ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁸ In his decision, the administrative law judge recognized the distinction between "legal" and "clinical" pneumoconiosis. See Decision and Order at 16. The administrative law judge quoted the definition of each, with the statement that clinical pneumoconiosis includes coal workers' pneumoconiosis. *Id.*

evidence,⁹ is sufficient to establish the existence of “legal” pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).¹⁰ In his consideration of whether the medical opinion evidence is sufficient to establish the existence of “legal” pneumoconiosis, the administrative law judge should not consider the fact that the physicians of record opined that claimant did not suffer from “clinical” pneumoconiosis. See 20 C.F.R. §718.202(a)(1).

⁹ On remand, the administrative law judge should also address whether Dr. Myers’s opinion is sufficient to establish the existence of “legal” pneumoconiosis. During a September 21, 1992 deposition, Dr. Myers opined that he found no evidence of coal workers’ pneumoconiosis. Director’s Exhibit 31-19. However, Dr. Myers further stated that:

I would say that [claimant’s] pulmonary impairment could be contributed to by his coal mine employment. It’s not the major cause, but certainly is probably one cause of this degree of obstructive airway disease.

Director’s Exhibit 31-19.

¹⁰ Because no party challenges the administrative law judge’s determination that the medical opinion evidence is insufficient to establish the existence of “clinical” pneumoconiosis, this finding is affirmed. *Skrack, supra*.

Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In finding that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis, the administrative law judge acknowledged that his finding was based in part upon his finding that claimant "did not establish the existence of pneumoconiosis." See Decision and Order at 20. In light of our decision to vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and remand the case for further consideration.¹¹ See *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

¹¹ 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 impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge