BRB No. 04-0646 BLA

MAC A. DUNCAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 05/20/2005
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (03-BLA-5927) of Administrative Law Judge Daniel L. Leland on modification of a district director's determination in a miner's 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). The administrative law judge credited claimant[1] with eighteen years of coal

[1]Claimant is Mac A. Duncan, the miner, who filed his claim for benefits on February 23, 2001. Director's Exhibit 2.

mine employment. Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). *Id.* at 5-6. Additionally, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits, commencing February 2001. *Id.* at 6.

On appeal, employer contends that the administrative law judge erred in determining that claimant established a mistake in fact pursuant to Section 725.310. Employer's Brief at 8. Employer also asserts that the administrative law judge erred in finding the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). *Id.* at 8-13. Employer further contends that the administrative law judge erred in finding that claimant's disability was due to pneumoconiosis pursuant to Section 718.204(c). *Id.* at 13-15. Lastly, employer asserts that the administrative law judge failed to consider the medical evidence regarding the date of entitlement. *Id.* at 15-16. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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

We initially address employer's allegations of error regarding the administrative law judge's consideration of whether the evidence was sufficient to establish modification of the district director's denial of claimant's claim. Employer's Brief at 8, 9, 15. In interpreting 20 C.F.R. §725.310 (2000),[3] the Board has held that an administrative

[2]We affirm the administrative law judge's finding of eighteen years of coal mine employment and his findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3), but established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]Because claimant filed his claim after January 19, 2001, revised 20 C.F.R. §725.310 is applicable. It is noted, however, that the Board's holdings regarding the effect of a claimant's request for modification of a district director's denial of benefits set out in *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992) and *Kott v. Director, OWCP*¸ 17 BLR 1-9 (1992) are not affected by the revisions to Section 725.310.

law judge is not required to make a preliminary determination regarding whether a claimant has established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. Rather, the Board has recognized that such a determination is subsumed into the administrative law judge's decision on the merits. The Board has held that an administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*¸ 17 BLR 1-9 (1992). The administrative law judge, therefore, was authorized to address the merits of claimant's claim without first addressing whether the evidence was sufficient to establish modification of the district director's denial of the claim. Because the administrative law judge, in his consideration of whether there was a mistake in a determination of fact, considered all of the evidence of record, he effectively addressed the merits of claimant's claim.

Pursuant to Section 718.202(a)(1), employer asserts that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis based on the x-ray evidence. Employer's Brief at 8-10. The record contains five readings[4] of two x-rays. The administrative law judge noted that the May 22, 2001 x-ray was read as positive by Drs. Loveless and Cappiello, who are both B readers[5] and Board-certified radiologists, and that the October 4, 2001 x-ray was interpreted as negative by Dr. Hasson, a B reader, and Dr. Scott, who is a B reader and Board-certified radiologist. Decision and Order at 5. The administrative law judge stated that "the qualifications of the physicians who found radiographic evidence of pneumoconiosis are superior to the qualifications of the physicians who did not diagnose pneumoconiosis." *Id.* Therefore, the administrative law judge "conclude[d] that claimant has clinical pneumoconiosis." *Id.*

Specifically, employer argues that, in considering the physicians' qualifications, the administrative law judge erred by failing to compare the professional appointments of Drs. Cappiello and Scott, Employer's Brief at 9. Employer asserts, and the record reveals, that Dr. Scott has been a professor of radiology at The Johns Hopkins Medical

[4]The five readings include Dr. Sargent's reading of the May 22, 2001 x-ray for film quality only. Director's Exhibit 13.

[5]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Institutions from 1978 to the present, whereas Dr. Cappiello has not had any professional appointments since 1984. *Id.*; Director's Exhibits 26, 27. Although an administrative law judge "is not barred from considering further factors relevant to the level of radiological competence" of an x-ray reader, after considering the B reader and Board-certified status of a physician who has read an x-ray, he is not compelled to accord greater weight to a physician on this basis. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Therefore, contrary to employer's contention, the administrative law judge permissibly considered the B reader and Board-certified status of the physicians in weighing the x-ray evidence at Section 718.202(a)(1). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345-46 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Additionally, employer asserts that the administrative law judge "failed to consider the likelihood that the earlier positive readings were mistaken in light of the Claimant's asbestosis, lung cancer, bronchiectasis, pneumonectomy and the negative x-ray readings of his later chest films." Employer's Brief at 9-10. In accordance with Sections 718.102 and 718.202(a)(1), an administrative law judge is permitted to find the existence of pneumoconiosis based on an x-ray that is classified as Category 1/0 or greater. 20 C.F.R. §§718.102, 718.202(a)(1); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*). Since the administrative law judge properly found the existence of pneumoconiosis in accordance with Section 718.202, we reject employer's contentions[6] and affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge committed numerous errors in finding the medical opinion evidence sufficient to

[6]Employer contends that, in determining whether pneumoconiosis was present in claimant, the administrative law judge erred in failing to weigh all of the relevant evidence together regarding the existence of pneumoconiosis. Employer's Brief at 10. Because Section 718.202(a) provides four alternative methods by which a claimant may establish the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), the administrative law judge was not required to weigh all of the evidence regarding the existence of pneumoconiosis together. *See U.S. Steel Mining Co. v. Director, Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004); *but see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

establish legal pneumoconiosis.[7] Employer's Brief at 10-13. In determining that claimant has legal pneumoconiosis, the administrative law judge credited the opinions of Dr. Hawkins and claimant's treating physician, Dr. Crain, over the contrary opinions of Drs. Hasson and Goldstein.[8] Decision and Order at 5. The administrative law judge dismissed the opinions of Drs. Hasson and Goldstein because he found that their opinions were not probative as to whether claimant has legal pneumoconiosis and because he found that both these physicians based their conclusions that claimant does not suffer from clinical pneumoconiosis on negative x-ray readings. *Id.* Therefore, the administrative law judge concluded that the medical opinion evidence was sufficient to establish legal pneumoconiosis.

Employer asserts that Dr. Hawkins' diagnosis regarding the cause of claimant's chronic obstructive pulmonary disease (COPD) was "neither reasoned nor documented" because Dr. Hawkins relied on an inaccurate smoking history. Employer's Brief at 11. In considering Dr. Hawkins' opinion, the administrative law judge noted that "[a]lthough he did not accurately state claimant's smoking history, this inaccuracy does not undermine his finding that claimant's lung disease was partly related to his coal dust exposure." Decision and Order at 5. The administrative law judge noted that claimant testified to smoking approximately one-half pack of cigarettes per day for twenty-eight to thirty years. Decision and Order at 2. Dr. Hawkins noted in his report that claimant smoked one to two packs of cigarettes per week for seventeen years. Director's Exhibit 13. Given the discrepancy that exists between the number of years and the intensity of claimant's smoking history, as noted by Dr. Hawkins and as stated by claimant in his testimony, it is unclear, without further elaboration, how the administrative law judge found that Dr. Hawkins' inaccurate notation of claimant's smoking history did not affect the credibility of his opinion regarding the cause of claimant's COPD. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); *Stark v.*

[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]Dr. Hawkins found that claimant's chronic obstructive pulmonary disease (COPD) was due to smoking and coal dust exposure. Director's Exhibit 13. Dr. Crain found that claimant "has significant obstructive lung disease, both related to his prior tobacco use and steroid dependent asthma and coal dust exposure." Claimant's Exhibit 1. Dr. Hasson stated that there is no evidence that claimant suffers from pneumoconiosis and that his asthma and bronchiectasis are not related to or caused by coal dust exposure. Director's Exhibit 20; Employer's Exhibit 1. Dr. Goldstein opined that there is no evidence of pneumoconiosis or a dust-related lung disease and that claimant's COPD is caused by his smoking. Director's Exhibit 21.

Director, OWCP, 9 BLR 1-36, 1-37 (1986). Moreover, the administrative law judge did not adequately explain how he found Dr. Hawkins' opinion regarding legal pneumoconiosis to be "well-reasoned in light of the positive x-ray evidence[9] and claimant's eighteen years of underground coal mine employment." *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994)(Occupational exposure is not evidence of pneumoconiosis, but merely a reason to expect that evidence might be found.). Accordingly, we vacate the administrative law judge's finding that Dr. Hawkins' opinion is "well-reasoned" and remand this case for the administrative law judge to reconsider this physician's opinion, providing a detailed rationale for his finding on remand. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Additionally, employer asserts that the administrative law judge erred in relying on the opinion of Dr. Crain, claimant's treating physician, to establish the existence of legal pneumoconiosis. Employer's Brief at 11-12. In a December 10, 2003 letter, Dr. Crain stated that claimant "has significant obstructive lung disease, both related to his prior tobacco use and steroid dependent asthma and coal dust exposure." Claimant's Exhibit 1. In his next sentence, Dr. Crain added that claimant's "obstructive symptoms were worsened by his exposure to coal dust." *Id.* Employer argues that Dr. Crain's subsequent statement that claimant's symptoms were worsened by his coal dust exposure negates his finding that claimant's obstructive lung disease is due, in part, to his coal dust exposure. Employer's Brief at 11. As the administrative law judge stated in his Decision and Order, legal pneumoconiosis is defined, in the regulations, as any chronic lung disease or impairment arising out of coal mine employment, and the regulations further define "arising out of coal mine employment" to include "any chronic pulmonary disease . . . significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). Accordingly, there is no merit in employer's contention that the statements Dr. Crain made in his letter do not constitute a diagnosis of legal pneumoconiosis.

Moreover, employer argues that the administrative law judge failed to consider whether Dr. Crain's findings in his letter were supported by his treatment notes and whether Dr. Crain's failure to note the extent of claimant's smoking history affects the credibility of his opinion regarding legal pneumoconiosis.[10] Employer's Brief at 11-12. The administrative law judge found that "Dr. Crain's opinion is entitled to substantial weight" as he treated claimant for at least four years and performed various diagnostic

[9]A positive x-ray reading, by itself, is indicative of clinical pneumoconiosis, not legal pneumoconiosis.

[10]Dr. Crain only noted that claimant stopped smoking in 1989. Claimant's Exhibit 1.

tests on him. Decision and Order at 5. In so finding, however, the administrative law judge failed to consider whether Dr. Crain's opinion, set forth in his letter, that claimant has legal pneumoconiosis, is reasoned based on this physician's findings contained in his treatment notes. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)(there is no rule requiring deference to treating physicians' opinions in black lung claims). Further, the administrative law judge did not consider whether Dr. Crain's failure to note the extent of claimant's smoking history affects the credibility of his opinion regarding legal pneumoconiosis. *See Sellards*, 17 BLR at 1-80-81; *Bobick*, 13 BLR at 1-54. Therefore, we remand this case for the administrative law judge to do so.

Employer next contends that the administrative law judge "erroneously rejected the opinions of two highly-qualified pulmonary physicians," Drs. Hasson and Goldstein. Employer's Brief at 12-13. Employer's assertions have merit. Regarding Dr. Hasson, the administrative law judge stated that this physician "did not consider whether claimant's pulmonary impairment had been aggravated by his exposure to coal dust" and that he based "his conclusion that [claimant] does not have pneumoconiosis on his negative x-ray reading." Decision and Order at 5. Dr. Hasson's report initially noted that there is "no evidence of pneumoconiosis – 0/0." Director's Exhibit 20. Dr. Hasson concluded his report by stating that claimant "has significant pulmonary impairment related to his asthma and his saccular bronchiectasis and previous pneumonectomy for carcinoma of the lung. He has no evidence of pneumoconiosis." *Id.* He subsequently noted, "[H]is asthma is predominately intrinsic, as is his bronchiectasis, which is related to multiple infections. These conditions were not caused or related to coal dust exposure." Employer's Exhibit 1. While it was proper for the administrative law judge to discredit Dr. Hasson's opinion regarding clinical pneumoconiosis because it was based on a negative x-ray reading that was discounted based on positive x-ray readings by physicians with superior qualifications,[11] *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983), it is unclear, without further elaboration, why he dismissed Dr. Hasson's opinion because this physician "did not consider whether claimant's pulmonary impairment had been aggravated by his exposure to coal dust." Therefore, we instruct the administrative law judge, on remand, to clarify his rationale for dismissing Dr. Hasson's opinion.

Regarding Dr. Goldstein, the administrative law judge found that this physician "clearly failed to determine whether [claimant] has legal pneumoconiosis and his finding

[11]In reconsidering whether Dr. Hasson's opinion is sufficient to establish the existence of legal pneumoconiosis on remand, the administrative law judge should consider that, in addition to performing a chest x-ray, this physician also conducted a physical examination and pulmonary function and blood gas testing on claimant, prior to rendering his opinion. Director's Exhibit 20.

that claimant does not have [clinical] pneumoconiosis relies solely on Dr. Hasson's negative x-ray reading." *Id.* In fact, Dr. Goldstein stated that claimant "does not have coal workers' pneumoconiosis or any other dust-related disease of the lungs." Director's Exhibit 21. Dr. Goldstein also noted that he:

> believe[d] that Dr. Hawkins is [in]correct in attributing [claimant's] COPD to be caused "in part" by coal dust exposure. I believe that smoking, causing COPD, and saccular bronchiectasis, causing chronic cough, are responsible for all of this gentleman's symptoms.

Id. It was proper for the administrative law judge to discredit Dr. Goldstein's opinion regarding clinical pneumoconiosis because it was based on a negative x-ray reading that that was discounted based on positive x-ray readings by physicians with superior qualifications, *Arnoni*, 6 BLR at 1-426; *White*, 6 BLR 1-371. However, the administrative law judge erred in his characterization of Dr. Goldstein's opinion by stating that this physician did not consider whether claimant has legal pneumoconiosis, when Dr. Goldstein clearly addressed this issue in his report. *See generally Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to Sections 718.201(a)(2) and 718.202(a)(4), and remand this case for further consideration.[12] 20 C.F.R. §718.201(a)(2); *see McClendon v. Drummond Coal Co.*, 86l F.2d 1512, 12 BLR 2-108 (11th Cir. l988).

Because the administrative law judge's Section 718.204(c) finding, that claimant's COPD is a substantially contributing cause of his total disability, is dependent upon his finding that claimant established the existence of legal pneumoconiosis, we vacate the administrative law judge's Section 718.204(c) finding as well. We instruct the administrative law judge to reconsider the relevant evidence pursuant to Section 718.204(c), if this issue is again reached on remand. *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004).

Lastly, employer contends that the administrative law judge erred in awarding benefits as of the filing date of claimant's claim, prior to "attempt[ing] to ascertain when the Claimant became totally disabled due to pneumoconiosis." Employer's Brief at 15-16. As a general rule, once entitlement to benefits has been demonstrated, the date for

[12]Because the administrative law judge did not render a finding as to whether claimant's pneumoconiosis arose out of his coal mine employment, we instruct the administrative law judge to do so on remand, if necessary. 20 C.F.R. §718.203(b); *see Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999).

commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all of the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. § 725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In the instant case, the administrative law judge did not attempt to determine when claimant became totally disabled due to pneumoconiosis, by rendering specific findings regarding the medical evidence on this issue, but merely stated "[a]s the evidence does not clearly establish an onset date of total disability due to pneumoconiosis, benefits will be awarded as of February 1, 2001." Decision and Order at 6; *see* 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); *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591. Therefore, we vacate the administrative law judge's finding of the date of entitlement and instruct the administrative law judge that, if benefits are awarded on remand, he must address the relevant evidence and make specific findings, if possible, regarding the date of entitlement. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). If such analysis does not establish the month in which claimant became totally disabled due to pneumoconiosis, benefits must commence as of the filing date of the claimant's claim pursuant to 20 C.F.R. §725.503(b).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge