BRB No. 06-0809 BLA

KENNETH E. MORGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 05/24/2007
CALVERT & YOUNGBLOOD COAL COMPANY	)	
	)	
and	)	
	)	
CAPITOL FIRE & MARINE INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

BEFORE: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Law Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-6437) of Administrative Law Judge Janice K. Bullard rendered 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). The administrative law judge credited claimant with sixteen years of coal mine employment pursuant to the parties' stipulation.[1] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). The administrative law judge also found that the evidence established total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in her weighing of the evidence pursuant to 20 C.F.R. §§718.202(a)(1), (4) and failed to apply the correct legal standard when determining the total disability issue pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer also contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs has not filed a response brief. Employer has filed a reply brief reiterating its contentions.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred in her weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered seven readings of three x-rays. Claimant's October 15, 2002 x-ray was

[1] The record indicates that the miner's coal mine employment occurred in Alabama. Director's Exhibits 5, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

interpreted as positive for pneumoconiosis by Dr. Ballard, a B reader, and by Dr. Ahmed, a Board-certified radiologist and B reader. Director's Exhibits 18, 20. However, Dr. Wiot, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis.[2] Director's Exhibit 19. Treating Dr. Ballard as a "dually-qualified" reader with the same credentials as Drs. Ahmed and Wiot, the administrative law judge found that the "numerical superiority" of the positive readings by equally qualified readers outweighed Dr. Wiot's negative reading. Decision and Order at 6. Accordingly, the administrative law judge found that the October 15, 2002 x-ray was positive for pneumoconiosis. Claimant's October 14, 2004 x-ray was read as negative for pneumoconiosis by Dr. Bailey, whose radiological qualifications are not of record. Claimant's Exhibit 1. Since there were no positive readings, the administrative law judge found that the October 14, 2004 x-ray was negative for pneumoconiosis. Finally, claimant's October 24, 2005 x-ray was read as positive for pneumoconiosis by Dr. Miller, a Board-certified radiologist and B-reader, but as negative for pneumoconiosis by Dr. Goldstein, a B reader. Claimant's Exhibit 1; Employer's Exhibit 4. Based on Dr. Miller's superior credentials, the administrative law judge found that Dr. Miller's positive reading outweighed Dr. Goldstein's negative reading. The administrative law judge therefore found that the February 24, 2005 x-ray was positive for pneumoconiosis.

Based on this analysis of the x-ray readings, the administrative law judge found that two x-rays were positive for pneumoconiosis, and one was negative. According diminished weight to Dr. Bailey's negative reading of the October 14, 2004 x-ray because of Dr. Bailey's lack of credentials, the administrative law judge found that the preponderance of the x-ray evidence supported a finding of pneumoconiosis. Decision and Order at 7.

Employer argues that the administrative law judge mischaracterized Dr. Ballard's qualifications when she treated Dr. Ballard as a B reader and Board-certified radiologist. This contention has merit. Although the record indicates that Dr. Ballard is a B reader, there is no documentation indicating that Dr. Ballard is a Board-certified radiologist. Director's Exhibit 18. A review of the administrative law judge's decision does not reflect that she took official notice of Dr. Ballard's credentials. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). Consequently, substantial evidence does not support the administrative law judge's finding that Dr. Ballard is a B reader and Board-certified radiologist. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). As set forth above, the administrative law judge's mischaracterization of Dr. Ballard's credentials affected her finding that the "numerical superiority" of positive readings by dually-qualified readers established that the October 15, 2002 x-ray was

[2] Dr. Goldstein, a B reader, reviewed the October 15, 2002 x-ray for its film quality only. Director's Exhibit 18.

positive. That finding in turn affected the determination that pneumoconiosis was established because two x-rays were positive and one was negative. We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), and remand the case to her for further consideration.[3]

Employer contends that the administrative law judge erred in her weighing of the medical opinions pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Hawkins, Bailey, and Goldstein, and the medical treatment notes of Dr. Dey. Director's Exhibit 8; Claimant's Exhibit 2; Employer's Exhibits 1-5. Dr. Hawkins examined claimant and diagnosed chronic bronchitis due to "cigarette smoke/ prior dusts/ atopic reactive airways disease," and pneumoconiosis due to "dusts." Director's Exhibit 18 at 4. Dr. Bailey reviewed claimant's medical records and test results and diagnosed chronic obstructive pulmonary disease (COPD) related to cigarette smoking. Employer's Exhibits 1-3. Dr. Goldstein examined and tested claimant and reviewed his medical records. Dr. Goldstein opined that claimant does not have coal workers' pneumoconiosis, but has chronic bronchitis by history and no evidence of impairment. Employer's Exhibit 4. Dr. Dey's medical treatment notes contain diagnoses of coal workers' pneumoconiosis, chronic bronchitis, and COPD.[4] Claimant's Exhibit 2.

The administrative law judge found that Dr. Dey's opinion was well reasoned and documented and accorded it substantial weight, based on Dr. Dey's status as claimant's treating physician, and because Dr. Dey specifically diagnosed pneumoconiosis and chronic bronchitis. Decision and Order at 9. The administrative law judge found Dr. Hawkins's opinion well reasoned and documented and entitled to substantial weight, because the positive x-ray Dr. Hawkins relied on was read by a dually-qualified physician. Decision and Order at 10. The administrative law judge accorded reduced weight to Dr. Bailey's opinion because it was based in part on his negative x-ray reading, and because he did not adequately explain his finding that claimant's COPD was due to smoking. The administrative law judge accorded less weight to Dr. Goldstein's opinion,

[3] Employer additionally argues that the administrative law judge did not consider that Dr. Wiot is a professor of radiology. Although the administrative law judge is not required to defer to this additional radiological expertise, the administrative law judge on remand is instructed to consider Dr. Wiot's qualification as a radiology professor, as it may bear on the quality of the x-ray evidence. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

[4] A review of Dr. Dey's treatment notes reveals that Dr. Dey did not link the diagnoses of chronic bronchitis or chronic obstructive pulmonary disease to coal dust exposure. Claimant's Exhibit 2; *see* 20 C.F.R. §718.201(a)(2).

because he relied on a negative x-ray that was contrary to the other x-ray evidence of record. On the issue of the etiology of claimant's respiratory impairment, the administrative law judge gave "more weight" to Dr. Dey's opinion as claimant's treating pulmonologist than to Dr. Goldstein's opinion, because Dr. Dey "did not exclude coal dust as a reason for [claimant's] bronchitis." Decision and Order at 10.

Employer contends that the administrative law judge erred in relying on Dr. Dey's diagnosis because the administrative law judge did not analyze whether the opinion was reasoned and documented, and because Dr. Dey never linked claimant's chronic bronchitis to coal dust exposure. This contention has merit. The administrative law judge did not assess whether Dr. Dey's opinion was documented and reasoned; she merely stated that it was. *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, only a diagnosis of chronic bronchitis linked to coal dust exposure constitutes legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). As employer argues, Dr. Dey did not relate claimant's chronic bronchitis to coal dust exposure. Claimant's Exhibit 2. We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge should reconsider whether Dr. Dey's opinion is reasoned and documented and supports a finding of pneumoconiosis. Consequently, the administrative law judge should also reconsider the weight to be accorded to Dr. Dey's opinion based on his status as claimant's treating physician. *See* 20 C.F.R. §718.104(d).

However, we reject employer's argument that the administrative law judge "improperly" looked outside the record to www.abms.org to determine Dr. Dey's credentials. Employer's Brief at 4, n. 3. Review of the administrative law judge's decision reflects that she properly took official notice of Dr. Dey's credentials as Board-certified in internal and pulmonary medicine. Decision and Order at 8, n. 8; *see Maddaleni*, 14 BLR at 1-138-39.

Employer next contends that the administrative law judge erred in finding Dr. Hawkins's opinion well reasoned and documented and entitled to substantial weight. This contention has merit. In finding the opinion well reasoned and documented, the administrative law judge considered only Dr. Hawkins's reliance on an x-ray, and failed to consider any other studies or evidence that the physician relied on in reaching his diagnoses. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Further, the administrative law judge did not consider whether Dr. Hawkins explained his opinion that claimant's pulmonary condition was due to both smoking and dust exposure. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge is therefore instructed, on remand, to reconsider whether Dr.

Hawkins's opinion is reasoned and documented and supports a finding of pneumoconiosis.

Employer also contends that the administrative law judge erred in according less weight to the opinions of Drs. Goldstein and Bailey. We agree. As discussed, the administrative law judge erred in her weighing of the x-ray readings, and she accorded less weight to both Drs. Goldstein and Bailey based on their reliance on negative x-ray readings to support their conclusions. Additionally, the administrative law judge accorded less weight to Dr. Goldstein's opinion because of her decision to credit Dr. Dey's opinion. We therefore instruct the administrative law judge to reconsider the opinions of Drs. Goldstein and Bailey on remand in determining whether the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.202(b)(2)(iv), employer contends that the administrative law judge failed to identify the exertional requirements of claimant's usual coal mine employment and compare the requirements with the medical opinions of record when she found that the medical opinions established that claimant is totally disabled.[5] Contrary to employer's contention, the administrative law judge considered the exertional requirements of claimant's usual coal mine employment: "At the formal hearing, Claimant testified that his last coal mine job was a 'shovel operator.' That work required him to walk long distances at steep angles and lift heavy tools such as a jackhammer." Decision and Order at 14. The administrative law judge noted that the credibility of claimant's testimony was not questioned. *Id*. On appeal, employer does not argue that claimant's description was inaccurate in any way.

Dr. Goldstein opined that claimant was able to perform his past coal mine employment, such as operate a dozer, operate a drill, or drive a truck. Employer's Exhibit 5 at 19. However, the administrative law judge accorded Dr. Goldstein's opinion diminished weight, because Dr. Goldstein relied on a pulmonary function study that produced qualifying values after bronchodilator, and because the job duties that he relied on were less demanding than claimant's actual job duties, as established by claimant's

[5] In considering the other medical evidence relevant to total disability, the administrative law judge found that the pulmonary function studies supported a finding of total disability, the blood gas studies did not support total disability, and there was no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii). No party challenges these findings. They are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

testimony.[6] Dr. Bailey opined that claimant was restricted by a mixed obstructive and restrictive impairment from performing work that he had previously been able to perform. Employer's Exhibit 2 at 20, 25. Dr. Hawkins opined that claimant could not perform manual labor due to his mild impairment. Director's Exhibit 18. Dr. Dey did not discuss total disability. Claimant's Exhibit 2. The administrative law judge noted that "all four physicians found that Claimant suffered from some type of pulmonary or respiratory impairment." Decision and Order at 14. Since the administrative law judge found that claimant had to climb steep angles and lift heavy tools, and Drs. Bailey and Hawkins stated that claimant was unable to perform manual labor due to his respiratory impairment, the administrative law judge found that the medical opinions "substantially establish[ed]" that claimant is totally disabled from performing his usual coal mine employment. *Id.*

Based on the foregoing, we find no merit in employer's contention that the administrative law judge did not consider the exertional requirements of claimant's coal mine employment when analyzing the medical opinions. However, as discussed above, the administrative law judge must consider whether the opinions of Drs. Hawkins and Bailey are reasoned and documented. *See Risher*, 940 F.2d at 327, 15 BLR at 2-186; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-19. We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv). Further, as employer argues, the administrative law judge failed to weigh all the contrary probative evidence together in determining claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2) and instruct her to weigh together all contrary probative evidence, once she has reconsidered her finding at 20 C.F.R. §718.204(b)(2)(iv). Because we have vacated the administrative law judge's finding that total disability was established, we also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instruct her to reconsider this issue on remand, if reached.

[6] Employer does not challenge the administrative law judge's finding that Dr. Goldstein's opinion merited diminished weight for these reasons. The finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge