BRB Nos. 07-0769 BLA
and 07-0769 BLA-A

<table>
<tr><td>J.T.

Claimant-Petitioner
Cross-Respondent

v.

MOUNTAIN CLAY, INCORPORATED

Employer-Respondent
Cross-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
)
)
)
)
)
)
)
)
)
)
)
)
)
)
)
)</td><td>

DATE ISSUED: 05/28/2008

DECISION and ORDER</td></tr>
</table>

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

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (03-BLA-5994) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) 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 has been before the Board on two prior occasions. In the original Decision and Order, the administrative law judge found that claimant was not a "miner" within the meaning of the Act. Accordingly, the administrative law judge denied

benefits. In response to claimant's appeal, the Board affirmed the administrative law judge's finding that the portion of claimant's work that he spent transporting parts to and from warehouses and coal mine sites was not the work of a "miner." However, the Board vacated the administrative law judge's finding that the portion of claimant's work that he spent at employer's coal mine sites and coal preparation facilities was not the work of a "miner," and remanded the case for further consideration pursuant to 20 C.F.R. §725.202(a).[1] The Board instructed the administrative law judge to address whether employer put forth affirmative proof sufficient to establish rebuttal of the presumption that claimant was a "miner" during the periods of employment that he was present at the coal mine sites and coal preparation facilities. The Board also instructed the administrative law judge to address whether claimant's work as a heavy equipment operator early in his career constituted that of a "miner." Further, the Board instructed the administrative law judge that if he found that claimant was a "miner," then he must render a separate determination regarding the length of claimant's coal mine employment. In addition, the Board instructed the administrative law judge to address whether claimant established all of the applicable elements of entitlement, if reached. [*J.T.*] *v. Mountain Clay, Inc.*, BRB No. 04-0573 BLA (May 5, 2005)(unpub.). In a subsequent Order, the Board denied claimant's request for reconsideration. [*J.T.*] *v. Mountain Clay, Inc.*, BRB No. 04-0573 BLA (Aug. 10, 2005)(unpub. Order on Recon.).

On remand, the administrative law judge found that claimant was not a "miner" within the Act. Accordingly, the administrative law judge again denied benefits. In disposing of claimant's second appeal, the Board affirmed the administrative law judge's finding that claimant's testimony regarding his work as a heavy equipment operator was not credible.[2] However, the Board vacated the administrative law judge's finding that employer established rebuttal of the presumption that claimant was a "miner" by showing that claimant was not engaged in the extraction, preparation, or transportation of coal while working at the mine sites.[3] The Board also vacated the administrative law judge's

---

[1] The Board held that Administrative Law Judge Daniel F. Solomon (the administrative law judge) improperly shifted the burden of proof to claimant to establish that his work at the coal mine sites and coal preparation facilities constituted that of a "miner." [*J.T.*] *v. Mountain Clay, Inc.*, BRB No. 04-0573 BLA, slip op. at 5 (May 5, 2005)(unpub.).

[2] The Board noted that it was within the administrative law judge's discretion to reopen the record on remand. [*J.T.*] *v. Mountain Clay, Inc*., BRB No. 06-0288 BLA, slip op. at 6-7 n.7 (Sept. 26, 2006)(unpub.).

[3] The Board held that the administrative law judge erred in discrediting claimant's testimony that the primary portion of his job was spent repairing and maintaining mining

finding that employer established rebuttal of the presumption that claimant was a "miner" by showing that claimant was not regularly employed in or around a coal mine or coal preparation facility, and remanded the case to the administrative law judge to reconsider whether employer established rebuttable of the presumption that claimant was a "miner." The Board also instructed the administrative law judge that if he finds that claimant was a "miner" within the Act, then he must render a separate determination regarding the length of claimant's coal mine employment. In addition, the Board instructed the administrative law judge to address whether claimant established the applicable elements of entitlement, if reached. [*J.T.*] *v. Mountain Clay, Inc*., BRB No. 06-0288 BLA (Sept. 26, 2006) (unpub.).

On the most recent remand, the administrative law judge found that claimant was a "miner" within the Act, credited him with eighteen years of coal mine employment,[4] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge also found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge again denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Employer responds, urging affirmance of the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). On cross-appeal, employer argues that the administrative law judge erred in weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4). The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[5]

---

equipment because it was given in response to an allegedly leading question. [*J.T.*] *v. Mountain Clay, Inc*., BRB No. 06-0288 BLA, slip op. at 5 (Sept. 26, 2006)(unpub.).

[4] Because the record indicates that claimant was last employed in the coal mine industry in Kentucky, Director's Exhibits 3, 8, 9, 11, we will apply the law 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*).

[5] Because the administrative law judge's findings that that claimant was a "miner" within the meaning of the Act, that he has eighteen years of coal mine employment, and that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

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 into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant initially contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The administrative law judge considered the four interpretations of three x-rays dated October 4, 2001, December 19, 2001, and September 24, 2003. Of the four x-ray interpretations, one reading was positive for pneumoconiosis, Director's Exhibit 14, and three readings were negative for pneumoconiosis. Director's Exhibit 15; Employer's Exhibits 2, 4. Dr. Simpao, who is not a B reader or a Board-certified radiologist, read the October 4, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 14, while Dr. Wiot, a B reader and a Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Director's Exhibit 15. Dr. Broudy, a B reader, read the December 19, 2001 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Similarly, Dr. Repsher, a B reader, read the September 24, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 4. After considering both the quantitative and qualitative nature of the conflicting x-rays, the administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In this case, the administrative law judge properly accorded greater weight to the x-ray readings by physicians who were B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). We, therefore, reject claimant's assertion that the administrative law judge improperly

relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Further, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[6]

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) because he did not consider the opinion of Dr. Simpao, who diagnosed the existence of pneumoconiosis. Employer agrees.

In finding that the medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge noted that "[t]here are two medical reports [in the record], prepared by Drs. Repsher and Broudy." Decision and Order on Remand at 11. The administrative law judge noted that Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis or any other lung disease caused by coal dust exposure, Employer's Exhibit 4, and that Dr. Repsher opined that claimant does not have coal workers' pneumoconiosis or legal pneumoconiosis. Employer's Exhibit 2. The administrative law judge concluded, therefore, that because he "discounted both of the medical opinions put forth by the [e]mployer, [and] it is the [c]laimant's burden to develop the record and submit for evaluation affirmative evidence establishing the presence of medical or legal pneumoconiosis[,]…[c]laimant…failed to meet this burden." Decision and Order on Remand at 12.

As claimant argues, however, the administrative law judge failed to consider Dr. Simpao's opinion at 20 C.F.R. §718.202(a)(4). Dr. Simpao opined that claimant has coal workers' pneumoconiosis. Director's Exhibit 14. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Thus, we vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of all the medical opinions thereunder.

---

[6] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order on Remand at 10-11. Thus, we reject claimant's suggestion.

On cross-appeal, employer argues that this case must also be remanded because the administrative law judge erred in substituting his opinion for that of Dr. Broudy. The administrative law judge stated that "[Dr. Broudy] does not sufficiently address the possibility of legal pneumoconiosis." Decision and Order on Remand at 11. However, as noted above, Dr. Broudy opined that claimant does not have a lung disease caused by coal dust exposure. Employer's Exhibit 4. Dr. Broudy's opinion was based on a coal mine employment history, a smoking history, an x-ray, a CT scan, a pulmonary function test, an arterial blood gas test, and a physical examination. *Id.* Because the administrative law judge failed to explain why he found that Dr. Broudy did not adequately address whether claimant has legal pneumoconiosis, *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), the administrative law judge erred in failing to provide a valid basis for discounting Dr. Broudy's opinion that claimant does not have legal pneumoconiosis.

Employer also argues that the administrative law judge erred in substituting his opinion for that of Dr. Repsher. Dr. Repsher opined that claimant does not have legal pneumoconiosis. Employer's Exhibits 2, 9. During a deposition, Dr. Repsher opined that claimant probably has small airways disease-related chronic obstructive pulmonary disease (COPD), related to cigarette smoke, not coal dust exposure. Employer's Exhibit 9 (Dr. Repsher's Deposition at 28-29). The administrative law judge, however discounted Dr. Repsher's opinion that claimant does not have legal pneumoconiosis, as unreasoned because Dr. Repsher stated that coal mine dust induced COPD is only evident when you compare a large group of coal mine dust exposed miners with a large group of non-cola (sic) mine dust exposed group. Based on this testimony, the administrative law judge concluded that Dr. Repsher's opinion would appear to foreclose the possibility of a diagnosis of legal pneumoconiosis based on a finding of COPD without a large study of coal mine dust exposed versus non-coal mine dust exposed groups. The administrative law judge questioned whether Dr. Repsher's view regarding the etiology of COPD was inconsistent with the regulatory definition of legal pneumoconiosis at 20 C.F.R. §718.201. Decision and Order on Remand at 11-12. As we are remanding this case for consideration of the opinions of Drs. Simpao and Broudy at Section 718.202(a)(4), we also remand the case for the administrative law judge to reconsider Dr. Repsher's opinion.

Accordingly, on remand, the administrative law judge must reconsider the medical opinions of Drs. Simpao, Broudy, and Repsher, and explain how he weighs these conflicting medical opinions at 20 C.F.R. §718.202(a)(4). *Wojtowicz*, 12 BLR at 1-165.

If, on remand, the administrative law judge finds that the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a), then he must consider whether the evidence establishes that the pneumoconiosis arises out of coal mine employment at 20 C.F.R. §718.203. In addition, if reached, the administrative law judge must consider

whether the evidence establishes total disability at 20 C.F.R. §718.204(b). Lastly, the administrative law judge must consider whether the evidence establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), if reached.

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 to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge