BRB No. 08-0704 BLA

J.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 05/20/2009
	)	
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 on Remand Granting Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

John C. Webb, V (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (05-BLA-5651) 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). Claimant filed his claim on January 30, 2004. Director's Exhibit 2. Initially, the administrative law judge credited claimant with thirty-

four years of coal mine employment,[1] and found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

Upon employer's appeal, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1), but vacated the administrative law judge's findings pursuant to Sections 718.203(b) and 718.204(c). [*J.P.G.*] *v. Jim Walters Resources, Inc.*, BRB No. 06-0701 BLA (Apr. 26, 2007)(unpub.). The Board remanded the case to the administrative law judge to consider all evidence relevant to rebuttal of the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), including comments made on x-ray readings and the CT scan reading, and in the medical opinion evidence, in accordance with the holding in *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-6 (1999)(*en banc*), that comments as to the source of diagnosed pneumoconiosis should be considered at 20 C.F.R. §718.203. The Board also instructed the administrative law judge to reconsider her finding that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), as that determination was affected by her finding that claimant's clinical pneumoconiosis arose out of coal mine employment.

On remand, the administrative law judge found that the weight of the comments to the x-ray and CT scan readings, and the medical opinion evidence established that claimant's clinical pneumoconiosis arose out of his coal mine employment. Thus, the administrative law judge found that employer did not rebut the presumption pursuant to Section 718.203(b). The administrative law judge also found that the evidence established that claimant's disability is due to clinical pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.203(b) and 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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

[1] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit, as claimant was last employed in the coal mining industry in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Hearing Transcript at 15-16, 19-20.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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).

Pursuant to Section 718.203(b), the administrative law judge weighed the readings of the May 13 and August 25, 2004 x-rays, along with the relevant comments by the readers, the interpretation of the October 9, 2003 CT scan and relevant comments, the treatment notes by Dr. Krishnamurthy, and the medical opinions of Drs. Fino, Hasson, and Hawkins. The administrative law judge found that employer did not rebut the Section 718.203(b) presumption that claimant's clinical pneumoconiosis arose out of his coal mine employment, since the x-ray evidence demonstrated the presence of coal workers' pneumoconiosis, and was supported by Dr. Krishnamurthy's treatment records and Dr. Hawkins's opinion, and this evidence outweighed the contrary evidence.

Employer first contends that the administrative law judge erred in finding that the opinions of Drs. Wiot and Hasson, that claimant's x-ray abnormalities were not coal workers' pneumoconiosis because they were located in the peripheral areas or the bases of claimant's lungs, were outweighed by the x-ray readings of Drs. Ahmed, Cappiello, Miller, and Pathak, identifying abnormalities of pneumoconiosis in all six zones of claimant's lungs. Specifically, employer argues that the readings of Drs. Ahmed, Cappiello, Miller, and Pathak were irrelevant because the physicians did not identify the source of claimant's clinical pneumoconiosis. We disagree. The readings by Drs. Ahmed, Cappiello, Miller, and Pathak were not required to identify the source of the clinical pneumoconiosis they diagnosed; claimant is entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b), by having established at least ten years of coal mine employment. *See* 20 C.F.R. §718.203(b). The credibility of the comments to Dr. Wiot's interpretation of the two x-rays taken on May 13 and August 25, 2004, as well as the comments by Dr. Hasson regarding the August 25, 2004 x-ray, had to be evaluated in light of the remaining readings by Drs. Ahmed, Cappiello, Miller, and Pathak, to determine whether employer rebutted the presumption pursuant to Section 718.203(b).

The administrative law judge rationally found that Dr. Wiot's opinion that the May 13, 2004 x-ray was unreadable was not persuasive in light of the opinion of Dr. Barrett, a Board-certified radiologist and B reader, that the film quality was 1, and in light of the readings of pneumoconiosis in all six lung zones, provided by Board-certified

radiologists and B readers, Drs. Ahmed, Ballard, Miller, and Pathak.[2] *See generally Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986); Decision and Order on Remand at 2, 5; Director's Exhibits 9, 10; Claimant's Exhibits 1, 4, 5. Further, the administrative law judge reasonably found that the readings of the August 25, 2004 x-ray by Drs. Hasson and Wiot, of idiopathic pulmonary fibrosis and interstitial fibrosis unrelated to coal dust exposure in the mid and lower lung zones, respectively, were outweighed by the readings of Drs. Cappiello and Miller identifying pneumoconiosis in all six lung zones. The administrative law judge noted that Dr. Hasson lacks radiological qualifications, and that Dr. Wiot's reading was inconsistent with the readings of the earlier x-ray, finding changes in all six lung zones. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order on Remand at 3-5; Director's Exhibit 9; Claimant's Exhibits 2, 3; Employer's Exhibits 1, 3, 4. Thus, weighing both the May 13 and August 25, 2004 x-ray evidence, the administrative law judge rationally found that the readings by Drs. Ahmed, Cappiello, Miller, and Pathak, outweighed the readings and comments by Drs. Hasson and Wiot. *See Chaffin*, 22 BLR at 1-300; Decision and Order on Remand at 5; Director's Exhibits 9, 10; Claimant's Exhibits 1-5; Employer's Exhibits 1, 3, 4. Consequently, we affirm the administrative law judge's finding that the x-rays do not establish that claimant's opacities did not arise out of coal mine employment.

Employer next argues that the administrative law judge erred in her evaluation of the October 9, 2003 CT scan and Dr. Scholl's handwritten notes on the CT scan reading, and thus erred in finding that employer did not rebut the Section 718.203(b) presumption based on the CT scan. Employer's argument lacks merit. The administrative law judge rationally found that Dr. Scholl's comments on the CT scan were equivocal "at best," because Dr. Scholl did not provide a specific etiology for the interstitial lung disease seen, but raised coal dust exposure as a possible etiology.[3] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order on Remand at 6; Director's Exhibit 9; Claimant's Exhibit 6.

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[2] The administrative law judge noted that Dr. Ballard is a Board-certified radiologist only, but the record indicates that he is also a B reader. Director's Exhibit 9. The record indicates that Dr. Pathak is a B reader, but does not indicate his additional qualification as a Board-certified radiologist. Claimant's Exhibit 1. However, employer does not challenge the administrative law judge's characterization of the radiological qualifications of any reader, and notes Dr. Pathak's dual qualifications in its brief. Employer's Brief at 4.

[3] Dr. Scholl interpreted the October 9, 2003 CT scan as showing interstitial lung disease, "not specific for a particular etiology." Director's Exhibit 9; Claimant's Exhibit 6. Dr. Scholl raised coal dust exposure as a possible etiology in his handwritten notes on the interpretation. *Id.*

Employer next argues that the administrative law judge erred in relying on Dr. Krishnamurthy's treatment notes to find that employer did not rebut the Section 718.203(b) presumption because the treatment notes do not support a diagnosis of coal workers' pneumoconiosis. This argument lacks merit. The administrative law judge rationally found that Dr. Krishnamurthy's treatment notes supported a diagnosis of coal workers' pneumoconiosis, since Dr. Krishnamurthy initially diagnosed "possible" pneumoconiosis and subsequently diagnosed pneumoconiosis in more definite terms.[4] *See Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 1531 n.1, 12 BLR 2-110, 2-112 n.1 (11th Cir. 1989); Decision and Order on Remand at 6; Claimant's Exhibit 6.

Employer further argues that the administrative law judge erred in relying on Dr. Hawkins's opinion and in rejecting the opinions of Drs. Fino, Hasson, and Wiot, to find that employer did not establish rebuttal of the Section 718.203(b) presumption. We disagree. The administrative law judge permissibly discounted Dr. Fino's opinion, that claimant has diffuse interstitial pulmonary fibrosis unrelated to coal dust exposure, because it was not supported by the medical literature that Dr. Fino relied upon to support his opinion.[5] *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); Decision and Order on Remand at 6; Employer's Exhibit 2. Moreover, the administrative law judge reasonably found that Dr. Fino's opinion, as well as that of Dr. Hasson, were outweighed by the remaining medical evidence of record, which the administrative law judge found supported a diagnosis of pneumoconiosis arising out of coal mine employment, rather than diffuse interstitial pulmonary fibrosis or idiopathic pulmonary fibrosis.[6] Decision and Order on Remand at 6; Director's Exhibit

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[4] Dr. Krishnamurthy initially saw claimant on November 6, 2003, and reported that the CT scan showed interstitial lung disease with honeycomb pattern, and diagnosed chronic interstitial lung disease, possibly due to coal workers' pneumoconiosis, but that other forms of pulmonary fibrosis needed to be considered. Claimant's Exhibit 6. While Dr. Krishnamurthy initially diagnosed pneumoconiosis with a question mark (on December 15, 2003), he later diagnosed pneumoconiosis without the question mark (in visits on May 12 and March 10, 2004). *Id.*

[5] As summarized by the administrative law judge, the medical literature relied upon by Dr. Fino stated that the disease diagnosed by Dr. Fino, diffuse interstitial pulmonary fibrosis, occurs more frequently in coal miners than in the general population, and that it is reasonable to conclude that the pigmented form of this disease is caused by coal mine dust exposure. Employer's Exhibit 2.

[6] Dr. Hasson's opinion was that claimant has idiopathic pulmonary fibrosis, based in part on the August 25, 2004 x-ray and October 9, 2003 CT scan, which the administrative law judge found supported a diagnosis of pneumoconiosis, and not idiopathic pulmonary fibrosis. *See* Director's Exhibit 9.

9; Employer's Exhibit 2. The administrative law judge rationally found that Dr. Wiot's readings of the May 13 and August 25, 2004 x-rays were outweighed by the other x-ray readings of record, as discussed above. The administrative law judge reasonably found that Dr. Hawkins's opinion was well-reasoned and well-documented since it diagnosed pneumoconiosis based, in part, on claimant's May 13, 2004 x-ray, and was supported by the positive readings of pneumoconiosis by Drs. Ahmed, Ballard, Cappiello, Miller, and Pathak, and Dr. Krishnamurthy's treatment records. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984); Decision and Order on Remand at 6; Director's Exhibit 9. Thus, the administrative law judge, as instructed, properly considered the comments to the x-ray and CT scan readings, and the medical opinion evidence, to find that employer did not rebut the presumption pursuant to Section 718.203(b). *See Cranor*, 22 BLR at 1-5-6. Consequently, we affirm the administrative law judge's finding that employer did not rebut the presumption that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). *See McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 1514-15, 12 BLR 2-108, 2-110 (11th Cir. 1988).

Pursuant to Section 718.204(c), the administrative law judge found Dr. Hawkins's opinion, that claimant is totally disabled due to pneumoconiosis, to be the most persuasive, because it was supported by the x-ray readings and treatment records. Decision and Order on Remand at 7. Conversely, the administrative law judge found that the contrary opinions of Drs. Fino and Hasson were not persuasive on the etiology of claimant's disabling impairment, because they were not supported by the x-ray readings and treatment records. *Id.*

Employer contends that the administrative law judge erred in finding that claimant established that his total disability was due to clinical pneumoconiosis pursuant to Section 718.204(c). Employer argues that the opinions of Drs. Fino and Hasson, as well as the October 9, 2003 CT scan and the August 25, 2004 x-ray readings by Drs. Hasson and Wiot, "clearly establish" that claimant's disability is due to interstitial pulmonary fibrosis unrelated to coal mine employment.[7] Employer's Brief at 14. Employer's contention lacks merit.

[7] In his May 13, 2004 report, Dr. Hawkins stated that claimant's moderate impairment is due solely to pneumoconiosis arising out of coal mine employment. Director's Exhibit 9. In his February 17, 2005 report, Dr. Fino related claimant's total disability to diffuse interstitial pulmonary fibrosis unrelated to coal mine employment. Employer's Exhibit 2. In his August 25, 2004 report, Dr. Hasson diagnosed claimant with a moderate restrictive ventilatory impairment, relating it to chronic peripheral interstitial lung disease, consistent with idiopathic pulmonary fibrosis. Director's Exhibit 9.

The administrative law judge permissibly credited Dr. Hawkins's opinion that claimant is totally disabled due to pneumoconiosis, as supported by the x-rays and treatment records. *See U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 993, 23 BLR 2-213, 2-240-41 (11th Cir. 2004). Moreover, the administrative law judge reasonably discounted the opinions of Drs. Fino, Hasson, and Wiot, after finding that the evidence established that claimant has clinical pneumoconiosis arising out of coal mine employment and not diffuse interstitial pulmonary fibrosis, idiopathic pulmonary fibrosis, or interstitial fibrosis unrelated to coal mine employment. *See Jones*, 386 F.3d at 993, 23 BLR at 2-240-41; Decision and Order on Remand at 7; Director's Exhibit 9; Employer's Exhibits 1, 2, 4. Employer essentially asks the Board to reweigh the evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge's findings and credibility determinations. Consequently, we affirm the administrative law judge's disability causation finding pursuant to Section 718.204(c). In light of our affirmance of the administrative law judge's findings pursuant to Sections 718.203(b) and 718.204(c), we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Benefits is affirmed.

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