BRB No. 99-1263 BLA

BILL HOLBROOK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY	)	
	)	
and	)	
	)	
UNDERWRITER SAFETY & CLAIMS	)	
	)	
Respondent/Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Timothy Wilson (Wilson, Sowards, Polites & McQueen), Lexington, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, and MCGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0678) of Administrative Law Judge Joseph E. Kane awarding 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). The parties stipulated that claimant had established twenty-four years of coal

[1]Claimant is the miner, Bill Holbrook, who filed his application for benefits on February

mine employment, and the administrative law judge considered the claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge further found that claimant had established every element necessary for entitlement pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, and 718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred by finding that the x-ray readings, biopsy reports, and medical reports of record established the presence of pneumoconiosis arising out of coal mine employment, and that claimant's total respiratory disability was due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Grant v. Director, OWCP,* 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

Pursuant to 20 C.F.R. §718.202(a)(1), employer challenges the administrative law judge's weighing of the x-ray evidence of record, contending that the Decision and Order fails to specify the basis for the administrative law judge's findings, and therefore fails to satisfy the provisions of the Administrative Procedure Act (the APA). Specifically, employer contends that the administrative law judge erred by failing to discuss the relative qualifications of the physicians who interpreted claimant's x-rays, and did not state why he credited the readings of Dr. West over the contrary readings of Drs. Halbert, Poulos, Barrett, Sargent and Leiber. Employer further argues that the administrative law judge

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15, 1997. Director's Exhibit 1.

[2]The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

[3]The Administrative Procedure Act, 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).

mischaracterized, as not ruling out any type of pneumoconiosis, the interpretations of those physicians who did not classify claimant's x-rays according to the ILO-U/C system, but indicated that the films were inconsistent with coal workers' pneumoconiosis.

The record includes forty-six readings of eighteen x-rays. Thirteen x-rays were interpreted as negative for the existence of pneumoconiosis, *see* Claimant's Exhibit 1; Employer's Exhibit 3; Director's Exhibits 20, 25, 42, 46, 49, five x-rays were considered unreadable, *see* Director's Exhibits 42, 46, 50, 54, and twelve x-rays were read as positive for pneumoconiosis in accordance with the ILO system. Director's Exhibits 17, 22, 23, 26, 27, 42, 51. Six of the twelve positive interpretations indicated that the changes seen on x-ray were not compatible with coal workers' pneumoconiosis. Director's Exhibits 24, 26, 27, 42. The remaining x-ray interpretations did not specifically address the issue of the existence of pneumoconiosis. Director's Exhibits 21, 42, 44, 48, 50, 51, 54. The administrative law judge listed the readings, with the exception of the positive reading of Dr. Dineen dated February 22, 1997, *see* Director's Exhibit 17, noted the qualifications of each reader, and found that the x-rays showed:

> changes consistent with pneumoconiosis; whether a reader classified x-ray changes as such or not depended upon what the reader felt the changes were due to. Many physicians who felt that the changes were not consistent with coal workers' pneumoconiosis did not check off the size or shape of the opacities.

Decision and Order at 28. The administrative law judge further rejected Dr. Branscomb's opinion that stated, "scoring a film positive does not mean the changes are due to pneumoconiosis," and the administrative law judge determined that "I do not find that any of the physicians concluded that the changes were not consistent with any type of pneumoconiosis." Decision and Order at 28. The administrative law judge additionally found that the doctors used the terms "coal workers' pneumoconiosis" and "pneumoconiosis", interchangeably, and thus, that they did not explicitly rule out other types of pneumoconiosis. Decision and Order at 29. The administrative law judge thereupon found that the existence of pneumoconiosis had been established pursuant to Section 718.202(a)(1), and noted that the etiology of such pneumoconiosis would be discussed pursuant to 20 C.F.R. §718.203.

We agree with employer that the administrative law judge's findings regarding the x-ray evidence of record fail to satisfy the requirements of the APA. The administrative law

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[4]The ILO-U/C system classifies "the radiological appearances seen in all types of pneumoconiosis." *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconiosis,* International Labour Office, p. V (Revised Ed. 1980); 20 C.F.R. §718.102(b).

judge has not provided the rationale for his crediting of the readings diagnosing pneumoconiosis, over the readings which did not diagnose the disease. *Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985). Accordingly, remand is required for the administrative law judge to reconsider the clinical x-ray evidence and provide his findings of fact and conclusions of law. On remand, the administrative law judge must specifically consider and discuss all the readings of record, and the qualifications of each physician. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Furthermore, we agree with employer that substantial evidence does not support the administrative law judge's finding that those physicians who did not classify claimant's x-rays on the ILO x-ray form, but found no coal workers' pneumoconiosis did not rule out other forms of pneumoconiosis, since the purpose of the x-ray form is to classify all forms of pneumoconiosis. *See Cranor v. Peabody Coal Co.*, 21 BLR 1-201 (1999). We reject however, employer's contention that an x-ray reading classified as positive according to the ILO-U/C system is not a diagnosis of pneumoconiosis, but a statement only that such a condition is possible, as such a contention is contrary to established law. 20 C.F.R. §718.202(a)(1); *Dixon, supra; cf. Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Pursuant to 20 C.F.R. §718.202(a)(2), employer contends that the administrative law judge erred by finding that the biopsy evidence of record was inconclusive and did not establish the presence or absence of pneumoconiosis. Employer asserts that the administrative law judge failed to consider all the relevant medical opinions of record, failed to provide the basis of his finding, mischaracterized the opinion of Dr. Colby, failed to consider the validity and thoroughness of the physicians' reasoning, their qualifications, or their familiarity with claimant's condition, and failed to apply the proper burden of proof by not crediting the opinions of Drs. Colby, Wilhelmus and Kleinerman.

The record contains the opinions of numerous physicians who reviewed the results of claimant's November 1996 biopsy, and diagnosed interstitial lung disease. Dr. Wilhelmus found emphysema and interstitial fibrosis, stated that claimant might have Goodpasture's syndrome, idiopathic hemosiderosis, or other bleeding tendency, and requested a second opinion from Dr. Colby. Director's Exhibit 48. Dr. Colby also found interstitial fibrosis, and stated that he did not believe the increase in pigment warranted a diagnosis of coal workers' pneumoconiosis, but that "[s]ince coal miners are exposed to anthracotic pigment which is also seen in cigarette smoking, it may be difficult to completely separate the effects of exposure to coal from the effects of exposure to cigarettes" and that the pathologic changes are "for the most part (and perhaps entirely), related to cigarette smoking." Director's Exhibit 48. Dr. Caudill opined that the biopsy revealed interstitial fibrosis and contained carbonatious material consistent with pneumoconiosis. Director's Exhibit 52. Dr. Todd found that the biopsy revealed numerous interalveolar hemosiderin laden macrophages consistent with Goodpasture's syndrome, idiopathic pulmonary hemosiderosis or other bleeding tendencies, but that no particular bleeding tendency had been identified. Director's

Exhibit 48. Dr. John Myers found that the biopsy did not rule out the presence of coal workers' pneumoconiosis, nor did it definitely establish its existence. Director's Exhibit 41. Dr. Dineen stated that the biopsy did not reveal the presence of coal workers' pneumoconiosis, but did reveal interstitial lung disease. Director's Exhibit 51. Dr. Broudy diagnosed idiopathic pulmonary fibrosis, but did not feel the biopsy showed coal workers' pneumoconiosis. Director's Exhibits 55, 56. Drs. Westerfield, Lockey and Branscomb reviewed the biopsy report and diagnosed interstitial lung disease, but opined that coal workers' pneumoconiosis was not established. Director's Exhibits 57, 58; Employer's Exhibit 2. Dr. Kleinerman reviewed the biopsy slides and diagnosed interstitial fibrosis, but found no evidence of coal workers' pneumoconiosis. Employer's Exhibit 3.

The administrative law judge accurately noted all the aforementioned medical reports, but considered only the opinions of the physicians who reviewed the actual pathology slides. Decision and Order at 30-31. The administrative law judge found that the biopsy evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). However, the administrative law judge determined that the medical reports were inconclusive regarding the cause of claimant's interstitial lung disease. Decision and Order at 31. The administrative law judge found that Dr. Wilhelmus was unable to provide a definite opinion on the presence of pneumoconiosis, and that Dr. Colby was equivocal regarding the role coal dust exposure played in claimant's lung disease, which countered Dr. Kleinerman's definite statement that coal dust exposure played no role in claimant's lung disease. Decision and Order at 30-31.

Contrary to employer's contention, the administrative law judge accurately characterized the opinion of Dr. Colby as equivocal since this physician indicated that it was difficult to separate the effects of smoking and coal dust exposure, and was uncertain whether smoking was the sole cause of claimant's condition. *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). In addition, the administrative law judge rationally determined that both Drs. Wilhelmus and Colby failed to affirmatively diagnose the absence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992). Remand is required however, since the administrative law judge failed to consider the opinions of the physicians who reviewed the biopsy report, and rendered opinions on its results. Employer's Exhibit 2; Director's Exhibits 41, 48, 51, 52, 55-58. *Rowe v. Director, OWCP,* 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Perry, supra; Tackett v. Director, OWCP,* 7 BLR 1-703 (1985). On remand, the administrative law judge must consider all the relevant evidence of record, determine if the evidence is documented and reasoned, and provide a thorough rationale to support his findings. *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Wojtowicz, supra.* The administrative law judge may also consider the relative qualifications of each physician, but is not required to credit any particular opinion on this basis. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989); *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988); *Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987).

Employer also challenges the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). Employer argues that the administrative law judge erred by finding that Dr. Caudill was claimant's treating physician and by crediting his opinion solely on that basis, and by determining that Dr. Caudill independently diagnosed the presence of pneumoconiosis. Employer also contends that the administrative law judge erroneously credited Dr. Baker's report as supportive of Dr. Caudill's opinion, and that the administrative law judge failed to state why he credited the opinions of Drs. Caudill and Baker over the contrary opinions of Drs. Branscomb, Broudy, Westerfield, Dineen, Kleinerman, and Lockey. Lastly, employer contends that the administrative law judge erred by failing to consider claimant's CT scans and the qualifications and reasoning of the other physicians who provided medical reports.

The record contains medical reports from numerous physicians and the results of two CT scans. The CT scans, performed in May 1996 and July 1996, diagnosed infiltration in both lower lung fields, and pneumonia respectively. Director's Exhibit 48. The administering physicians did not interpret the CT scans as revealing the presence of pneumoconiosis. Drs. Baker, Myers, and Caudill all diagnosed totally disabling coal workers' pneumoconiosis. Director's Exhibits 18, 41, 52. Drs. Broudy, Westerfield, Dineen, Lockey, Branscomb and Kleinerman, concluded that claimant did not have coal workers' pneumoconiosis, although they all diagnosed some type of totally disabling interstitial lung disease. Employer's Exhibits 1, 2; Director's Exhibits 15, 44, 51, 54-58. Drs. Todd, White and Collins each diagnosed some form of totally disabling interstitial lung disease, but made no statement regarding the presence or absence of coal workers' pneumoconiosis. Director's Exhibits 42, 48.

The administrative law judge considered the medical reports, but not the CT scans, and credited the opinion of Dr. Caudill, over the contrary opinions, as he found Dr. Caudill was claimant's treating physician since 1978, and his opinion was well reasoned and documented. Decision and Order at 31-32. The administrative law judge further found Dr. Caudill's opinion supported by the opinion of Dr. Baker. The report of Dr. Branscomb , a reviewing physician, who diagnosed idiopathic pulmonary hemosiderosis, was given less weight as none of the other examining physicians diagnosed this condition. The administrative law judge further accorded less weight to the reports of Drs. Broudy, Westerfield, Dineen and Lockey because he found they were contradictory since they all provided differing diagnoses, and had "not reached a definitive diagnosis sufficient to overcome the opinion of the treating physician." Decision and Order at 32. Dr. Lockey's report was also given less weight since one of the reasons he concluded that pneumoconiosis

[5]We affirm the administrative law judge's finding that the existence of pneumoconiosis cannot be established pursuant to 20 C.F.R. §718.202(a)(3), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Decision and Order at 31.

was not present was due to his belief that coal workers' pneumoconiosis causes persistent changes on x-ray which conflicted with the administrative law judge's finding that the classified x-rays were almost entirely read as positive for pneumoconiosis.

We hold that remand is required since the administrative law judge neglected to consider the CT scans pursuant to Section 718.202(a)(4). *Rowe, supra; Perry, supra; Tackett, supra.* We reject however, employer's argument that the administrative law judge erred in finding that Dr. Caudill was claimant's treating physician, since the record indicates that Dr. Caudill has treated claimant since 1978, and we further find no support for the contention that Dr. Caudill did not independently diagnose the presence of coal workers' pneumoconiosis since the evidence establishes that although he consulted with and reviewed other physician's opinions and test results during the course of claimant's treatment, he actively participated in reaching the diagnosis of pneumoconiosis. In addition, treating physicians may be accorded greater weight than examining or reviewing physicians if the administrative law judge's reasoning is rational. *Griffith v. Director, OWCP* F.3d, 19 BLR 2211 (6th Cir. 1995); *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Revnak v. Director, OWCP*, 7 BLR 1-771 (1985). Moreover, the administrative law judge did not err by finding that Dr. Baker's report supported the opinion of Dr. Caudill. Despite the fact that the administrative law judge did not find that the x-ray evidence established the existence of coal workers' pneumoconiosis, Dr. Baker's opinion, that claimant had totally disabling coal workers' pneumoconiosis, was based on his examination of claimant, his review of other medical evidence, and claimant's medical and work history in addition to claimant's x-rays. *Trumbo, supra.* On remand, the administrative law judge must consider and discuss all the relevant evidence of record, determine which reports are reasoned and documented and provide the rationale for his findings. *Rowe, supra; Wojtowicz, supra.*

Pursuant to Section 718.203, employer contends that the administrative law judge erred by failing to consider whether the x-ray evidence established the presence of coal workers' pneumoconiosis. We agree. The Decision and Order indicates that claimant received the benefit of the presumption that his pneumoconiosis arose out of his coal mine employment, which presumption, the administrative law judge found was unrebutted. The administrative law judge stated that the issue of whether the x-ray evidence classified in accordance with the ILO-U/C system for the presence of pneumoconiosis reflects diagnoses of coal workers' pneumoconiosis is relevant at Section 718.203, but failed to discuss this evidence at this section. *Cranor, supra.* Since the administrative law judge did not discuss relevant evidence when considering whether employer established rebuttal of the presumption, remand of the administrative law judge's finding on this issue is necessary. *Rowe, supra; Perry, supra; Tackett, supra.* On remand, the administrative law judge must reconsider all the relevant evidence on this issue and provide a statement of his findings of fact and conclusions of law.

Lastly, employer challenges the administrative law judge's finding that claimant

established that his totally disabling respiratory impairment was due to his coal dust exposure pursuant to Section 718.204(b). Subsequent to the administrative law judge's determination that claimant had established the existence of coal workers' pneumoconiosis pursuant to Section 718.202(a), he summarily concluded that claimant had also established that he was totally disabled therefrom. Decision and Order at 33. As the administrative law judge did not discuss any of the medical evidence pursuant to Section 718.204(b), remand of the administrative law judge's finding of causation is also required. On remand, the administrative law judge must specifically discuss the relevant medical evidence and provide the rationale for his findings. *Rowe, supra; Perry, supra; Tackett, supra.*

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]We affirm the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).