BRB No. 01-0203 BLA

JAMES M. CAREY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Mark Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

Per Curiam:

Employer appeals the Decision and Order Awarding Benefits (99-BLA-1291) of Administrative Law Judge Ainsworth H. Brown 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).[1] The administrative law judge considered the instant claim, a duplicate claim which was filed on July 15, 1998, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000).[2] After crediting claimant with twenty-eight and three quarter years of coal mine employment based upon the stipulation of the parties, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). The administrative law judge determined that, therefore, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Additionally, the administrative law judge found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was not rebutted. The administrative law judge further found the evidence of record sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4) (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Consequently,

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). On August 10, 2001, the Board rescinded its prior order requiring the parties to submit briefs on the issue of the impact of the amended regulations in this case.

[2]Claimant filed a previous claim on November 16, 1993. Director's Exhibit 38. Administrative Law Judge Ralph A. Romano denied this claim in a Decision and Order dated August 3, 1995, finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id*. Claimant did not take any further action thereafter until filing the instant duplicate claim on July 15, 1998. Director's Exhibit 1.

the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings under Sections 718.202(a)(1) and (a)(4) (2000), and 718.204(b) (2000). Claimant has filed a response brief in support of the administrative law judge's decision awarding benefits. Employer has filed a reply brief reiterating contentions raised in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating he agrees in part, and disagrees in part, with certain of employer's contentions on appeal.[3]

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 challenging the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the presence of pneumoconiosis under Section 718.202(a)(1) (2000), employer first contends that the administrative law judge erred in limiting the number of x-ray interpretations each party could submit to two. Specifically, employer contends that the administrative law judge erred in failing to consider interpretations of the May 5, 1998 x-ray from Drs. Ahmed, Miller and Gaylor, Director's Exhibits 17, 18, 21, 30, as well as negative interpretations from Drs. Wheeler, Scott, Gaylor and Duncan of the film taken on November 20, 1998, Director's Exhibits 30, 31, all of which had already been submitted at the district director level prior to the hearing held on June 28, 2000. The Director states that he agrees with employer to the extent that the administrative law judge relied on the Department of Labor's then-proposed regulations regarding evidentiary development as a basis for limiting the number of readings allowed. Employer's contention has merit.

In a pre-hearing Order dated February 7, 2000, the administrative law judge ruled that "a maximum of two (2) interpretations of each x-ray will be received in the record from each party, except if fairness requires additional readings." February 7, 2000 Order at 1. While the administrative law judge did not provide a basis for this ruling in his pre-hearing Order,

[3]We affirm, as unchallenged on appeal, the administrative law judge's findings with respect to length of coal mine employment, and with respect to total disability under 20 C.F.R. §718.204(c) (2000). *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983); Decision and Order at 3, 8-9; *see* 20 C.F.R. §718.204(b).

the administrative law judge indicated at the hearing that he based his ruling on the proposed regulations, which he stated were "wending their way over to the Office of Management and Budget." Hearing Transcript at 11. As employer and the Director note, the evidentiary development provisions of the amended regulations at 20 C.F.R. §725.414, limiting the number of x-ray interpretations each party may submit, apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2(c). Thus, the new evidentiary provisions do not apply to the instant claim, and the administrative law judge could not rely on them to limit the number of admissible x-ray readings. We, therefore, vacate the administrative law judge's pre-hearing Order limiting to two the number of x-ray interpretations admissible from each party, inasmuch as the basis for the administrative law judge's Order was improper.

Employer also argues that the administrative law judge erred in ignoring the film dated August 5, 1998, which was read as negative by four B reader/Board-certified radiologists, on the ground that the film was "last in the possession of employer's expert and disappeared before claimant could have his own medical experts interpret it." *See* Decision and Order at 5. We disagree. In support of its contention, employer states that it is unclear from the record whether the x-ray was misplaced by employer's experts or the Department of Labor. Employer argues that, moreover, claimant had an opportunity to examine the x-ray since the film was read in the first place at claimant's request, by Dr. Rashid as positive for pneumoconiosis. Director's Exhibit 20. An administrative law judge has broad discretion in procedural matters, however. In the instant case, it was rational for the administrative law judge to essentially find that it would be unfair to credit the re-readings of the August 5, 1998 x-ray by employer's experts since the physicians reading the film for employer are B reader/ Board-certified radiologists, and since claimant had no opportunity to submit a reading of the film from a physician possessing similar qualifications.[4] We thus reject employer's contention that the administrative law judge erred in according the readings of the August 5, 1998 film no probative value.

We also reject employer's contention that the administrative law judge erred because he simply counted the number of positive and negative x-ray interpretations rather than considering the detailed, written analyses of Drs. Wheeler, Scott and Gaylor explaining why the x-ray dated May 5, 1998 was, in their opinions, negative. Contrary to employer's suggestion, the administrative law judge is not required to accord greater weight to an x-ray

[4]Unlike Drs. Duncan, Wheeler, Scott and Gaylor, who read the August 5, 1998 film for employer, Dr. Rashid, who initially interpreted the film at claimant's request, is neither a B reader nor a Board-certified radiologist. Director's Exhibits 19, 20, 30.

reading based upon the thoroughness of an x-ray report. Rather, the administrative law judge may properly weigh the x-ray evidence by correctly taking into consideration the classification noted, the qualifications of the x-ray readers, and the quantity of the evidence. *See Roberts v. Bethlehem Mining Corp.*, 8 BLR 1-211 (1985).

In addition, noting that claimant had no coal dust exposure subsequent to Judge Romano's finding in the previous Decision and Order, issued in 1995, that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, employer contends that the new x-ray evidence cannot establish that claimant's condition has worsened to the point where he now has pneumoconiosis because pneumoconiosis is not a progressive disease. Employer asserts that, on account of the Department of Labor's rule-making proceedings for the amended regulations, prior case law on the progressivity of pneumoconiosis is no longer valid. This contention lacks merit. As the Director notes in his letter in response to employer's appeal, the Department of Labor explained in published comments to the revised regulations that the revised regulations reflect a codification of prior case law, recognizing the progressive nature of pneumoconiosis. *See* 65 Fed. Reg. 79920, 79971 (December 20, 2000); *see also LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

In summary with respect to the administrative law judge's findings under Section 718.202(a)(1) (2000), we vacate the administrative law judge's February 7, 2000 pre-hearing Order limiting the number of x-ray interpretations the parties could submit. Consequently, we vacate the administrative law judge's finding that the new x-ray evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) (2000). *See* 20 C.F.R. §718.202(a). On remand, the administrative law judge must consider affording the parties the opportunity to submit the interpretations of the May 5, 1998 and November 20, 1998 x-rays which were submitted at the district director level.

Employer further challenges the administrative law judge's finding that the new medical opinion evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000). The newly submitted medical opinion evidence consists of the opinions of Drs. Aquilina and Rashid on the one hand, which indicate that claimant has pneumoconiosis, Director's Exhibits 10, 13, 32; Claimant's Exhibit 5, and the opinions of Drs. Dittman and Fino on the other, which indicate that claimant suffers from chronic obstructive pulmonary disease due to cigarette smoking, and not pneumoconiosis. Director's Exhibits 11, 12, 31, 38; Employer's Exhibits 4, 5. Employer contends that the administrative law judge gave disparate treatment to the contrary sets of opinions, merely reciting the opinions of Drs. Aquilina and Rashid without subjecting them to any scrutiny or analysis, while subjecting the opinions of Drs. Fino and Dittman to extensive review. Employer asserts that the opinions of Drs. Aquilina and Rashid should have been rejected as unreasoned because the doctors failed to state any basis for their shared opinion that claimant

has pneumoconiosis, other than claimant's coal dust exposure. Employer further contends that the administrative law judge improperly discounted the opinions of Drs. Dittman and Fino by mischaracterizing, as invalid, certain pulmonary function study results relied upon by the two doctors in rendering their opinions. In addition, employer argues that the administrative law judge's rejection of Dr. Fino's opinion was improper because the administrative law judge incorrectly stated that Dr. Fino provided only one basis for his opinion that claimant does not have pneumoconiosis, thereby mischaracterizing Dr. Fino's opinion.

Employer's contentions have merit, in part. Initially, we reject employer's contention that the administrative law judge should have rejected the opinions of Drs. Aquilina and Rashid by finding them unreasoned as a matter of law. Contrary to employer's assertion, the administrative law judge could conclude that Drs. Aquilina and Rashid based their diagnoses of pneumoconiosis on several factors, including their x-ray interpretations, their understanding that claimant has a coal dust exposure history of approximately thirty years, and the objective studies they administered. Director's Exhibits 10, 13, 32; Claimant's Exhibit 5. Whether a medical opinion is reasoned and explained is for the administrative law judge, as fact-finder, to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

We do agree with employer, however, that the administrative law judge has not provided a sufficient basis for crediting the opinions of Drs. Aquilina and Rashid because the administrative law judge merely recited the findings contained in these opinions without adequately explaining why the opinions are worthy of determinative weight. Decision and Order at 6-7. Where an administrative law judge does not provide an adequate explanation for crediting or discounting evidence, the Board will remand for reconsideration of the relevant evidence. *See Brewster v. Director, OWCP*, 7 BLR 1-120 (1984).

With regard to the opinions of Drs. Dittman and Fino, we reject employer's contention that the administrative law judge improperly discounted them by focusing on the underlying pulmonary function study results upon which the doctors stated they based their opinions. Drs. Dittman and Fino found that pulmonary function studies administered to claimant on November 20, 1999 and April 7, 2000 exhibited reversibility of claimant's condition after the administration of bronchodilators. Employer contends that the administrative law judge mischaracterized the post-bronchodilator results of the pulmonary function studies as invalid, and erred in rejecting the opinions of Drs. Dittman and Fino because the two doctors relied on invalid testing. Contrary to employer's assertion, however, the administrative law judge correctly stated that the post-bronchodilator values on the November 20, 1999 and April 7, 1999 pulmonary function tests were valid, according to Drs. Kaplan and Levinson, who reviewed the studies. Decision and Order at 8; Employer's Exhibits 2, 3. The administrative law judge also properly found, however, that the pre-bronchodilator values on these

pulmonary function tests were invalid, according to Drs. Kaplan and Levinson, whose opinions, with respect to these studies, the administrative law judge properly relied upon, in light of these doctors' superior qualifications.[5] *Id*. We hold that it was rational for the administrative law judge to discount the opinions of Drs. Dittman and Fino to the extent that they based their opinions on the reversibility of claimant's condition after bronchodilators were administered in the aforementioned pulmonary function studies. Because the administrative law judge properly found that the pre-bronchodilator values were invalid, he rationally concluded that no improvement in claimant's condition could accurately be gauged from a perceived difference in the pre and post-bronchodilator values. Decision and Order at 8.

We vacate the administrative law judge's rejection of the opinions of Drs. Dittman and Fino, however, to the extent that he rejected the opinions on the basis that they were not corroborated by the x-ray interpretations, the majority of which, the administrative law judge found, were positive for pneumoconiosis. Because we vacate the administrative law judge's finding at Section 718.202(a)(1) (2000) for the reasons discussed *supra*, the administrative law judge should reconsider whether discounting the opinions of Drs. Dittman and Fino on this basis is appropriate. In addition, we agree with employer that the administrative law judge erred by failing to fully consider the bases Dr. Fino gave for his opinion that claimant does not have pneumoconiosis; specifically that claimant exhibited obstruction in the small airways of his lungs, and had normal arterial blood gas test results, both of which Dr. Fino stated are inconsistent with the disease. Employer's Exhibit 3.

[5]The administrative law judge correctly stated that Drs. Kaplan and Levinson are Board-certified in internal medicine and pulmonary diseases. Decision and Order at 8; Employer's Exhibits 2, 3.

We thus vacate the administrative law judge's finding that the new medical opinion evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000), and remand the case for the administrative law judge to reconsider the newly submitted medical opinions of Drs. Aquilina, Rashid, Dittman and Fino, and to provide a sufficient basis for crediting or discounting each opinion, taking the entirety of each opinion into account, as well as the relative qualifications of the physicians. On remand, the administrative law judge must weigh all of the like and unlike evidence together under Section 718.202(a)(1)-(4) prior to making his ultimate determination as to whether the new evidence is sufficient to establish the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). If the administrative law judge finds the newly submitted evidence sufficient to establish the existence of pneumoconiosis, he must then weigh all of the evidence of record, both old and new, in addressing this element of entitlement and the remaining elements of entitlement, if reached, on the merits. *See Swarrow, supra*; 20 C.F.R. §725.309 (2000).[6]

[6]We note that the amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

Employer contends that the opinions of both Drs. Aquilina and Rashid are insufficient to establish total disability causation. Since the administrative law judge did not purport to rely upon Dr. Rashid's opinion to find causation established, we need not address employer's contentions regarding that opinion. Because we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a) (2000), *see* 20 C.F.R. §718.202(a), we also vacate the administrative law judge's finding that the evidence of record is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *See* 20 C.F.R. §718.204(c).[7] In vacating the administrative law judge's finding, however, we reject employer's contention that the administrative law judge was required to reject, as a matter of law pursuant to *Lango v. Director, OWCP*, 104 F.3d 573, 21BLR 2-12 (3d Cir. 1997), the opinion of Dr. Aquilina as an unexplained opinion. Contrary to employer's contention, Dr. Aquilina specifically explained, in his deposition, the bases for his opinion that claimant's totally disabling respiratory impairment is due to pneumoconiosis.[8] Claimant's Exhibit 5 at 16 *et seq.* We further reject employer's contention that, in light of the decisions of the United States Courts of Appeals for the Fourth and Seventh Circuits in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998) and *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), respectively, claimant is precluded from establishing entitlement to benefits because he is independently totally disabled by a shoulder injury. The amended regulations provide that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether the miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). On remand, the administrative law judge should reconsider, if reached, whether the evidence is sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(c).

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.

---

[7]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[8]Dr. Aquilina explained that the fact that claimant worked in the mines for approximately thirty years, has pneumoconiosis, and exhibits both a restrictive and obstructive impairment indicates to him that claimant's totally disabling respiratory impairment is due to his pneumoconiosis. Claimant's Exhibit 5 at 16 *et seq*.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge