BRB No. 03-0180 BLA

BOBBY YATES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CALICO COAL COMPANY	)	DATE ISSUED: 11/21/2003
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Granting Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph (Wolfe Williams & Rutheford), Norton, Virginia, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order Granting Benefits (00-BLA-0097) of

Administrative Law Judge Alice M. Craft 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).[1] The administrative law judge found a material change in conditions established in this duplicate claim because the newly submitted evidence established the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. Decision and Order at 5.[2] Turning, therefore, to the record as a whole, the administrative law judge found that claimant established: a coal mine employment history of thirty and one-half years; the existence of pneumoconiosis; that pneumoconiosis arose out of coal mine employment; total disability; and that total disability was due to pneumoconiosis. Benefits were, accordingly, awarded.

On appeal, employer contends that the administrative law judge erred: in finding the newly submitted x-ray and medical opinion evidence established the existence of pneumoconiosis, and therefore, a material change in conditions; in failing to consider, once he had found a material change established, all of the evidence of record, both old and new, to determine whether the existence of pneumoconiosis was established; and in finding that disability due to pneumoconiosis was established. Claimant responds, urging that the administrative law judge's award of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), responds for the limited purpose of challenging employer's assertion that claimant must establish the progressive and latent nature of his pneumoconiosis. The Director argues that employer's contention in this regard has no support in the regulations or case law.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a);

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[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant initially filed a claim for benefits on July 6, 1994. Director's Exhibit 37. After a hearing, Administrative Law Judge Sheldon Lipson issued a Decision and Order denying benefits because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 37. The Board affirmed the denial of benefits. *Yates v. Calico Coal Co.*, BRB No. 97-0837 BLA (Nov. 21, 1997)(unpub.). No further action was taken by claimant until April 8, 1999, when he filed the instant claim. Director's Exhibit 1. On November 4, 2002, Administrative Law Judge Alice M. Craft issued the Decision and Order awarding benefits on the duplicate claim from which employer now appeals.

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Employer argues that the weight of the evidence developed between August 1997 and May 2001 fails to establish the existence of pneumoconiosis and that the administrative law judge erred in finding that the readings of the eight new x-rays were in equipoise. Specifically, employer contends that the x-ray readings were not evenly balanced because although claimant's August 1997 x-ray was read five times, it was interpreted as positive only once, by Dr. DePonte, who is board-certified and a B-reader, but it was read as negative by four radiologists, two of whom are board-certified and B-readers, as well as professors of radiology, and two who are B-readers.[3] Likewise, employer contends that the November 1999 x-ray was read as positive only by Dr. DePonte, while it was read as negative by Drs. Wheeler and Scott, who are dually qualified professors of radiology, as well as by Drs. Castle, Hippensteel, and Fino, who are B-readers. Thus, employer argues that since negative readings were provided by doctors who are professors of radiology, in addition to being board-certified and B-readers, and there were a greater number of negative readings, the administrative law judge erred in finding the readings of the August 1997 and November 1999 x-rays to be in equipoise.

The administrative law judge found that the readings of the newly submitted x-ray evidence did not establish either the presence or absence of pneumoconiosis because: the readings of two of the x-rays, dated August 4, 1997 and November 18, 1999, were in equipoise, *i.e.*, dually qualified readers read the x-rays as both negative and positive; the readings of three of the x-rays, those dated July 30, 1998, February 14, 2000, and May 4, 2001, were negative for the existence of pneumoconiosis because they were read negative by either dually qualified or B-readers; and the readings of three x-rays, those dated June 14, 1999, December 14, 2000, and December 18, 2000, were positive for the existence of pneumoconiosis because they were read as positive by dually qualified physicians and B-readers. The administrative law judge concluded, therefore, that the new x-ray evidence failed to establish either the presence or absence of pneumoconiosis. This was reasonable. 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Contrary to employer's argument, the administrative law judge did not err in finding

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[3] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

the readings of the August 1997 and November 1999 x-ray to be in equipoise because he did not accord greater weight to the readings of physicians who were also professors of radiology. While employer correctly points out that the administrative law judge may consider professorships in radiology in determining the weight to be assessed x-ray readings, *Worhach v. Director, OWCP*, 17 BLR 1-105, 108 (1993)(an administrative law judge may properly consider factors relevant to level of radiological competence, such as a professorship in the field); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(consideration may be given to teaching credentials in radiology), he is not required to do so. *See* 20 C.F.R. §718.202(a)(1). Thus, the administrative law judge in this case properly considered those credentials he was required to consider in assessing the credibility of the x-ray evidence and properly concluded that the x-ray evidence standing alone did not establish either the presence or absence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

Employer next argues that the administrative law judge erred in concluding that Dr. Rasmussen's lone diagnosis of pneumoconiosis, Director's Exhibit 6, outweighed the contrary, better reasoned opinions of the better qualified physicians, Drs. Fino, Tuteur and Hippensteel, Employer's Exhibits 5, 7, 10, 12, 13, 16-18. Specifically, employer contends: the administrative law judge's treatment of the medical opinions is inconsistent with her finding on the x-ray evidence; Dr. Rasmussen's diagnosis of clinical pneumoconiosis is merely a restatement of an x-ray reading; the administrative law judge credited the diagnosis based on the erroneous assumption that pneumoconiosis is an invariably latent and progressive disease; and the administrative law judge erred in crediting Dr. Rasmussen's finding of legal pneumoconiosis when Dr. Rasmussen never explained how he concluded that claimant's chronic obstructive pulmonary disease was due to coal mine employment, instead of claimant's longstanding smoking history.

In concluding that claimant established the existence of pneumoconiosis, the administrative law judge found Dr. Rasmussen's opinion entitled to the greatest weight because it was documented, well-reasoned, comprehensive, and consistent with the Act and regulations. Decision and Order at 25. The administrative law judge also noted that Dr. Rasmussen was a board-certified internist. Specifically, the administrative law judge noted that Dr. Rasmussen performed a thorough examination of claimant, including an exercise test and that his diagnoses were supported by objective studies, examination findings and histories. The administrative law judge also noted that Dr. Rasmussen took into account claimant's cardiac difficulties, and accounted "for the presence of cough, expectoration, wheezing and chest pain in claimant." Decision and Order at 25. The administrative law judge stated that while Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on history and positive x-ray, he also diagnosed chronic obstructive pulmonary disease due to coal mine employment and cigarette smoking, consistent with the definition of pneumoconiosis under the Act and regulations. The administrative law judge further noted that Dr. Rasmussen's opinion withstood Dr. Hippensteel's criticisms because Dr. Rasmussen was in a better position than Dr. Hippensteel to determine claimant's cardiac and pulmonary

conditions because Dr. Rasmussen gave claimant an exercise test. Likewise, the administrative law judge accorded greater weight to the opinion of Dr. Rasmussen than to that of Dr. Tuteur because Dr. Tuteur acknowledged that while claimant's oxygen desaturation was consistent with coal workers' pneumoconiosis, he would not relate it to coal workers' pneumoconiosis in the absence of a finding of coal workers' pneumoconiosis on x-ray and evidence of a restrictive impairment. The administrative law judge observed, however, that Dr. Tuteur's opinion was countered by x-rays finding the existence of clinical pneumoconiosis and the recognition by the Act and regulations that coal workers' pneumoconiosis can cause an obstructive impairment. Further, the administrative law judge noted that Dr. Tuteur's opinion that claimant's oxygen desaturation was caused by a heart condition and pulmonary vascular consideration, not coal workers' pneumoconiosis, was not supported by claimant's treatment notes. The administrative law judge, therefore, found that Dr. Tuteur's opinion was not as well-reasoned as Dr. Rasmussen's because it was not as well supported by underlying evidence. Additionally, the administrative law judge found the opinion of Dr. Fino was not credible, based on Dr. Fino's statements concerning the etiology of claimant's obstructive impairment: although the doctor was uncertain of the cause, he insisted it was not coal mine employment. The administrative law judge concluded therefore that in considering the medical opinion evidence, along with the x-ray evidence, claimant established the existence of pneumoconiosis. This was reasonable. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Contrary to employer's argument, the administrative law judge's findings on the medical opinions were not inconsistent with his findings on the x-ray evidence because he found that the new medical opinion evidence established the existence of pneumoconiosis, while the new x-ray evidence did not show either the presence or absence of coal workers' pneumoconiosis. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We need not consider employer's argument that the administrative law judge erred in crediting Dr. Rasmussen's finding of clinical pneumoconiosis because it was merely a restatement of a positive x-ray since the administrative law judge credited Dr. Rasmussen's finding of legal pneumoconiosis. 20 C.F.R. §718.201; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Additionally, contrary to employer's argument, the regulation requires only that the presence of pneumoconiosis as defined by the Act, 20 C.F.R. §718.201(c) be established, not that claimant must, in addition, establish that his particular pneumoconiosis is latent and progressive. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47, BLR (D.D.C. 2001); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Lane Hollow*

Coal Co. v. Director, OWCP, 137 F.3d 799, 803, 21 BLR 2-302 (4th Cir. 1998). Further, contrary to employer's argument, the administrative law judge found that Dr. Rasmussen explained how he determined claimant's coal mine employment was a more significant factor than smoking in causing claimant's pulmonary impairment. Decision and Order at 27-28. *See Anderson*, 12 BLR 1-111; *Clark*, 12 BLR 1-149. Accordingly, we affirm the administrative law judge's finding that the new evidence as a whole established the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Additionally, employer argues that, having determined that the newly submitted evidence established the existence of pneumoconiosis, the administrative law judge should have considered whether the evidence as a whole, both old and new, established the existence of pneumoconiosis. Contrary to employer's argument, however, a review of the administrative law judge's Decision and Order shows that he did consider all the relevant evidence of record in determining that claimant established the existence of pneumoconiosis. Decision and Order at 8-10, 24.

Finally, employer argues that the evidence establishes that claimant's totally disabling respiratory impairment was due solely to claimant's longstanding smoking habit, not to his pneumoconiosis. Specifically, employer asserts that the administrative law judge impermissibly rejected the findings of Drs. Fino, Tuteur, and Hippensteel on this matter in favor of the "conclusory" opinion of Dr. Rasmussen. Employer's Brief at 28.

In finding that claimant established that his pneumoconiosis was a "substantially contributing cause" of his disability, the administrative law judge concluded that Dr. Rasmussen's opinion that claimant's coal mine dust exposure was the most significant factor of his disability was best supported by the record. The administrative law judge noted that the opinions of Drs. Stewart and Tuteur were entitled to little weight as their findings, attributing claimant's oxygen desaturation to pulmonary vascular disease, had been refuted. Further, the administrative law judge found that Dr. Hippensteel's conclusion that claimant suffered from disability due to heart disease was "refute[d]" by the results of the test claimant performed for Dr. Rasmussen, inasmuch as any increase in carboxyhemoglobin level was shown not to be a cause of disability. Regarding Dr. Fino's opinion, that disability may be due to "vasculitis" of the lungs, the administrative law judge rejected it as biased, apparently she could not discern from it Dr. Fino's rationale for excluding claimant's thirty and one-half years of coal dust exposure as a cause of claimant's totally disabling impairment. Decision and Order at 25. In effect, the administrative law judge rejected Dr. Fino's opinion because she found it unreasoned. This was permissible. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-113. The administrative law judge's finding on causation is accordingly, affirmed. 20 C.F.R. §718.204(c). Employer's Exhibit 17.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part and dissenting in part:

I must respectfully dissent from the majority's decision to affirm the administrative law judge's consideration of Dr. Fino's opinion. The majority states that the administrative law judge apparently found Dr. Fino's opinion biased because she could not discern his rationale for excluding claimant's thirty and one-half years of coal dust exposure as a cause of total disability. This is the interpretation the majority gives to the administrative law judge's consideration of Dr. Fino's opinion. It is not, however, the interpretation given by the administrative law judge. It is unclear to me why the administrative law judge discounted Dr. Fino's opinion. Accordingly, I would remand this case for the administrative law judge to consider Dr. Fino's opinion and provide a clear discussion of her findings relevant to that opinion. In all other respects, I agree with the majority's affirmance of the administrative law judge's Decision and Order.

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ROY P. SMITH
Administrative Appeals Judge