BRB No. 05-0240 BLA

RICHARD M. McELVANEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JOE KUPERAVAGE COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 11/30/2005
	)	
ROCKWOOD CASUALTY 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 Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Gregory J. Fischer and Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-5930) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge noted the parties' stipulation to at least twenty-two years of coal mine employment. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2. After noting the parties' stipulation that the evidence establishes total disability due to a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Specifically, the administrative law judge substantively weighed the relevant medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge relied on his weighing of the medical opinion evidence at Section 718.202(a)(4) to find the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c), respectively. Employer further contends that the administrative law judge erred in his weighing of the medical opinion evidence of record and requests that the Board reverse, or alternatively vacate, the decision below and remand the case for a proper evaluation of the evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, noting the administrative law judge's error in allowing the parties to waive the limitation on the number of x-ray interpretations permitted under 20 C.F.R. §725.414. The Director contends that the error is harmless, however, as employer does not challenge the administrative law judge's determination that the weight of the x-ray evidence establishes the presence of pneumoconiosis. Claimant has not filed a response brief 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 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 order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the

pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to respiratory or pulmonary impairment arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Initially, we address the fact that the administrative law judge allowed the parties to waive the limitation on the number of x-ray interpretations permitted under 20 C.F.R. §725.414. Decision and Order at 5; Hearing Transcript at 5-7. The Board has held that the parties cannot waive the evidentiary limitations at 20 C.F.R. §725.414. *Smith v. Martin County Coal Corp.,* 23 BLR 1-69 (2004). The administrative law judge may, within his discretion, admit any medical evidence submitted in excess of the limitations, pursuant to a finding that the party submitting the evidence has established "good cause" for the submission of additional evidence. 20 C.F.R. §725.456(b)(1). Thus, as the Director correctly asserts, the administrative law judge's waiver of the limitations in the instant case is contrary to our holding in *Smith.* However, the administrative law judge's admission of excess x-ray interpretations into the record is harmless error as employer does not herein challenge the administrative law judge's weighing of the x-ray evidence. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). Moreover, because the administrative law judge's finding that the x-ray evidence establishes the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) is unchallenged on appeal, we affirm it.[1] *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Employer contends that the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), specifically his reasons for rejecting the medical opinions of Drs. Fino and Galgon, are not supported by substantial evidence. Employer argues that the administrative law judge erred in finding that Dr. Fino's opinion was not well reasoned or documented. Dr. Fino stated that he did not see radiographic evidence of coal workers' pneumoconiosis. Employer's Exhibit 2 at 8. Dr. Fino found that claimant has significant exposure to coal dust, and a significant smoking history, and concluded that there is insufficient objective evidence to justify a diagnosis of pneumoconiosis. *Id.* at 8, 9. Dr. Fino opined that claimant has a totally disabling respiratory impairment and that "the most significant contributing factor to [claimant's] overall disability is smoking" but that he "cannot rule out some contribution to [claimant's] obstruction as a result of coal mine dust [that] is not clinically significant." *Id.* In his review of Dr. Galgon's report dated October 1, 2003, Dr. Fino stated, "After the administration of bronchodilators, there was

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[1]We further affirm, as unchallenged on appeal, the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2)-(3) and 718.203(b). *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

an improvement in spirometry. Reversibility following the administration of bronchodilators is defined by an improvement in the FVC and/or the FEV1 by 12% over the baseline, pre-bronchodilator value. There must also be an absolute change of 200 cc in either the FVC or the FEV1. With exercise, there was no significant change in the pO2. However there was an increase in the pCO2, consistent with hypercarbia." *Id.* at 4, 5. Dr. Fino concluded, "The blood gas abnormalities are quite consistent with a smoking related condition. So is the reversibility." *Id*. at 8.

The administrative law judge found that Dr. Fino failed to explain what data he relied on and why it supported his statement about "blood gas abnormalities," and failed to explain his finding of "reversibility." However, as employer correctly contends, the record shows that Dr. Fino did explain his finding of blood gas abnormalities. Specifically, Dr. Fino opined that these abnormalities are consistent with a smoking-related condition because they show "no consistent drop in the pO2 with exercise but a consistent increase in the pCO2." Employer's Exhibit 2 at 8. Likewise, Dr. Fino, upon review of Dr. Galgon's report, explained his own finding of reversibility in claimant's pulmonary function studies by noting improvement in the spirometry with bronchodilator administration. Dr. Fino specifically indicated that an improvement in the FVC and/or FEV1 by 12% over the baseline, pre-bronchodilator value, defines reversibility. *See* Employer's Exhibit 2. Thus, Dr. Fino did explain his conclusion that smoking, not coal mine dust exposure, was the most significant cause of impairment. We, therefore, hold that the administrative law judge's finding, that Dr. Fino's opinion is not reasoned or documented, is not supported by substantial evidence. *Director, OWCP v. Rowe,* 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (in making credibility determinations, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion is based); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987).

Employer also contends that the administrative law judge erred by rejecting the opinion of Dr. Galgon at 20 C.F.R. §718.202(a)(4) as being inconsistent with the regulatory definition of "legal pneumoconiosis." *See* 20 C.F.R. §718.201(a)(2). Dr. Galgon opined that claimant does not have pneumoconiosis based on a physical examination and a negative chest x-ray. Employer's Exhibit 2, attachment at 3. Dr. Galgon stated that claimant has severe obstructive lung disease based on both the pO2 and pCO2 value increasing after exercise on the blood gas study and the significant reduction in the vital capacity on the pulmonary function study. Employer's Exhibit 1 at 24. He specifically stated that if any kind of interstitial lung disease had been present, including pneumoconiosis, there would have been a drop in the p02 value. *Id.* at 26. Dr. Galgon found that the severe obstructive lung disease (pulmonary emphysema) was secondary to claimant's heavy cigarette smoking. *Id.* at 27. He further explained that "pneumoconiosis can cause obstruction, but it typically causes obstruction only in the

presence of severe pneumoconiosis, at least category three. And so when one has an x-ray read as category zero, the likelihood of it being due to pneumoconiosis is minimal. The likelihood of it being due to cigarette smoking is maximal." *Id.* at 28.

The administrative law judge found that Dr. Galgon's opinion, that only obstructive disease accompanied by radiographic category three changes can constitute pneumoconiosis, is in conflict with the regulation indicating that "any" chronic obstructive disease arising from coal mine employment meets the definition of legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), and thus, that Dr. Galgon's opinion is entitled to no weight. The administrative law judge, however, mischaracterized Dr. Galgon's opinion. Dr. Galgon, when asked whether he was testifying that a person cannot have pulmonary function changes due to coal workers' pneumoconiosis without a finding of severe pneumoconiosis on x-ray, responded, "No;" he added that, "typically, when one has severe impairment one also has plenty of abnormalities on the chest x-ray. On the other hand, there are occasional cases where one has severe impairment and one does not have much or, in fact, any abnormality on x-ray." *Id.* at 39-40. Thus, Dr. Galgon did not indicate that he was ruling out a finding that obstructive disease can occur in instances of mild, lower levels of pneumoconiosis, but was expressing an opinion as to how such an obstructive defect is typically associated with pneumoconiosis. We, therefore, hold that the administrative law judge erred in finding that Dr. Galgon's opinion is entitled to no weight on the basis that the opinion conflicts with the regulatory definition of "legal pneumoconiosis" provided at 20 C.F.R. §718.201(a)(2). *Rowe*, 710 F.2d at 251, 5 BLR at 2-99; *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19.

Based on the foregoing, we hold that the administrative law judge's reasons for rejecting the medical opinions of Drs. Fino and Dr. Galgon pursuant to 20 C.F.R. §718.202(a)(4) are not supported by substantial evidence and cannot be affirmed. On remand, the administrative law judge must redetermine the credibility and weight of the medical opinion evidence at 20 C.F.R. §718.202(a)(4).

Employer next alleges error in the administrative law judge's reliance on the opinions of Drs. Talati, Kraynak, and Russell at 20 C.F.R. §§718.202(a)(4) and 718.204(c). Employer initially contends that the administrative law judge erred by substituting his own opinion for that of Dr. Talati. Based on physical examination, symptoms, a pulmonary function study dated March 26, 2003, a blood gas study dated April 15, 2003, a chest x-ray dated March 12, 2003, smoking and coal mine employment histories, Dr. Talati diagnosed chronic obstructive pulmonary disease and coal workers' pneumoconiosis and opined that claimant is totally disabled due to both smoking and coal workers' pneumoconiosis. Director's Exhibit 10. The administrative law judge found, "Dr. Talati stated that in his pulmonary function test ("PFT") 'post-bronchodilator testing failed to demonstrate a significant change in FVC, FEV1, or FEF 25-75.' As it is generally accepted that the absence of reversibility post-bronchodilator is an indicator of

the presence of pneumoconiosis, I find that this finding by Dr. Talati supports his diagnosis of pneumoconiosis." Decision and Order at 7-8.

We agree with employer's argument that the administrative law judge substituted his own opinion for that of Dr. Talati in finding that "it is generally accepted that the absence of reversibility post-bronchodilator" would indicate the presence of pneumoconiosis; the administrative law judge failed to provide an evidentiary basis for that finding. Director's Exhibits 10, 12; *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Further, nowhere in Dr. Talati's report does he indicate that the lack of reversibility seen on the pulmonary function studies supports a finding of pneumoconiosis.[2] Director's Exhibit 10. Consequently, we further remand the case for the administrative law judge to redetermine the weight and credibility of Dr. Talati's opinion at 20 C.F.R. §§718.202(a)(4) and 718.204(c).

Employer next contends that the administrative law judge "erred by failing to reject Dr. Russell's opinions in this matter outright as neither reasoned nor documented." Employer's Brief at 10. Dr. Russell stated that he had treated claimant since 1998. Claimant's Exhibit 4. Dr. Russell diagnosed anthracosilicosis and opined that "this condition alone" would prevent claimant from performing his usual coal mine employment as a heavy equipment operator or similarly physical work. *Id.* Dr. Russell based his opinion on claimant's symptoms, a history of at least twenty-two years of coal mine employment, a pulmonary function study dated February 19, 2004, and a history of forty-four years of smoking one pack of cigarettes per day. *Id.*

Employer specifically argues that, "Dr. Russell did not give full consideration to the extent of the miner's smoking history documented in the medical evidence of record, which included histories of up to 100 pack years." Employer's Brief at 10. The administrative law judge stated:

> I find that Employer's argument has some merit and therefore, although Dr. Russell qualifies as Claimant's treating physician under §718.104(d), his opinion is not entitled to controlling weight. However, I find that Dr. Russell's opinion should not be wholly rejected. Although the physician understated Claimant's smoking history at least by one-third, the 44 pack

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[2]In the pulmonary function study report dated March 26, 2003, Dr. Talati found moderate obstructive pulmonary impairment "indicated by the finding of a moderate reduction in the forced expired volume in one second as a % of the forced vital capacity (FVC)" and that "the degree of functional impairment reflected by the reduction in forced expired volume in the first second (FEV1) is found to be severe." Director's Exhibit 9.

> year smoking history on which Dr. Russell relied constitutes a heavy cigarette-smoking history. I therefore find that Dr. Russell's opinion has some probative value.

Decision and Order at 8. Contrary to employer's contention, the administrative law judge acted within his discretion and rationally accorded some probative value to Dr. Russell's opinion. *Clark,* 12 BLR at 1-149; *Dillon,* 11 BLR at 1-110; *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *see also Rowe,* 710 F.2d at 251, 5 BLR at 2-99.

Employer also contends that the administrative law judge erred in relying on Dr. Kraynak's opinion, as it is not supported by substantial evidence of record. Dr. Kraynak testified on deposition that claimant suffers:

> from coal worker's [sic] pneumoconiosis contracted during his employment in the anthracite coal industry and that he is totally and permanently disabled due to coal worker's pneumoconiosis.
>
> This gentleman obviously does have a fairly extensive smoking history. This would give rise to some element of obstructive lung disease. His pulmonary function studies, however, are fairly unremarkable for any significant degree of reversibility. And this would bolster my opinion that the vast majority of Mr. McElvaney's pulmonary defects[,] both from the obstructive standpoint and the restrictive standpoint[,] would be due to his coal worker's [sic] pneumoconiosis. It would be consistent with a gentleman who has exposure to anthracite coal dust for over 20 years.

Claimant's Exhibit 6 at 18, 19. Dr. Kraynak further testified on deposition that if claimant's smoking history were the major factor in his disability, Dr. Kraynak would expect to see "significant reversibility" in the pulmonary function studies after the administration of the bronchodilator, but that, in the instant case, "We don't have that." *Id.* at 19. Dr. Kraynak also found "emphysematous changes." *Id.* at 25. Dr. Kraynak specifically stated, "The cause of emphysema is, could be in part due to the tobacco abuse. In part it could be due to the exposure to coal dust. One of the pathological effects of coal dust is the formation of emphysematous changes in the lungs." *Id.* at 25. Dr. Kraynak further testified that although severe emphysema related to cigarette smoking does not generally cause much in the way of reversibility, it is possible "[i]f the lungs are that shot where there is, the elasticity is gone and the muscle tone is gone, that could potentially happen." *Id.*

Employer specifically contends that the administrative law judge erred in relying on Dr. Kraynak's opinion as the physician failed to address Dr. Fino's finding of significant reversibility based on Dr. Galgon's pulmonary function study of October 1,

2003. Dr. Kraynak, however, considered Dr. Galgon's pulmonary function study and agreed with Dr. Galgon's finding of a "slight degree" of reversibility. Claimant's Exhibit 6 at 13. Employer further contends that Dr. Kraynak's opinion, that claimant's smoking history plays a secondary role to his coal mine dust exposure and that pneumoconiosis is the primary cause of his pulmonary impairment, is not credible. Employer makes this contention "particularly in light of the miner's documented emphysema and significant smoking history which substantially outweighs his history of coal mine dust exposure." Employer's Brief at 12. The record shows, however, that Dr. Kraynak considered claimant's emphysema, smoking history and history of coal dust exposure and provided supportive reasoning for his conclusions by explaining that the results of the pulmonary function studies indicate that coal workers' pneumoconiosis was the primary cause of claimant's impairment. Claimant's Exhibit 6 at 24-26. Thus, the administrative law judge's weighing of, and reliance on, Dr. Kraynak's opinion is supported by substantial evidence.

Based on the foregoing, we vacate the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4)[3] and 718.204(c), and we remand the case for further consideration of the medical opinion evidence thereunder. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[3] The United States Court of Appeals for the Third Circuit held, in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), that all types of relevant evidence of record must be weighed together in determining whether claimant has met his burden of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, we instruct the administrative law judge to make findings on remand consistent with the standard enunciated in *Williams*.

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.

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