BRB No. 05-0276 BLA

MARVIN D. PROFFITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FALCON COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/29/2005
	)	
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 Awarding Living Miner's Benefits on Remand, Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Francesca L. Maggard (Lewis & Lewis Law Offices), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits on Remand (2001-BLA-00170) of Administrative Law Judge Thomas M. Burke (the administrative law judge) 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). This case is before the Board for a third time. The history of this case is set forth in the Board's prior Decision and Order. *Proffitt v. Falcon Coal Co., Inc.*, BRB No. 03-0500 BLA (May 26, 2004)(2-1 decision with Hall, J. dissenting)(unpub.). When this case was most recently before the Board, it vacated the administrative law judge's

findings: that the x-ray evidence supported a finding of pneumoconiosis pursuant to Section 718.202(a)(1); that the medical opinion evidence supported a finding of pneumoconiosis pursuant to Section 718.202(a)(4); that the overall weight of the evidence supported a finding of pneumoconiosis; and that disability causation was established pursuant to Section 718.204(c). Accordingly, the case was remanded to the administrative law judge for further consideration. *Proffitt*, BRB No. 03-0500 BLA.

On remand, the administrative law judge again found that the x-ray evidence supported a finding of the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and that when weighed together, the evidence established the existence of legal pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge also found that the evidence established disability causation pursuant to Section 718.204(c). Decision and Order at 2-7. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred: in finding that the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4), and in finding that the evidence established disability causation pursuant to Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.

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); *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 suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first contends that the administrative law judge erred in rejecting the negative x-ray readings by Drs. Wheeler, Scott, and Gayler, the best qualified x-ray readers, of the January 6, 2000 x-ray for the reason that the x-ray they read was of poor quality. Employer contends that because these readers were able to read the x-ray, despite its less than optimal quality, their negative readings should have been accepted.

Employer also contends that the administrative law judge selectively analyzed the x-ray evidence inasmuch as he did not reject the positive readings by Drs. Forehand and Navani of the February 2, 2000 x-ray and Dr. Depone's positive reading of the January 13, 2001 x-ray, which were also of less than optimal quality. In conclusion, employer contends that the administrative law judge's analysis of the evidence does not comport with the requirements of the Administrative Procedure Act to fully evaluate the evidence and explain his conclusions, 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), 30 U.S.C. §932(a).[1]

In considering the x-ray readings, the administrative law judge found that the preponderance of the readings was positive for the existence of pneumoconiosis and, therefore, concluded that the x-ray evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(1). Decision and Order on Remand at 2-4. In reaching this determination, the administrative law judge found that while Drs. Gayler, Scott and Wheeler, B-readers and board-certified radiologists, read the July 6, 2000, x-ray as negative for the existence of pneumoconiosis, Employer's Exhibits 3-5, he accorded little weight to their negative readings as they viewed copies of the x-ray film rather than the original film: Dr. Wheeler stated that a "B-reader should have good original films and not sub par copies," Employer's Exhibit 5; Dr. Scott opined that the film was a high contrast copy, Employer's Exhibit 4, and that Dr. Gayler indicated that the film for review was of level 2 and "light content," Employer's Exhibit 3. Decision and Order on Remand at 3.

Employer argues, however, under the applicable quality standard, a chest x-ray need be only of suitable quality for the proper classification of pneumoconiosis; the film need not be of optimal quality, 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984). Hence, employer contends that because the x-rays in question bear notations of film quality, they were not classified as unreadable, and were found by qualified readers to be of suitable quality for the proper classification of pneumoconiosis, the administrative law judge did not provide an adequate reason for rejecting these x-ray interpretations. Employer's Exhibits 3-5.

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[1] 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.

Contrary to employer's argument, however, the administrative law judge did not reject these readings. Rather, he gave them little weight based on the above factors, *see* Decision and Order on Remand at 3. Noting that the aforementioned July 6, 2000 x-ray was read negative by Drs. Gayler, Wheeler, and Scott, the administrative law judge also noted that: a February 2, 2000 x-ray was interpreted as positive by Dr. Branscomb, who was not a B-reader, and as positive by Dr. Forehand, a B-reader, and Dr. Navani, a dually qualified reader, while Drs. Gayler, Wheeler, and Scott, interpreted it as negative; a June 28, 2000 x-ray was interpreted by Dr. Fino as positive and that reading was not contradicted; a December 12, 2000 was read as positive by Dr. Patel, a dually qualified reader, but was also interpreted as negative by Drs. Wheeler, Scott, and Gayler; a January 13, 2001 x-ray was interpreted as positive by Dr. Deponte, a B-reader, but read negative by Drs. Wheeler, Scott and Gayler, and a May 14, 2001 x-ray was read positive by Dr. Castle, a B-reader, and was not contradicted. Based on his consideration of this evidence, the administrative law judge concluded that five of the six x-rays were read positive by physicians who were either B-readers or dually qualified B-readers and Board-certified radiologists. While the administrative law judge acknowledged that Drs. Wheeler, Scott and Gayler read some of these x-rays as negative, he concluded that the same x-rays were read by six qualified readers as positive. Accordingly, based on this evidence, the administrative law judge permissibly found that the x-ray evidence was positive for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989). This finding complies with the requirements of the APA.

Next, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, employer asserts that the administrative law judge erred in finding that the reports of Drs. Castle and Fino were merely restatements of their x-ray findings, while finding that Dr. Rasmussen's opinion was not a mere restatement of his x-ray finding. Employer asserts that although Dr. Rasmussen referenced other testing, it is clear that the physician's diagnosis of pneumoconiosis was based only on x-ray and claimant's history of exposure to coal dust and that the opinion cannot, therefore, be considered a well-reasoned opinion at Section 718.202(a)(4). In addition, employer contends that the administrative law judge failed to weigh together the x-ray and medical opinion evidence pursuant to Compton in finding that the existence of pneumoconiosis was established and that the evidence as a whole fails to establish the existence of pneumoconiosis.

When this case was most recently before the Board, the Board remanded the claim to the administrative law judge with instructions to reconsider the opinions of Drs. Fino, Castle and Rasmussen, Director's Exhibits 30, 37; Claimant's Exhibit 2; Employer's Exhibit 6, in order to determine whether the opinions of the physicians, all of whom diagnosed the presence of simple coal workers' pneumoconiosis, were, in fact merely

restatements of x-ray readings and not, therefore, reasoned medical opinions. *Proffitt*, BRB No. 03-0500 BLA, slip op. at 6-7. On remand, the administrative law judge found that the medical opinions of Drs. Castle and Fino were, in fact, mere restatements of positive x-rays and not, therefore, well-reasoned medical opinions supportive of a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 5. Regarding Dr. Rasmussen's opinion, who found the existence of both clinical and legal pneumoconiosis, however, the administrative law judge found that while Dr. Rasmussen stated that claimant had a significant history of exposure to coal dust and had x-ray changes consistent with coal workers' pneumoconiosis, his finding of legal pneumoconiosis, *i.e.*, that claimant's respiratory impairment arose out of coal mine employment, was not merely a restatement of an x-ray as his opinion was based on "all the information gathered from examining claimant and the test results contained in the report." Decision and Order on Remand at 5. The administrative law judge explained that Dr. Rasmussen "authored a full report on claimant's condition," and that "it [would be] unreasonable to ignore the body of the medical report and simply skip to the last page [which contained a brief summary of histories and test results] to determine whether [Dr. Rasmussen] provided a documented and reasoned opinion." *Id.* The administrative law judge concluded, therefore, that Dr. Rasmussen's opinion was a well-reasoned medical opinion which supported a finding of the existence of legal pneumoconiosis and that the opinion, in conjunction with the opinion of Dr. Forehand, diagnosing the presence of simple coal workers' pneumoconiosis,[2] Director's Exhibit 8, supported a finding of the existence of pneumoconiosis pursuant to Section 718.202(a) (4). *Id.*

After reviewing Dr. Rasmussen's opinion, we conclude that the administrative law judge permissibly found that Dr. Rasmussen's opinion was a well-documented, well-reasoned opinion, and not merely a restatement of an x-ray. As the administrative law judge found, contrary to employer's argument, the totality of Dr. Rasmussen's opinion and findings support his finding of legal pneumoconiosis. Dr. Rasmussen's three page opinion discusses findings on examination, claimant's coal mine employment and smoking history, symptoms, and tests that were performed. After citing the results of objective tests, Dr. Rasmussen concludes, "[o]verall, these studies indicate at least moderate loss of lung function as reflected principally by the ventilatory impairment[,] …[t]he two risk factors for [claimant's] disabling pulmonary impairment are his cigarette smoking and his coal mine exposure. His coal mine dust exposure must be considered a

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[2] In its previous Decision and Order, the Board affirmed the administrative law judge's Decision and Order that Dr. Forehand's opinion constituted a well-reasoned medical opinion diagnosing the existence of pneumoconiosis. *Proffitt*, BRB No. 03-0500 BLA, *slip op*. at 6-7. The Board also affirmed the administrative law judge's finding that Dr. Rasmussen's credentials were the most impressive of record. *Proffitt*, BRB No. 03-0500 BLA, *slip op*. at 8.

significant contributing factor." Claimant's Exhibit 2. We conclude, therefore, that the administrative law judge permissibly found that Dr. Rasmussen's finding of legal pneumoconiosis to be a reasoned opinion based on a number of factors including objective studies. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985). Moreover, while Dr. Rasmussen's finding of clinical pneumoconiosis might be based solely on x-ray and history of coal mine employment, his finding of legal pneumoconiosis is not. *See* 20 C.F.R. §718.201. Further, contrary to employer's contention, the administrative law judge properly weighed the x-ray and medical opinion evidence together pursuant to *Compton*, in finding the existence of pneumoconiosis established. Decision and Order on Remand at 6.

Finally, employer contends that the administrative law judge erred in finding that the medical opinion evidence established disability causation pursuant to 20 C.F.R. §718.204(c). Specifically, employer contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion inasmuch as it was based solely on x-ray evidence and the x-ray was properly determined to be negative in the administrative law judge's prior decisions. Likewise, employer contends that the administrative law judge's reliance on Dr. Forehand's opinion is baseless as the evidence does not establish the existence of pneumoconiosis, and even assuming the existence of pneumoconiosis, Dr. Forehand's opinion does not sufficiently support a finding that pneumoconiosis, as opposed to smoking, substantially contributing to total disability. Instead, employer contends that the administrative law judge erred in discrediting Dr. Branscomb's opinion that claimant's total disability was due to smoking not pneumoconiosis, because Dr. Branscomb erroneously found that claimant did not have pneumoconiosis.

Dr. Rasmussen opined that coal dust exposure must be considered a significant contributing factor of claimant's disabling pulmonary impairment. Claimant's Exhibit 2. Similarly, Dr. Forehand opined that coal workers' pneumoconiosis and chronic bronchitis related to coal dust exposure and smoking contributed to claimant's totally disabling respiratory impairment. Director's Exhibit 8. In contrast, Drs. Branscomb and Fino opined that coal dust exposure did not contribute to claimant's disabling respiratory impairment. Director's Exhibit 30; Employer's Exhibits 1, 2. Dr. Castle opined that claimant's disabling respiratory impairment was due to smoking. Employer's Exhibit 6.

The administrative law judge found that inasmuch as the Board previously held that the opinions of Drs. Castle, Fino and Branscomb were unreasoned on the issue of disability causation and because Drs. Forehand and Rasmussen concluded that claimant had "legal pneumoconiosis to such a degree that the underlying pulmonary impairment arising out of coal mine employment is totally disabling," the latter physicians' opinions

established disability causation pursuant to Section 718.204(c). Decision and Order on Remand at 6-7.

Employer argues that the administrative law judge erred in relying upon the opinion of Dr. Rasmussen because the doctor's diagnosis of pneumoconiosis was based only on x-ray evidence and was not, therefore, a reasoned medical opinion. This argument is rejected, however, since we have held that the administrative law judge permissibly found Dr. Rasmussen's opinion to be well-documented and reasoned. *Supra*.

Employer further argues that the administrative law judge erred in relying upon the opinion of Dr. Forehand as support for a finding of disability causation at Section 718.204(c). Employer asserts that because the administrative law judge's finding of pneumoconiosis cannot be affirmed, Dr. Forehand's finding of disability causation must also be vacated. Employer additionally argues that even if claimant established the existence of pneumoconiosis, Dr. Forehand's opinion cannot constitute support for a finding that the disease is a substantially contributing cause of total disability.

Dr. Forehand found that claimant's disabling respiratory impairment was due to coal mine employment and smoking. We conclude that the administrative law judge acted properly in finding that this opinion along with Dr. Rasmussen's was sufficient to establish that claimant's legal pneumoconiosis had a "material adverse effect on his respiratory condition." Decision and Order on Remand at 6; 20 C.F.R. §718.204(c)(1)(i).

Employer also asserts that the administrative law judge erred in his conclusion that the Board had permissibly affirmed his determination that Dr. Branscomb's opinion, on disability causation, was unreasoned. When this case was most recently before the Board, the Board held that because it was vacating the administrative law judge's finding that the existence of clinical and legal pneumoconiosis was established, it could not affirm the administrative law judge's discrediting of Dr. Branscomb's opinion, that claimant did not have pneumoconiosis, for the reason that it contradicted the administrative law judge's finding of pneumoconiosis. Because we are now affirming the administrative law judge's finding of legal pneumoconiosis, however, we can no longer say that the administrative law judge erred in discrediting Dr. Branscomb's finding that claimant's disabling respiratory impairment was due to smoking, not coal mine employment. *Proffitt*, BRB No. 03-0500, slip op. at 10; *Scott v. Mason Coal Co.*, 289 F.3d 416, 22 BLR 2-373 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Accordingly, we conclude that because the administrative law judge properly found that the existence of legal pneumoconiosis was established, he did not err in discrediting Dr. Branscomb's opinion on causation as contradictory.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge