

BRB No. 05-0392 BLA

ESTLE E. WALDROOP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROYAL GEM COAL COMPANY	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH	)	DATE ISSUED: 11/15/2005
AMERICA	)	
	)	
Employer/Carrier-	)	
Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order-Denial of Motion for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices), Harlan, Kentucky, for claimant.

Philip J. Reverman, Jr. (Boehl, Stopher & Graves, LLP), Louisville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order-Denial of Motion for Reconsideration (03-BLA-6077) of Administrative Law Judge Daniel F. Solomon denying 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). Pursuant to the parties' stipulations, the administrative law judge credited claimant with thirty-two years of coal mine employment,<sup>1</sup> found that employer is the responsible operator, and found that claimant is totally disabled by a respiratory or pulmonary impairment. Decision and Order at 2; Hearing Transcript at 6-7. 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 5-6. Noting that this claim is a subsequent claim,<sup>2</sup> the administrative law judge found that because claimant established that he is totally disabled, an element of entitlement previously adjudicated against him, he established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Decision and Order at 2, 4, 8. The administrative law judge further found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(4). Decision and Order at 6-8. Accordingly, the administrative law judge denied benefits. Subsequently, the administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond on the merits of this appeal.<sup>3</sup>

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

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<sup>1</sup> Claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 1, 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>2</sup> Claimant's initial application for benefits, filed on April 20, 1981, was finally denied on June 22, 1981 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed his current application for benefits on December 10, 2001. Director's Exhibit 2.

<sup>3</sup> The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(a)(3), 718.204(b)(2), and 725.309(d), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical reports of Drs. Baker and Dahhan. Dr. Baker diagnosed claimant with coal workers’ pneumoconiosis, 1/0, referencing an “abnormal chest x-ray and coal dust exposure.” Director’s Exhibit 8 at 4. Dr. Baker also diagnosed “COPD with moderate obstructive defect” based on pulmonary function study results, hypoxemia based on blood gas study results, and chronic bronchitis based on a “history of cough, sputum production and wheezing.” *Id.* Dr. Baker attributed these three conditions to coal dust exposure and cigarette smoking. *Id.* Dr. Baker indicated that claimant is totally disabled by a moderate impairment due to both smoking and coal dust exposure. Director’s Exhibit 8 at 5. In contrast, Dr. Dahhan concluded that there were insufficient examination findings, pulmonary function or blood gas study results, or x-ray findings to justify a diagnosis of coal workers’ pneumoconiosis. Employer’s Exhibit 2 at 2. Dr. Dahhan diagnosed claimant with disabling chronic obstructive lung disease due solely to smoking. *Id.*

The administrative law judge found Dr. Baker’s opinion “well documented but not well reasoned” because Dr. Baker based his diagnosis “mainly” on an x-ray reading and claimant’s coal mine employment history, when the x-ray Dr. Baker relied upon was read completely negative by a better-qualified reader, and when the administrative law judge found the weight of the x-ray evidence negative for pneumoconiosis. Decision and Order at 7. The administrative law judge added that Dr. Baker “failed to consider the effect of smoking in this record.” *Id.* By contrast, the administrative law judge found Dr. Dahhan’s opinion “well reasoned and documented,” and “bolstered by his clinical findings.” *Id.* The administrative law judge also found that Dr. Dahhan’s opinion merited greater weight because Dr. Dahhan reviewed all the medical evidence of record. Decision and Order at 8. Based on Dr. Dahhan’s opinion, the administrative law judge found it “more reasonable that [claimant’s] pulmonary disability has resulted from his lengthy smoking habit with no evidence” that it was “related to . . . or aggravated by the inhalation of coal dust or coal workers’ pneumoconiosis.” Decision and Order at 7-8.

In a motion for reconsideration, claimant argued that it was inaccurate to state that Dr. Baker failed to consider the effect of smoking, when Dr. Baker listed both smoking

and coal dust exposure as the etiologies for claimant's COPD, chronic bronchitis, and hypoxemia. Motion for Reconsideration at 2. Claimant also argued that Dr. Wiot, the better-qualified x-ray reader referred to by the administrative law judge, did not reread Dr. Baker's x-ray as completely negative, but rather, read it as "0/1" and indicated that he found abnormalities consistent with pneumoconiosis. Motion for Reconsideration at 3. Additionally, claimant contended that the finding that Dr. Baker based his opinion on an x-ray and coal mine employment history did not address Dr. Baker's diagnoses of hypoxemia and chronic bronchitis due, in part, to coal dust exposure. Motion for Reconsideration at 2.

On reconsideration, the administrative law judge reiterated that Dr. Baker's opinion was not well reasoned because the physician relied primarily on an x-ray and coal mine employment history, when the weight of the x-ray evidence was negative. The administrative law judge stated further that, although Dr. Baker considered the effect of smoking by listing it as an etiology, smoking still "was not adequately addressed by Dr. Baker." Order at 2. Additionally, the administrative law judge noted that while Dr. Wiot's "0/1" rereading of Dr. Baker's x-ray may not have been completely negative, Dr. Baker's opinion was nevertheless based partly on an x-ray that a more qualified reader interpreted as indefinite for pneumoconiosis. Order at 2-3.

Claimant contends that the administrative law judge did not adequately explain his reasons for discounting Dr. Baker's opinion. We agree. On the one hand, the administrative law judge was within his discretion to discount Dr. Baker's diagnosis of clinical pneumoconiosis to the extent it was based on a discredited x-ray.<sup>4</sup> See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). On the other hand, however, there is merit in claimant's argument that the administrative law judge did not explain why the x-ray was apparently "used to discredit Dr. Baker's conclusions not only about radiographic evidence of pneumoconiosis, but also his opinions about legal pneumoconiosis." Claimant's Brief at 6.

A positive x-ray is not required to establish the existence of legal pneumoconiosis. See 20 C.F.R. §§718.201(a)(2), 718.202(a)(4). Additionally, the Sixth Circuit court has held that a medical report in which a doctor considers multiple factors to diagnose a chronic pulmonary impairment related to coal dust exposure should not be characterized as a mere restatement of an x-ray. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). As noted above, the administrative law judge found

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<sup>4</sup> Section 718.102(b) provides in part that a chest x-ray classified as "0/1 . . . does not constitute evidence of pneumoconiosis." 20 C.F.R. §718.102(b).

that Dr. Baker's report setting forth relevant histories, physical examination findings, and test results was well-documented. Decision and Order at 7. Thus, it is unclear why the administrative law judge found Dr. Baker's opinion to be based mainly on an x-ray reading. Further, considering that Dr. Baker attributed claimant's COPD, chronic bronchitis, and hypoxemia to both smoking and coal dust exposure, we are unable to ascertain the administrative law judge's reason for finding that the effect of smoking "was not adequately addressed by Dr. Baker." Order at 2; *see Cornett*, 227 F.3d at 576, 22 BLR at 2-121 (explaining that a medical report need not eliminate smoking as a cause under Section 718.201). Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand this case for him to reconsider Dr. Baker's opinion and to explain the basis for his findings. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

On remand, the administrative law judge should also reconsider Dr. Dahhan's opinion. Substantial evidence does not support the administrative law judge's finding that Dr. Dahhan's opinion merited greater weight because Dr. Dahhan reviewed all medical evidence in the record. Review of Dr. Dahhan's medical report discloses that Dr. Dahhan examined and tested claimant, but did not review additional evidence. Employer's Exhibit 2. Additionally, since the administrative law judge found Dr. Dahhan's opinion "more reasonable" only after discrediting Dr. Baker's opinion as "not well reasoned," and we have instructed him to reconsider Dr. Baker's opinion, the administrative law judge should reassess the relative credibility of both opinions. Finally, the administrative law judge on remand should include Dr. Morgan's opinion in his discussion of the evidence under Section 718.202(a)(4). Director's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order and Order-Denial of Motion for Reconsideration are affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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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JUDITH S. BOGGS  
Administrative Appeals Judge