BRB No. 06-0134 BLA

JOHN F. FUNKA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 11/15/2006
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Debra L. Henry (Law Offices of Debra L. Henry), Greensburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West, Virginia, for employer.

BEFORE: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-6297) of Administrative Law Judge Michael P. Lesniak 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 parties stipulated to, and the administrative law judge

[1]Claimant filed his claim for benefits on June 5, 2003. Director's Exhibit 2. The district director awarded benefits in a Proposed Decision and Order on March 18, 2004. Director's Exhibit 22. Employer requested a formal hearing on March 23, 2004, and the

found, forty years of coal mine employment. Decision and Order at 11. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish any of the elements of entitlement pursuant to 20 C.F.R. Part 718.[2] Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4) and causation at 20 C.F.R. §718.203. Employer responds, urging affirmance of the denial of benefits.[3] Employer requests, in the event that the decision is vacated and remanded, that the finding that the opinion of Dr. Brooks is hostile to the Act be vacated, or in the alternative, that Dr. Salari's opinion also be discredited as hostile. The Director, Office of Workers' Compensation Programs, did not participate 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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record contains eleven interpretations of eight x-rays. The x-ray dated September 30, 1999 was read as negative by Dr. Hamilton, a physician with no special qualifications. Director's Exhibit 14. The x-ray dated February 14, 2003 was read as showing pulmonary fibrosis by Dr. Hamilton, a physician with no special qualifications. Director's Exhibit 14. The x-ray dated May 30, 2003, was read as showing abnormal parenchymal disease by Dr. Weaver, a physician with no special qualifications. Director's Exhibit 14. The x-ray dated July 10, 2003 was read as showing diffuse interstitial fibrosis by Dr. Rao, a physician with no special qualifications. This same x-

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case was transferred to the Office of Administrative Law Judges on May 17, 2004, for a formal hearing. Director's Exhibits 23, 28. The hearing was held on January 25, 2005, before Administrative Law Judge Michael P. Lesniak.

[2]The administrative law judge made no specific findings at 20 C.F.R. §718.204(b).

[3]Employer filed a Notice of Cross-Appeal on November 1, 2005. By letter dated March 10, 2006, employer requested that its cross-appeal be dismissed. The Board granted the motion and dismissed employer's cross-appeal on March 30, 2006.

ray was read as negative for pneumoconiosis by Dr. Bennett, a dually qualified physician, and was found unreadable by Dr. Wiot, a dually qualified physician. Director's Exhibits 12, 14. The x-ray dated November 3, 2003 was read as positive for pneumoconiosis by Dr. Cappiello, a dually qualified physician, as positive by Dr. Brooks, a physician with no special qualifications, and as negative by Dr. Wiot, a dually qualified physician. Director's Exhibit 13, Claimant's Exhibit 3, Employer's Exhibit 1. The x-ray dated September 23, 2003 was read as showing extensive basilar fibrosis by Dr. Farger, a physician with no special qualifications. Director's Exhibit 14. The x-ray dated July 19, 2004 was read as positive by Dr. Patel, a dually qualified physician. Claimant's Exhibit 1.

The administrative law judge found that among the readings by dually qualified readers, two of the four x-ray interpretations were negative for pneumoconiosis, and two were positive for pneumoconiosis. The administrative law judge found that the two positive readings by dually qualified physicians consist of the interpretation of the November 3, 2003 by Dr. Cappiello, and the interpretation of the July 19, 2004 x-ray by Dr. Patel. The administrative law judge found that the two negative readings by dually qualified physicians consist of the interpretation of the July 10, 2003 x-ray by Dr. Bennett, and the interpretation of the November 3, 2003 x-ray by Dr. Wiot.

The administrative law judge specifically found,

> Dr. Wiot, a BCR-B, indicated that the 7-10-03 chest x-ray was unreadable. However, Dr. Bennett, a BCR-B, indicated that the 7-10-03 chest x-ray was film quality 1 and that no pneumoconiosis was present. Since both doctors have equal qualifications, I will accord the reading by Dr. Bennett greater weight since he felt the film was of sufficient quality to make a diagnosis.

Decision and Order at 13. n. 7. The administrative law judge concluded that, "since the x-ray evidence is equipoised for the presence of pneumoconiosis, I find that Claimant has failed to establish, by a preponderance of the evidence, the existence of pneumoconiosis pursuant to §718.202(a)(1)." Decision and Order at 13.

Claimant specifically contends that the administrative law judge erred in finding the x-ray evidence in equipoise, as he improperly accorded more weight to Dr. Bennett's negative interpretation of the July 10, 2003 x-ray than to Dr. Wiot's finding that the July 10, 2003 was unreadable. Claimant suggests that the analysis by the administrative law judge makes no sense, particularly because the administrative law judge found Dr. Wiot "highly qualified to render an opinion regarding the presence of clinical pneumoconiosis on x-ray or CT scan", and made no such finding regarding Dr. Bennett's expertise. Claimant's Brief at 4-5. The claimant further notes that Dr. Brooks specifically deferred to Dr. Wiot, when referring to the "'more expert opinion of Dr. Wiot in the interpretation

of radiographic films.'" *Id.* at 5. The claimant notes that while Dr.Wiot opined that it was wrong to make any kind of determination based on a film, such as the July 10, 2003 film, that does not meet appropriate standards for credible readings (has motion or is underexposed), Dr. Bennett did not provide a rationale for his finding that the x-ray was readable. *Id.* Claimant contends that if the July 10, 2003 x-ray is not considered by the administrative law judge because of the dispute regarding the readability of the x-ray, the remaining x-ray evidence consists of three valid, readable x-rays by dually qualified physicians: the November 3, 2003 x-ray read as positive by Dr. Cappiello, the November 3, 2003 x-ray read as negative but consistent with idiopathic fibrosis by Dr. Wiot, and the July 19, 2004 x-ray read as positive by Dr. Patel. Director's Exhibit 13; Employer's Exhibit 1. Thus, claimant argues, the x-rays of record by dually qualified physicians would consist of two positive and one negative reading, and the administrative law judge may find pneumoconiosis by permissibly relying on the numerical superiority of the positive x-ray readings. *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990).

We agree with claimant that the administrative law judge's findings at Section 718.202(a)(1) cannot be affirmed. The administrative law judge failed to adequately explain his reasons for according greater weight to Dr. Bennett's x-ray reading of the July 10, 2003 film, finding it of sufficient readable quality to make a diagnosis, over Dr. Wiot's finding that the x-ray was unreadable. *See* Administrative Procedure Act, 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) and U.S.C. §932(a). We therefore vacate the administrative law judge's findings pursuant to Section 718.202(a)(1), and remand the case to the administrative law judge for further consideration. On remand, the administrative law judge is instructed to provide adequate rationale for finding the July 10, 2003 readable or unreadable, and in according more weight to Dr. Bennett's negative reading of the x-ray, or to Dr. Wiot's determination that the x-ray could not be read. The administrative law judge must then reweigh the x-ray evidence, if necessary, in light of his determination as to the readability of the July 10, 2003 x-ray.

Claimant next contends that the administrative law judge erred in weighing the medical opinions relevant to the issue of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The relevant evidence at Section 718.202(a)(4) consists of the following: By examination report dated October 21, 2004, Dr. Salari diagnosed pulmonary fibrosis and coronary artery disease, status post stent placement. Claimant's Exhibit 15. By letter dated December 7, 2004, Dr. Salari noted that claimant had not had any significant cardiac problems since June 2004, that he had moderately severe hypoxemia based on a blood gas study, and that claimant's shortness of breath was related to his pulmonary problems, which required him to be on supplemental oxygen. Claimant's Exhibit 17. In his deposition of June 8, 2004, Dr. Salari testified that he diagnosed pulmonary fibrosis on his first examination of claimant and that claimant's pulmonary condition had gotten progressively worse since the physician had first seen claimant a year ago. Employer's

Exhibit 2. Dr. Salari testified that pulmonary function studies revealed a restrictive defect which was consistent with pulmonary fibrosis. *Id.* at 13-14. He made a clinical diagnosis of chronic bronchitis and chronic obstructive pulmonary disease which was not revealed on pulmonary function testing. *Id.* at 20. Dr. Salari testified that he wasn't sure what caused claimant's pulmonary fibrosis, but that he must "assume that it's coming from the coal mine, although I don't have anything to prove it." *Id.* at 24. Dr. Salari indicated that he would not diagnose coal workers' pneumoconiosis because the findings on x-ray and CT scan were not typical of coal workers' pneumoconiosis. *Id.* Dr. Salari stated he could not rule out coal dust exposure as a cause of pulmonary fibrosis, and referred to studies that link coal dust exposure to the type of pulmonary fibrosis from which claimant suffered. *Id.* at 29-32.

In a report dated November 15, 2004, Dr. Fino reviewed medical evidence contained in the record. Employer's Exhibit 7. Dr. Fino found that claimant had a classic restrictive defect based on his having a "disabling respiratory impairment characterized by a reduction in the FVC, FEV1, lung volumes and diffusing capacity." *Id.* at 5. Dr. Fino also found that the restrictive defect is unrelated to the inhalation of coal mine dust as coal workers' pneumoconiosis causes a focal nodular fibrosis involving the upper lung zones more than the lower zones, and in the instant case, "there is an irregular fibrosis more in the lower and middle lung zones than the upper lung zones and much more in the periphery of the lung. This is a classic finding for usual interstitial pneumonitis which is the pathologic correlate to the clinical diagnosis of diffuse interstitial pulmonary fibrosis." *Id.* at 6. Dr. Fino concluded that coal mine dust did not play a role in the claimant's disabling pulmonary fibrosis. "Diffuse interstitial pulmonary fibrosis was the cause. It is idiopathic in nature which is the most common cause of diffuse interstitial pulmonary fibrosis." *Id.* at 6-7. Dr. Fino found that claimant "would have the same degree of pulmonary fibrosis, a restrictive impairment, and disability had he never been exposed to coal mine dust." *Id.* at 7.

By report dated July 19, 2004, Dr. Rasmussen diagnosed coal workers' pneumoconiosis and diffuse interstitial fibrosis based on 43 years of coal mine employment history and x-ray findings. Claimant's Exhibit 1. He noted that,

> Diffuse interstitial pulmonary fibrosis is a disease of the general public, etiology of which is uncertain. It is, however, known to be associated with mineral dust exposures as well as heavy cigarette smoking. It is also known to occur in conjunction with a number of so-called collagen vascular diseases.
>
> Diffuse interstitial pulmonary fibrosis is also known to occur as a consequence of coal mine dust exposure.

Claimant's Exhibit 1 at 4. In his supplemental report of December 13, 2004, after review of Dr. Fino's report, Dr. Rasmussen opined that chest films of miners "who at one point had primarily rounded opacities", may develop irregular opacities over time, and that it is "well known epidemiologically that individuals with exposure to silica dust are at increased risk of developing interstitial fibrosis." Claimant's Exhibit 14. In his deposition dated June 8, 2004, Dr. Rasmussen concluded that claimant had severe disabling diffuse interstitial fibrosis due to coal dust exposure based on: 1) occupational history; 2) literature/studies indicating that the disease was more common among coal miners; 3) personal experience that the disease is more common in coal miners and 4) claimant's possible exposure to asbestos. (Dr. Rasmussen admitted this is speculation as there was no evidence that claimant was exposed to asbestos.) Claimant's Exhibit 18 at 20-24. Dr. Rasmussen testified that coal workers' pneumoconiosis and interstitial fibrosis could co-exist and that as fibrosis progresses, it destroys radiographic evidence of pneumoconiosis. *Id.* at 24-25. Dr. Rasmussen concluded that there was nothing in the record that would exclude coal dust exposure as a cause of the fibrosis and that although all the physicians agree that claimant had a totally disabling lung disease, they disagree as to the cause. *Id.* at 28. On cross-examination, Dr. Rasmussen testified that he did not diagnose radiographic pneumoconiosis and that some part of claimant's disability was due to smoking. *Id.* at 32, 59.

In considering the medical opinion evidence at Section 718.202(a)(4), the administrative law judge found Dr. Salari's opinion of pneumoconiosis entitled to less weight as it was equivocal and not well-documented. Specifically, the administrative law judge found Dr. Salari's opinion equivocal, as the physician stated that claimant's fibrosis was secondary to coal workers' pneumoconiosis in his medical report of October 21, 2004, but testified in his deposition that he could not diagnose pneumoconiosis. Decision and Order at 15. The administrative law judge found that the uncertainty noted by Dr. Salari when he testified that he "assumed" that claimant's pulmonary fibrosis was caused by coal mine dust exposure, does not "rise to the level of a reasonable degree of medical certainty standard", and thus, the opinion was not persuasive. *Id.* Likewise, the administrative law judge accorded less weight to Dr. Rasmussen's opinion of clinical and legal pneumoconiosis, as the physician stated in his report dated July 19, 2004 that claimant had pneumoconiosis based on chest x-ray, but in his deposition of November 29, 2004 found that, based on the chest x-ray, there was no evidence of pneumoconiosis. The administrative law judge noted that Dr. Rasmussen, citing various studies, opined that claimant's pulmonary fibrosis was due to coal dust exposure, while Dr. Fino, upon review of two of the studies, "persuasively pointed out that one study merely recognized that interstitial fibrosis occurs in coal miners and that another study concluded that there 'may' be an association between coal miner's pneumoconiosis and interstitial fibrosis." Decision and Order at 16. After noting that Drs. Wiot and Brooks also "denied an established connection between coal mine dust exposure and the development of pulmonary fibrosis", the administrative law judge concluded,

> I find that based on the above that [sic] the relationship between coal mine dust exposure and the development of pulmonary fibrosis is a contested issue that has yet to be resolved in the medical community. I find that the studies referenced by Dr. Rasmussen do not show a definitive link between coal mine dust exposure and pulmonary fibrosis. Therefore, because his opinion is based at least in part on these less than conclusive studies, I find that the opinion of Dr. Rasmussen is not persuasive on this issue and will be accorded less weight.

Decision and Order at 16.

Claimant contends that the administrative law judge erred in finding Dr. Salari's opinion of legal pneumoconiosis not well-documented and equivocal, and in according it less weight. Claimant argues that a physician is not required to express his opinion in terms of a "reasonable degree of medical certainty" or in "absolute" terms in order to be credited by an administrative law judge. Claimant's Brief at 9. Claimant specifically contends that the administrative law judge erred in finding Dr. Salari's opinion equivocal, arguing that the opinion constitutes a documented opinion of a physician exercising reasoned medical judgment, despite his reporting that he "assumed" that claimant's fibrosis was related to coal dust exposure. *Id.*

Contrary to claimant's contention, however, the administrative law judge rationally assigned little weight to Dr. Salari's opinion on the basis that it is not well-documented and that it is equivocal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Decision and Order at 15. Specifically, the administrative law judge rationally found that Dr. Salari's opinion is not well-documented as he failed to explain the inconsistent findings in his medical report and deposition testimony. *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). Moreover, the administrative law judge rationally found that Dr. Salari's opinion is equivocal as he stated that he "assumed" that coal mine dust exposure caused claimant's pulmonary fibrosis. *Justice*, *supra; Campbell*, *supra; Puleo*, *supra*; Decision and Order at 15. Thus, the administrative law judge's finding that Dr. Salari's opinion is not well-documented as it is inconsistent and equivocal in its conclusions, is supported by substantial evidence.[4] *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Moreover, because he rationally found it did not constitute a well-documented opinion,

[4]Contrary to claimant's contention, the administrative law judge considered Dr. Salari's testimony in its entirety. Decision and Order at 8-9.

the administrative law judge properly found that Dr. Salari's opinion is not entitled to greater weight simply because of his status as claimant's treating physician. 20 C.F.R. §718.104(d); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004).

Claimant next contends that the administrative law judge erred in according Dr. Rasmussen's opinion of clinical pneumoconiosis little weight "based on his understanding that Dr. Rasmussen reported radiographic evidence of pneumoconiosis in his report and admitted in his deposition that there was no evidence of pneumoconiosis on Claimant's x-rays." Claimant's Brief at 13. Claimant specifically contends that the "ALJ misunderstood or misinterpreted these statements of Dr. Rasmussen as contradictory." *Id.* We disagree. In his report dated July 19, 2004, Dr. Rasmussen specifically found,

> [b]ased on the interpretation of the earlier film by Dr. Cappiello, which revealed pneumoconiosis q/t with a profusion of 2/2 throughout all lung zones as well as identification of nodular densities in the CT chest examination of January 5, 2004, Mr. Funka also has coalworkers' pneumoconiosis.

Claimant's Exhibit 1. However, in his deposition, when asked whether he diagnosed coal workers' pneumoconiosis based on the radiographic studies in this case, Dr. Rasmussen stated that he did not diagnose radiographic pneumoconiosis. Claimant's Exhibit 18 at 32. Thus, contrary to claimant's contention, the administrative law judge rationally found that Dr. Rasmussen's testimony is inconsistent with the findings in his report. Decision and Order at 16.

Claimant additionally contends that the administrative law judge erred in according less weight to Dr. Rasmussen's legal pneumoconiosis opinion because it was based, at least in part, on less than conclusive studies. Claimant specifically contends that the administrative law judge erred in finding the studies do not support Dr. Rasmussen's assertion that claimant's fibrosis was due to coal dust exposure. As employer correctly points out, however, Dr. Rasmussen relied on studies that were found by other physicians to be insufficient to establish a definitive link between claimant's interstitial fibrosis and his coal mine dust exposure. As the administrative law judge noted, Dr. Fino pointed out that the [McConnochie article] merely recognizes that interstitial fibrosis occurs in miners, and the [Japanese study by Dr. Homna], does not state that there is a link between interstitial fibrosis and coal dust exposure, but concludes that there may be an association between the two. Decision and Order at 16. The administrative law judge rationally found that the studies relied on by Dr. Rasmussen fail to establish a definitive link between coal mine dust and pulmonary fibrosis. Employer's Brief at 13-14; Employer's Exhibit 10 at 16-17; *See* 20 C.F.R. §718.201(a); *Biggs v.*

Consolidation Coal Co., 8 BLR 1-317, 1-322 (1985). Thus, the administrative law judge rationally accorded Dr. Rasmussen's opinion less weight as Dr. Rasmussen failed to adequately explain how this claimant's interstitial fibrosis was linked to his coal dust exposure. *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, supra*; *Justice, supra; Fields, supra*. Moreover, as the administrative law judge rationally gave little weight to the evidence supportive of claimant's burden, he rationally determined that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). We therefore affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), as it is supported by substantial evidence and is in accordance with law.[5]

Based on the foregoing, we affirm the administrative law judge's findings pursuant to Section 718.202(a)(4), but vacate the administrative law judge's findings at Section 718.202(a)(1), and remand this case for further consideration of the x-ray evidence. If, on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), he is instructed to make findings consistent with the standard enunciated in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Further, if, on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a), the administrative law judge must then consider the evidence pursuant to all the applicable elements of entitlement. Specifically, the administrative law judge must then consider the evidence at Sections 718.203(b) and 718.204(c).[6]

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[5]As the administrative law judge properly declined to credit the opinions of Drs. Salari and Rasmussen, the only opinions or record that arguably support claimant's burden at Section 718.202(a)(4), we need not consider the administrative law judge's treatment of the employer's experts, as any error therein in harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6]Claimant contends that he is entitled to the presumption of causation at 20 C.F.R. §718.203(b), as the evidence is sufficient to establish pneumoconiosis, and because he has an extensive coal mine employment history. Inasmuch as findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(c) are contingent upon a finding that the existence of pneumoconiosis has been established, we vacate the administrative law judge's current findings thereunder. In light of our disposition herein, we need not address claimant's specific argument at Section 718.203(b).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and the case 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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BETTY JEAN HALL
Administrative Appeals Judge