BRB No. 06-0349 BLA

JAMES W. MOYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MEADOW RIVER COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 11/27/2006
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2004-BLA-6244) of Administrative Law Judge Daniel L. Leland awarding 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). After crediting claimant with twenty-six years of coal mine employment, as stipulated to by the parties, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(ii), (iv), and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in reviewing the medical opinions of Drs. Rasmussen, Boustani, and Zaldivar, and that he did not properly weigh all of the relevant evidence in finding the existence of pneumoconiosis, total disability, and causation established. Claimant has responded and urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), urges rejection of employer's contentions concerning the issue of the existence of pneumoconiosis.

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 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that in evaluating the medical opinion evidence at Sections 718.202(a)(4) and 718.204(b)(2)(iv), (c), the administrative law judge impermissibly discredited Dr. Zaldivar's opinion that claimant does not have coal workers' pneumoconiosis or a totally disabling pulmonary impairment due to coal dust exposure. Employer argues that the administrative law judge erred in relying solely on the radiographic evidence to find the existence of pneumoconiosis established without

weighing all of the relevant evidence together. In addition, employer asserts that the administrative law judge erred in discrediting Dr. Zaldivar's opinion on total disability because the doctor's report contained a reference to the test results of a different patient. Employer's Brief at 5-6. We agree.

In evaluating Dr. Zaldivar's opinion, that claimant does not suffer from any coal dust related condition and does not have a pulmonary impairment, the administrative law judge discredited the physician's opinion since his diagnosis was against the weight of the preponderance of the x-ray evidence. Although a finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge must weigh all of the relevant evidence together in determining if the existence of pneumoconiosis is established. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In his consideration of the medical opinions under Section 718.202(a)(4), the administrative law judge stated:

> The record includes the opinions of three physicians. In her November 28, 2003 letter, Dr. Boustani referred to unspecified, abnormal x-ray readings as "consistent with pneumoconiosis." I find that Dr. Boustani's opinion is neither documented nor well-reasoned and it is accorded little weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Dr. Rasmussen based his diagnosis of pneumoconiosis on Claimant's history of coal dust exposure and a positive x-ray interpretation. Dr. Zaldivar concluded that Claimant does not suffer from pneumoconiosis or any coal dust-induced lung disease. As a preponderance of the x- ray evidence establishes pneumoconiosis, I accord more weight to the opinion of Dr. Rasmussen and less weight to the opinion of Dr. Zaldivar.

Decision and Order at 6.

As employer contends, the administrative law judge only provided a cursory review of the medical opinions and essentially based his determination that claimant suffers from pneumoconiosis solely on the radiographic evidence and "did not adequately review each of these physicians' opinions in regards to whether or not they supported a finding of pneumoconiosis apart from the radiographic evidence." Employer's Brief at 4. Consequently, we vacate the administrative law judge's determination at Section 718.202(a)(4) and remand the case for reconsideration of the evidence thereunder and a reweighing of all of the evidence together pursuant to Section 718.202(a). *Compton*, 211 F.3d 203, 22 BLR 2-162.

The administrative law judge, however, permissibly found that Dr. Zaldivar's partial reliance on the blood gas exercise test results of a different individual from claimant, which were included in Dr. Zaldivar's report, rendered the report flawed since the administrative law judge could not "deduce to what extent those results influenced Dr. Zaldivar's overall conclusions." Decision and Order at 7. Contrary to employer's argument, the administrative law judge did not err in considering this factor, even though the report also contained claimant's blood gas test results. The administrative law judge permissibly found Dr. Zaldivar's report flawed regarding total disability in light of the physician's reliance, in part, on studies conducted on a different patient, thus rendering the objective indications upon which his medical conclusion was based suspect. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Consequently, we affirm the administrative law judge's determination to accord little weight to the opinion of Dr. Zaldivar at Section 718.204(b)(2)(iv). *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); *see 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, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

On the issue of whether the evidence established claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204(c), the administrative law judge accorded little weight to the opinion by Dr. Zaldivar because he did not diagnose pneumoconiosis. Decision and Order at 8. Because the administrative law judge must reevaluate whether the x-ray and medical opinion evidence together is sufficient to establish the existence of pneumoconiosis, an analysis that could affect his weighing of the medical opinions on the issue of disability causation, we vacate the administrative law judge's findings pursuant to Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, 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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JUDITH S. BOGGS
Administrative Appeals Judge