BRB No. 07-0210 BLA

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| R.A.L. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| PLATEAU MINING CORPORATION | ) | DATE ISSUED: 11/09/2007 |
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| Employer-Petitioner | ) | |
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| 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 William Dorsey, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, 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:

Employer appeals the Decision and Order - Awarding Benefits (03-BLA-6654) of Administrative Law Judge William Dorsey on a claim[1] 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 adjudicated this claim pursuant to 20 C.F.R. Part 718 and, after crediting claimant with twenty-one years of qualifying coal mine employment, found that claimant established the existence of pneumoconiosis

[1] Claimant filed an application for benefits on January 22, 2002. Director's Exhibit 2.

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(b), (c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that the x-ray evidence established pneumoconiosis at Section 718.202(a)(1) and erred in finding that the medical opinion evidence established pneumoconiosis at Section 718.202(a)(4). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal.[2]

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).[3]

Employer contends that the administrative law judge's resolution of the conflicting x-ray evidence under Section 718.202(a)(1) was irrational and, therefore, argues that the administrative law judge erred in finding pneumoconiosis established under Section 718.202(a)(1). Employer asserts that the administrative law judge should have found the readings of the August 16, 2002 and July 22, 2003 chest x-rays to be in equipoise, rather than finding the readings to be consistent with pneumoconiosis, because equally qualified readers read the x-rays as both positive and negative. Additionally, employer argues that the administrative law judge erred in including Dr. Preger's reading of the August 16, 2002 x-ray for quality only as a reading in favor of the presence of the disease.

In finding that the x-ray evidence established pneumoconiosis, the administrative law judge found the August 16, 2002 x-ray to be positive because it was read as positive by both Dr. James, a B reader, and Dr. Ahmed, a Board-certified radiologist and B reader, despite the fact that it was also read as negative by Dr. Wiot, a Board-certified

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[2] We affirm the administrative law judge's finding of twenty-one years of coal mine employment and that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 18.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because claimant's coal mine employment was in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

radiologist and B reader. The administrative law judge also found the July 22, 2003 x-ray to be positive for pneumoconiosis because it was interpreted as positive by both Dr. Repsher, a B reader, and Dr. Ahmed, a Board-certified radiologist and B reader, even though it was read as negative by Dr. Wiot. Finally, the administrative law judge found the readings of the February 1, 2005 x-ray to be in equipoise, as the x-ray was read as positive by two dually qualified radiologists, Drs. Caprillo and Ahmed, and as negative by Drs. Wiot and Wheeler, two dually qualified radiologists.[4] In conclusion, the administrative law judge found that the x-ray evidence established pneumoconiosis at Section 718.202(a)(1) because a preponderance of the x-ray readings was positive.

Contrary to employer's argument, the administrative law judge acted properly in finding that the preponderance of the x-ray readings of the August 16, 2002 and July 22, 2003 x-rays by better qualified physicians was positive. 20 C.F.R. §718.202(a)(1);[5] *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 14; Director's Exhibit 17; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 2, 6. Further, contrary to employer's argument, the administrative law judge's inclusion of Dr. Preger's reading for quality only as one of the readings did not affect his determination that the August 16, 2002 x-ray was positive, as the administrative law judge clearly stated that Dr. Preger's reading was for quality only and that his determination that the August 16, 2002 x-ray was positive was based on the fact that both a dually qualified reader and a B-reader interpreted it as positive. Decision and Order at 14.[6] Accordingly, we affirm that the administrative law judge's weighing of the x-ray evidence as it provides both a

[4] This finding is affirmed as unchallenged on appeal. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[5] Section 718.202(a)(1) provides, in pertinent part, that when two or more x-ray reports are in conflict, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

[6] Employer additionally argues that the administrative law judge erred in finding that Dr. Preger rated the August 16, 2002 film as quality "1" when, in fact, Dr. Preger rated it as quality "2." Director's Exhibit 18. In his list of the x-ray evidence, on page 5 of the decision, the administrative law judge indicated that Dr. Preger's reading for quality only was "2," but later, on page 14 of the decision, when analyzing the evidence, stated that Dr. Preger's quality reading was "1." Decision and Order at 5, 14. In any case, we deem this error, if any, to be harmless as it did not affect the administrative law judge's finding that the April 16, 2002 x-ray was positive based on the preponderance of positive readings by better qualified physicians. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 14.

qualitative and quantitative assessment of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1994); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4-5 (1999) (*en banc*). We, therefore, affirm the administrative law judge's finding that the x-ray evidence established pneumoconiosis pursuant to Section 718.202(a)(1).

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established pneumoconiosis at Section 718.202(a)(4). Because Section 718.202(a)(1)-(a)(4) provides alternative methods of establishing pneumoconiosis and we have affirmed the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1), *see Cranor*, 22 BLR at 1-4-5; *Dixon*, 8 BLR at 1-345; *see also Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226-227 (2002) (*en banc*), we would not normally need to address employer's argument regarding the medical opinion evidence at Section 718.202(a)(4). Because employer's arguments at Section 718.202(a)(1) are, however, relevant to the administrative law judge's finding that the medical opinion evidence established that pneumoconiosis was a substantially contributing cause of total disability at Section 718.204(c) (disability causation), we will, address them.[7]

In finding that the medical opinion evidence established pneumoconiosis at Section 718.202(a)(4), the administrative law judge assigned greatest probative weight to the opinion of Dr. Alward as he was claimant's treating physician, citing 20 C.F.R. §718.104(d)(1)-(4). The administrative law judge also found Dr. Alward's opinion to be reasoned and documented because he personally examined claimant, considered claimant's symptoms, considered the results of medications prescribed to claimant, had an accurate understanding of claimant's occupational and smoking histories as well as claimant's family and medical histories, considered the results of claimant's x-ray and pulmonary function studies, reviewed information provided to him by claimant's cardiologist, and reviewed claimant's hospitalization records. As a result of Dr. Alward's analysis, the administrative law judge assigned his opinion of pneumoconiosis controlling weight. Decision and Order at 16.

The administrative law judge further noted that the opinions of Dr. James, who examined claimant in 2002, and Dr. Kanner, who examined claimant in 2005, and found coal workers' pneumoconiosis and chronic obstructive pulmonary disease, supported Dr.

[7] We affirm the administrative law judge's finding that claimant established that his clinical pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) as this determination is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17-18.

Alward's diagnosis of pneumoconiosis as they were well-reasoned and documented opinions based on accurate occupational and smoking histories, as well as the results of objective pulmonary function studies and radiological tests. The administrative law judge also found the opinions of Drs. Alward, Kanner and James to be supported by claimant's hospitalization records as the records noted that claimant was being treated for chronic obstructive pulmonary disease and emphysema "likely" related to coal dust exposure.[8]

Regarding the opinion of Dr. Renn, who found that claimant did not have a pulmonary condition caused by coal dust, that claimant's ventilatory defect was entirely due to smoking, and that claimant did not have legal or medical pneumoconiosis, the administrative law judge found it unreliable because Dr. Renn relied on an uncertain smoking history of 42 to 82 pack years, "a range far too broad for a reliable opinion about the etiology and possible multiple sources of [claimant's lung condition]. Decision and Order at 16. The administrative law judge also assigned less probative weight to Dr. Renn's opinion because it was impermissibly based on statistical probability, because the doctor relied on the fact that claimant's pulmonary function studies did not show a "restrictive defect," and because that claimant experienced "bronchoreversibility" subsequent to being medicated, factors which did not necessarily rule out the existence of pneumoconiosis. Based on the opinions of Drs. Alward, James, and Kanner the administrative law judge found pneumoconiosis established at Section 718.202(a)(4).

Considering the medical opinion evidence at Section 718.204(c) and, using his analysis of the medical opinion evidence at Section 718.202(a)(4), the administrative law judge also found that disability causation was established at Section 718.204(c) based on the opinion of Dr. James. The administrative law judge noted that while the opinions of Drs. Alward and Kanner did not establish disability causation, as they did not specifically address the issue of disability causation, their opinions did not detract from the opinion of Dr. James, which was supported by hospitalization treatment records. The administrative law judge assigned less probative weight to the opinion of Dr. Repsher because it was equivocal as to pneumoconiosis and less weight to the opinion of Dr. Renn because he did not find pneumoconiosis, contrary to the administrative law judge's finding.

Employer contends that, in assessing the credibility of the medical opinions, the administrative law judge failed to first resolve the conflicts in various reports regarding

[8] The administrative law judge properly accorded less weight to Dr. Repsher's finding of simple pneumoconiosis, because the doctor also noted that such a diagnosis was not "diagnostic of the disease. The administrative law judge found that Dr. Repsher's opinion was equivocal. *See Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989).

the length of claimant's smoking history. Employer further contends that the administrative law judge erred in stating that both Drs. Kanner and James relied on accurate smoking histories when Dr. Kanner recorded a smoking history in excess of 60 years, while Dr. James recorded a smoking history of 42 years. Employer also notes that Dr. Repsher and Dr. Smith, who saw claimant while he was hospitalized for cardiac catheterization, recorded different smoking histories. Employer further contends that since the administrative law judge found that Dr. Renn's notation of a 42 to 82 pack year smoking history was far too broad a range to render a reliable opinion, it was especially important that the administrative law judge resolve any inconsistencies regarding claimant's smoking histories and determine which history was most reliable. We agree.

Because claimant's smoking history is relevant to a determination of whether the evidence establishes legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c), the administrative law judge must resolve the discrepancies in the evidence regarding claimant's smoking history before he can assess the credibility of the opinions regarding legal pneumoconiosis and disability causation. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985).[9]

Further, as employer contends, the administrative law judge must reconsider whether the diagnoses of Dr. James and Kanner as to the presence of an obstructive airways disease constitutes legal pneumoconiosis. 20 C.F.R. §718.201.[10] Likewise, as employer contends, the administrative law judge erred in crediting the opinions of Drs. James and Kanner without considering the fact that they were not aware of additional testing performed by claimant that was available to other doctors. Employer notes that the administrative law judge did not consider that Dr. James, in fact, asked for additional testing to help make a more certain diagnosis. Instead, employer contends that the administrative law judge should consider whether Dr. Renn's opinion was more credible, because he reviewed more testing than the other physicians, and may, therefore, have been able to reach a better reasoned opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

We also agree with employer that the administrative law judge must consider the effects found by Dr. Alward after treating claimant with bronchodilators and the fact that Dr. Alward did not provide an explanation for finding that both smoking and coal dust exposure caused claimant's obstructive lung disease in determining whether it was a

[9] The administrative law judge found a smoking history of approximately 41 years. Decision and Order at 2.

[10] In order to constitute a finding of legal pneumoconiosis, a chronic respiratory disease must be attributed, at least in part to coal mine employment. 20 C.F.R. §718.201.

reasoned opinion. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Clark*, 12 BLR at 1-155. Moreover, as noted by employer, the administrative law judge must also determine whether Dr. Alward's statement that coal dust exposure "can" cause obstructive lung disease, is sufficient to establish legal pneumoconiosis in this case; *see also Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Further, while a doctor is not required to assign relative contributions to coal mine employment and smoking, 20 C.F.R. §718.204(c); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003), the administrative law judge must, as employer asserts, consider whether a doctor has sufficiently explained the basis for his finding that either coal mine employment, smoking, or both contributed to claimant's disability. Accordingly, we vacate the administrative law judge's findings as Section 718.202(a)(4) and 718.204(c) and we remand the case for further consideration of Dr. Alward's opinion for the reasons set forth by employer.

Finally, because it is unclear whether the administrative law judge found that the medical opinion evidence established the existence of clinical or legal pneumoconiosis, or both, and such a finding may affect the administrative law judge's finding on disability causation, the administrative law judge must clarify this finding on remand. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-118-119 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon. en banc*, BLR (June 27, 2007); *see Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Accordingly, the Decision and Order – Awarding of Benefits of the administrative law judge 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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BETTE JEAN HALL
Administrative Appeals Judge