BRB No. 08-0206 BLA

J.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAR LEE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/28/2008
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH, INCORPORATED	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-BLA-05025) of Administrative Law Judge Alice M. Craft 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, based on claimant's July 23, 2004 filing date, the administrative law judge accepted the parties' stipulation of fifteen years of coal mine employment. Initially, the administrative law judge found that employer, Har Lee Coal Company, is the properly named responsible operator. Weighing the medical evidence on the merits of entitlement, the administrative law judge then found the x-ray evidence and medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). In addition, the administrative law judge found the medical evidence sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant's total respiratory disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits, commencing as of July 2004.

On appeal, employer contends that the administrative law judge erred in finding the x-ray evidence of record sufficient to establish clinical pneumoconiosis pursuant to Section 718.202(a)(1). In addition, employer contends that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to Section 718.202(a)(4), arguing that the administrative law judge erred in according determinative weight to the opinion of Dr. Baker, claimant's treating physician, over the contrary opinions of Drs. Broudy and Westerfield. In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a substantive response on the merits of entitlement, unless requested to do so by the Board.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] We affirm, as unchallenged on appeal, the administrative law judge's decision to accept the parties' stipulation of fifteen years of coal mine employment, and her findings that employer is the properly designated responsible operator and that the medical evidence is sufficient to establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *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*).

Pursuant to Section 718.202(a)(1), the administrative law judge considered six readings of four x-ray films dated August 27, 2004, January 11, 2005, May 24, 2005 and June 7, 2005. The August 27, 2004 x-ray was read as negative by Dr. Baker, a B reader, and Dr. Wiot, who is dually-qualified as a B reader and a Board-certified radiologist. Director's Exhibits 16, 21. The January 11, 2005 x-ray was read as positive by Drs. Alexander and Brandon, both of whom are dually-qualified radiologists. Director's Exhibits 22, 23. The May 24, 2005 and June 7, 2005 films were read as negative by Dr. Westerfield and Dr. Broudy, respectively, both of whom are B readers. Employer's Exhibits 1, 2.

Weighing the interpretations of each of the x-ray films, the administrative law judge found that the August 27, 2004, May 24, 2005 and June 7, 2005 films were negative for pneumoconiosis, whereas the January 11, 2005 film was positive for pneumoconiosis. Decision and Order at 14-15. However, weighing the x-ray evidence as a whole, the administrative law judge found that the weight of the x-ray evidence was sufficient to establish the existence of pneumoconiosis, based on the positive readings of the January 11, 2005 x-ray by Drs. Alexander and Brandon, both of whom are dually-qualified radiologists. Decision and Order at 18. Specifically, the administrative law judge found that the positive interpretations of Drs. Alexander and Brandon outweighed the negative interpretations of Drs. Baker and Wiot, as the January 11, 2005 x-ray showed small opacities which had grown from the time of the negative reading of Dr. Wiot in August 2004 to January 11, 2005, with Dr. Alexander's positive reading of coal workers' pneumoconiosis. *Id*. The administrative law judge further found that the positive readings of the January 11, 2005 x-ray outweighed the negative readings of the May 24, 2005 and June 7, 2005 x-rays by Drs. Westerfield and Broudy, respectively, based on the superior professional qualifications of Drs. Alexander and Brandon, as dually-qualified radiologists. *Id*. Consequently, the administrative law judge found that the x-ray evidence of record, based on the positive readings by Drs. Alexander and Brandon, is sufficient to establish clinical pneumoconiosis pursuant to Section 718.202(a)(1).

On appeal, employer contends that the administrative law judge erred in finding the weight of the x-ray evidence sufficient to establish the existence of clinical pneumoconiosis, arguing that the administrative law judge failed to explain why a single positive x-ray film outweighed the three negative x-ray films. Employer's Brief at 10-11. In addition, employer contends that the administrative law judge, in according greater weight to the positive interpretations of the January 11, 2005 x-ray by Drs. Alexander and Brandon based on their superior radiological qualifications, failed to adequately consider the negative interpretation of the August 27, 2004 x-ray by Dr. Wiot, who is also a dually-qualified radiologist. Employer's Brief at 11. Employer further contends that the administrative law judge erred in failing to consider the quality of the x-ray films in her evaluation of the x-ray evidence; in particular, that the January 11, 2005 film, which was credited by the administrative law judge, was determined to be of Quality 2 by the physicians who read that film, whereas the other three films were considered to be of Quality 1 by the physicians who interpreted them. *Id*. There is no merit in these contentions.

Contrary to employer's contentions, the administrative law judge fully set forth the bases for her conclusion that the weight of the x-ray evidence is sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge reasonably exercised her discretion as trier-of-fact, in finding that the positive interpretations of the January 11, 2005 film by the two dually-qualified physicians, Drs. Alexander and Brandon, outweighed Dr. Wiot's negative interpretation of the August 27, 2004 film. In addition, the administrative law judge reasonably accorded greater weight to the positive interpretations of Drs. Alexander and Brandon over the negative interpretations of the May 2005 and June 2005 films by Drs. Broudy and Westerfield, respectively, based on the superior radiological qualifications of Drs. Alexander and Brandon. 20 C.F.R. §718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 18; Director's Exhibits 22, 23; Employer's Exhibits 1, 2. Moreover, contrary to employer's contention, merely because the January 11, 2005 x-ray was found to be of Quality 2 does not render the film non-conforming or mechanistically entitled to less weight. Rather, the regulations only require that x-ray films be "of suitable quality" for interpretation purposes and need not be of optimal quality. 20 C.F.R. §718.102(a); *see Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984); *see also Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983). Therefore, contrary to employer's assertions, the record indicates that the administrative law judge based her finding on a reasonable qualitative and quantitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Consequently, we affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence pneumoconiosis.

In light of the affirmance of the administrative law judge's finding of clinical pneumoconiosis pursuant to Section 718.202(a)(1), claimant has established the existence of pneumoconiosis, one of the requisite elements of entitlement, and we need not address the administrative law judge's other findings with regard to the existence of pneumoconiosis at Section 718.202(a). *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216, 1-226-227 (2002)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, because the administrative law judge relies on the credibility determinations rendered under Section 718.202(a)(4) in her weighing of the medical opinion evidence on disability causation pursuant to Section 718.204(c), we will address employer's allegations of error with regard to the administrative law judge's weighing of the medical opinion evidence.

In challenging the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), employer contends that the administrative law judge erred in failing to adequately explain the bases for her conclusion that Dr. Baker's opinion, diagnosing legal pneumoconiosis, is entitled to greater weight than the contrary opinions of Drs. Westerfield and Broudy. Employer contends that the administrative law judge erred in failing to adequately discuss the opinions of Drs. Westerfield and Broudy, and their criticisms of Dr. Baker's conclusion that asthma was not present in claimant. Employer's Brief at 14. In addition, employer contends that the administrative law judge did not accurately set forth the opinion of Dr. Westerfield in finding that he relied on an exaggerated smoking history and that he did not adequately explain his diagnosis. Employer's Brief at 15-16. Employer further contends that the administrative law judge erred in weighing the opinion of Dr. Broudy, arguing that the administrative law judge failed to adequately explain her weighing of Dr. Broudy's opinion. There is merit, in part, in employer's contentions.

Pursuant to Section 718.202(a)(4), the administrative law judge found the opinion of Dr. Baker, that claimant's chronic obstructive pulmonary disease is due to a combination of cigarette smoking and coal dust exposure, entitled to great weight, because it is well-reasoned and well-documented. Decision and Order at 17; Director's Exhibit 16; Claimant's Exhibit 1. The administrative law judge found that Dr. Baker's opinion was based on an accurate employment and smoking history, and also that Dr. Baker's opinion was supported by the objective evidence. *Id.*

In weighing the contrary medical opinions of Drs. Westerfield and Broudy, the administrative law judge found that these opinions were entitled to little weight because they were not well-reasoned, as the physicians failed to adequately explain why claimant's respiratory impairment was not due to coal dust exposure. Decision and Order at 18, 19; Employer's Exhibits 1-4. With regard to the opinion of Dr. Broudy, that

claimant suffers from chronic obstructive airways disease due to smoking and a predisposition to asthma, the administrative law judge found that Dr. Broudy relied on an exaggerated smoking history, and did not adequately explain his conclusion that coal dust exposure did not contribute to claimant's respiratory condition. Decision and Order at 18; Employer's Exhibits 2, 4. Dr. Broudy, in opining that claimant's chronic obstructive airways disease was due to smoking, relied on a thirty pack year smoking history, which is double the smoking history found by the administrative law judge, *see* Decision and Order at 4. However, because the administrative law judge provided a valid basis for according less weight to Dr. Broudy's opinion, we reject employer's contention that the administrative law judge failed to provide an adequate rationale for her weighing of Dr. Broudy's opinion. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

With regard to Dr. Westerfield's opinion, the administrative law judge accorded little weight to this opinion, on the grounds that Dr. Westerfield did not adequately explain why only cigarette smoking caused claimant's impairment and that Dr. Westerfield relied on an exaggerated smoking history. Decision and Order at 17-18. However, as employer contends, the administrative law judge has not accurately set forth the conclusions of Dr. Westerfield concerning the causes of claimant's impairment. The administrative law judge found that Dr. Westerfield diagnosed chronic obstructive lung disease, which is the result of asthma and chronic bronchitis. Decision and Order at 11. However, in further discussing Dr. Westerfield's opinion, the administrative law judge found that Dr. Westerfield diagnosed chronic obstructive pulmonary disease due to smoking and asthma, and stated that Dr. Westerfield failed to explain why cigarette smoking alone caused claimant's impairment and also failed to "explain why, if the Claimant was truly suffering from smoking-induced asthma," the objective evidence still showed a residual disability. Decision and Order at 17-18. Contrary to the administrative law judge's characterization of his opinion, Dr. Westerfield opined that claimant is suffering from chronic bronchitis due to smoking and asthma, which he did not attribute to either cigarette smoking or coal dust exposure. Employer's Exhibits 1, 3. Specifically, Dr. Westerfield stated that claimant's "major respiratory injury" is his asthma and that the asthma is not caused by claimant's cigarette smoking. Employer's Exhibit 3 at 11, 34. Moreover, the administrative law judge has not adequately considered Dr. Westerfield's opinion in its entirety, specifically his discussion and criticisms of Dr. Baker's finding that claimant's respiratory condition is the result of chronic obstructive pulmonary disease attributable to both cigarette smoking and coal dust exposure, and that claimant does not suffer from asthma, the condition to which Dr. Westerfield attributes the majority of claimant's disabling respiratory impairment. *See* Employer's Exhibit 3 at 14-18, 24, 33-34. Consequently, because the administrative law judge's characterization of Dr. Westerfield's conclusion is not wholly accurate and the administrative law judge has not considered the entirety of Dr. Westerfield's opinion, we

vacate her findings concerning Dr. Westerfield's opinion and remand the case for the administrative law judge to more fully consider and discuss all aspects of his opinion.[3]

Consequently, in light of our holding that the administrative law judge failed to adequately consider the entirety of Dr. Westerfield's medical opinion, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Moreover, because the administrative law judge relied on her findings at Section 718.202(a)(4), in weighing the relevant evidence on disability causation, we also vacate her finding that the medical opinion evidence is sufficient to establish that claimant's total respiratory disability is due to pneumoconiosis pursuant to Section 718.204(c). Thus, we vacate the administrative law judge's award of benefits and remand the case for further consideration of the medical opinion evidence with regard to the issue of the cause of claimant's total respiratory disability. 20 C.F.R. §718.204(c); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288 (6th Cir. 2001); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211,

[3] On remand, the administrative law judge must also more fully discuss Dr. Westerfield's specific findings concerning claimant's smoking history. In particular, the administrative law judge found that Dr. Westerfield relied on an exaggerated smoking history of forty-five pack years, based on a smoking history of one and one-half packs of cigarettes per day for thirty years. Decision and Order at 17, 22. While Dr. Westerfield stated that he considered a 45 pack year history of smoking for claimant, Employer's Exhibit 3 at 11-12, when questioned regarding a lesser smoking history of fifteen years, he stated that he misspoke in stating that the smoking history was 45 pack years, as claimant's history shows a smoking history of one-half packs of cigarettes per day for thirty years. *Id*. at 32. Dr. Westerfield further stated that this lesser figure, nonetheless, is consistent with his overall conclusions. Specifically, Dr. Westerfield testified:

> A [Dr. Westerfield]. Again, I'm attributing the major respiratory injury here and his medical problem to asthma. And I've made chronic bronchitis from cigarette smoking a much lesser component.
>
> Q. [Mr. Stonecipher] So the primary problem here, you think, is the asthma.
>
> A. Yes, sir.
>
> Q. And that has no relation – that's not caused by cigarette smoking, is that right?
>
> A. That's correct.

Id. at 34.

218, 20 BLR 2-360, 2-373 (6th Cir. 1996) (medical opinion attributing claimant's respiratory impairment to a combination of smoking and coal dust exposure may be sufficient to establish that claimant was totally disabled due to pneumoconiosis).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is 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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BETTY JEAN HALL
Administrative Appeals Judge