BRB No. 99-0244 BLA

CHARLES M. SHORT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CUMBERLAND MOUNTAIN SERVICE CORPORATION	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
U.S. FIDELITY & GUARANTY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford & Siemon), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer and carrier.

Rita Roppolo (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0005) of Administrative Law Judge Robert L. Hillyard 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). This case is on appeal before the Board for a third time. In his initial Decision and Order issued on November 12, 1987, Administrative Law Judge Clement J. Kichuk credited claimant with thirty-eight years of qualifying coal mine employment, and adjudicated this claim, filed on September 7, 1983, pursuant to the provisions at 20 C.F.R. Part 718. Judge Kichuk found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), and thus denied benefits.

On appeal, the Board vacated the administrative law judge's findings at Section 718.204(c)(4), and remanded this case for the administrative law judge to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's medical assessment of claimant's physical abilities. If on remand the administrative law judge found total respiratory disability established at Section 718.204(c), *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), the Board instructed him to determine at Section 718.204(b) whether claimant's total respiratory disability was due, at least in part, to pneumoconiosis under the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). *Short v. Mountain Coals, Inc.*, BRB No. 87-3566 BLA (Apr. 24, 1990)(unpub.). The Board summarily denied employer's request for reconsideration by Order dated October 1, 1991.

In a Decision and Order on Remand issued on July 21, 1992, Judge Kichuk gave little weight to Dr. Baker's medical assessment, and found that claimant failed to establish total respiratory disability pursuant to Section 718.204(c). Accordingly, benefits were denied.

On appeal, the Board granted the motion filed by the Director, Office of Workers' Compensation Programs (the Director), and remanded this case to the district director to provide claimant with a complete pulmonary evaluation. *Short v. Mountain Coals, Inc.*, BRB No. 92-2473 BLA (Sept. 15, 1993)(unpub. order). The Board subsequently denied employer's motion for reconsideration. *Short v. Mountain Coals, Inc.*, BRB No. 92-2473 BLA (May 24, 1995)(unpub. order on

recon.).

Following further development of the record, this case was assigned to Administrative Law Judge Robert L. Hillyard for hearing on April 1, 1998. In a Decision and Order issued on November 9, 1998, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a)(1), 718.203(b), but insufficient to establish total respiratory disability due to pneumoconiosis at Section 718.204. Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.204(b). Employer responds, urging affirmance of the denial of benefits, and challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.204(c)(2). The Director responds in support of claimant's position. By Order issued on February 26, 1999, the Board denied employer's motion to strike the Director's response brief.[1]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

[1]We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1), (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning first to the issue of the existence of pneumoconiosis, employer contends that the administrative law judge failed to provide a valid reason for according determinative weight at Section 718.202(a)(1) to the positive interpretations of the two earliest films of record, dated October 10, 1983[2] and March 17, 1986. We agree. The administrative law judge gave less weight to the later negative x-ray interpretations "[b]ecause the first two x-rays were uniformly read as positive, and because pneumoconiosis is a progressive and irreversible disease, and because the film quality of the x-rays dated June 24, 1997 and November 5, 1993 was uniformly noted as poor or fair...." Decision and Order at 9. Employer correctly notes, however, that the pertinent regulation only requires that a film be of suitable quality for proper classification, thus absent support in the record for finding that interpretations of suboptimal quality films are unreliable, the rationale provided by the administrative law judge for discounting the more recent negative interpretations of record was contrary to law. 20 C.F.R. §718.102; *see Preston v. Director, OWCP*, 6 BLR 1-1229 (1984); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). Employer additionally argues that the administrative law judge did not address all relevant evidence, specifically the negative interpretations contained at Claimant's Exhibits 1, 2 of films taken on February 7, 1995, February 14, 1995, and March 6, 1997 during claimant's hospitalizations. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(1), and remand this case for the administrative law judge to determine the probative value of the negative interpretations contained at Claimant's Exhibits 1, 2, *see* 20 C.F.R. §718.102(e); *Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984), and to reevaluate the x-ray evidence of record consistent with *Staton v. Norfolk & Western Rwy. 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. 1993). If, on remand, the administrative law judge finds that pneumoconiosis is not established at Section 718.202(a)(1), he must determine whether the weight of the evidence establishes pneumoconiosis pursuant to Section 718.202(a)(2)-(4).

[2]Employer accurately notes that the administrative law judge incorrectly listed Dr. Baker as a B-reader, when in fact the physician has no special radiological qualifications. *See* Director's Exhibit 12.

Turning next to the issues of total respiratory disability and disability causation at Section 718.204(c), (b), claimant and the Director contend that the administrative law judge erred in relying on the opinion of Dr. Dahhan to support his finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment arising out of coal mine employment. Decision and Order at 12. Claimant and the Director argue that Dr. Dahhan's opinion, that claimant has no respiratory impairment related to coal mine employment and retains the physiological capacity to continue his previous coal mine work, Director's Exhibit 21, is not credible with regard to either issue because Dr. Dahhan merely listed claimant's job titles but did not indicate an awareness of the physical requirements of claimant's usual coal mine employment, *see generally Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); and he mistakenly believed that claimant did not have pneumoconiosis, contrary to the administrative law judge's findings, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Claimant and the Director thus maintain that the qualifying blood gas studies of record at Section 718.204(c)(2) establish total respiratory disability as a matter of law because there is no credible contrary probative evidence, and they assert that because Dr. Baker's report is legally sufficient to establish both pneumoconiosis and disability causation,[3] remand is required for the administrative law judge to either credit Dr. Baker's opinion or set forth his reasons for discounting it. Employer counters that the administrative law judge's finding of total respiratory disability at Section 718.204(c)(2) does not comport with the requirements of the Administrative Procedure Act (APA), 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), 30 U.S.C. 932(a), because the administrative law judge did not provide any rationale for crediting the qualifying blood gas studies of record over the non-qualifying studies. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). All of the parties' arguments have some merit. The administrative law judge did not render a definitive finding as to whether claimant established a totally disabling respiratory impairment. Rather, he combined his disability and disablility causation findings at Section 718.204(c)(4), after determining

[3]Based upon the PO2 values of claimant's blood gas studies, Dr. Baker diagnosed hypoxemia which he attributed to a combination of coal dust exposure and smoking. Director's Exhibit 21. While the administrative law judge accurately determined that Dr. Baker's opinion was insufficient to support a finding of total respiratory disability, Decision and Order at 12, his diagnosis satisfies the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201 and, if credited, is sufficient to establish disability causation at Section 718.204(b). *See generally Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996).

that the evidence was insufficient to establish total respiratory disability at Section 718.204(c)(1), (3), and that the arterial blood gas studies, while inconsistent, were, as a whole, supportive of a finding of pulmonary disability. Decision and Order at 10-12. Inasmuch as the administrative law judge did not provide an explanation for the weight he assigned to the conflicting blood gas studies of record at Section 718.204(c)(2), *see Wojtowicz, supra*, and failed to separately evaluate the evidence relevant to the issues of total respiratory disability at Section 718.204(c) and disability causation at Section 718.204(b), *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc* recon.), we vacate his findings at Section 718.204(c)(2), (4), (b). If, on remand, the administrative law judge finds the existence of pneumoconiosis established, he must reassess the relevant evidence under Section 718.204(c)(2), (4), assign it appropriate weight and provide a rationale therefor, and determine whether the weight of the evidence, both like and unlike, establishes total respiratory disability at Section 718.204(c). *Fields, supra.* If so, the administrative law judge must weigh the conflicting opinions of Drs. Dahhan and Baker, and determine whether claimant has established disability causation at Section 718.204(b). *See Adams, supra; Peabody Coal Co. v. Smith,* 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Tussey, supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge