BRB No. 03-0107 BLA

ERNEST R. LEONARD	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
10/31/2003	)	
BLACK MOUNTAIN COAL COMPANY	)	
	)	
	)	
and	)	
	)	
TRAVELER'S INSURANCE COMPANY	)	
	)	
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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ernest R. Leonard, Panther, West Virginia, *pro se.*

Mary Beth Chapman (Pullin, Knopf, Fowler & Flanagan, PLLC), Charlestown, West Virginia, for employer.

Jeffrey S. Goldberg (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (01-BLA-1104) of Administrative Law Judge Linda S. Chapman (the administrative law judge) 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 administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b).[2] Accordingly, the administrative law judge denied the claim.[3]

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in her analysis of the evidence pursuant to Section 718.202(a)(1) and (a)(4). The Director argues that employer conceded that claimant has a totally disabling respiratory impairment pursuant to Section 718.204(b). The Director urges that the case be remanded to the administrative law judge for further consideration of the evidence. Employer has filed a brief in response to claimant's statement in support of his appeal. Therein, employer generally reiterates its

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3]The relevant procedural history of this claim is as follows: Claimant filed the instant claim on March 28, 2000. Director's Exhibit 1. The claim was informally denied by the district director on August 28, 2000 because claimant failed to submit to a medical examination. Director's Exhibit 7. The district director revised the Notice of Initial Finding, and awarded interim benefits on February 23, 2001. Director's Exhibit 23. Following employer's controversion of the claim, the district director again informally awarded benefits on May 21, 2001. Director's Exhibits 19, 20.

previous contentions and repeats it assertion that affirmance of the denial of benefits is appropriate.[4]

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

The administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). The record contains five x-ray interpretations. Dr. Navani read an October 16, 2000 film as 1/0, positive for pneumoconiosis. Director's Exhibit 12. Dr. Patel read the same film, as 1/0, positive for pneumoconiosis. Director's Exhibits 11, 13. Dr. Wiot read the same film as negative for pneumoconiosis. Dr. Zaldivar read a May 31, 2001 film as 0/1, negative for pneumoconiosis. Employer's Exhibits 5, 6. In addition, Dr. Rasmussen interpreted the October 16, 2000 film read by Drs. Patel, Navani and Wiot, as 1/0, positive for pneumoconiosis. Director's Exhibits 11,12, 13; Employer's Exhibit 7. Dr. Rasmussen did not communicate his interpretation by written report. Rather, he orally communicated his interpretation during his deposition. Employer's Exhibit 7 at 16-17.[5]

As the administrative law judge failed to consider Dr. Rasmussen's interpretation, the administrative law judge's finding, that there are only four x-ray interpretations of record, one each by Drs. Patel, Navani, Wiot and Zaldivar, cannot be affirmed. Decision and Order at 6. The regulation which sets forth the criteria for the development of x-ray evidence does not include a requirement that x-ray interpretations be in writing. 20 C.F.R. §718.102. Moreover, Section 718.102(e) states, in relevant part, that: "…no chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is

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[4]We affirm, as unchallenged on appeal and not adverse to claimant, the administrative law judge's findings that the miner established eighteen years of qualifying coal mine employment, and that the employer is the responsible operator in the instant case. Decision and Order at 4; *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]Dr. Rasmussen is Board-certified in Internal Medicine and Forensic Medicine, and is a B-reader. Claimant's Exhibit 10.

conducted and reported in accordance with Appendix A. In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed." *Id.* The administrative law judge erred by failing to consider Dr. Rasmussen's x-ray interpretation. The administrative law judge may not reject relevant evidence without an explanation. *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Further, the administrative law judge must consider all relevant evidence, as required by the 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 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On remand, the administrative law judge must consider the x-ray interpretation of Dr. Rasmussen, along with the other x-ray interpretations of record.

We next address the administrative law judge's weighing of the four x-ray readings by Drs. Patel, Navani, Wiot and Zaldivar. In weighing these interpretations, the administrative law judge improperly determined that Dr. Zaldivar's negative interpretation of a May 31, 2001 film was entitled to the most weight, on the basis that the film Dr. Zaldivar read was taken seven months later than the October 16, 2000 film read by the three other doctors and thus, was the most recent. Decision and Order at 7; Employer's Exhibit 5. The United States Court of Appeals for the Fourth Circuit has held that reliance upon the "later is better" rationale is not correct in instances where the later negative x-rays are inconsistent with the earlier positive ones, in light of the fact that pneumoconiosis is a progressive disease. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

In light of the foregoing, we vacate, the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and remand the case for reconsideration of the x-ray evidence of record, including Dr. Rasmussen's x-ray interpretation, and for further consideration of all the x-ray evidence, consistent with the decisions of the Fourth Circuit *Scarboro, Lockhart*, and *Adkins*.[6]

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[6]The Director, Office of Workers' Compensation Programs, asserts that the Board must instruct the administrative law judge to determine whether the October 16, 2000 film is positive or negative for pneumoconiosis. Director's Brief at 10. We reject this contention, as there is no legal requirement that the fact finder determine whether each film is positive or negative for pneumoconiosis. Rather, the administrative law judge must consider all of the relevant x-ray evidence, and explain her findings so that they can be reviewed on appeal. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5

At Section 718.202(a)(4), the administrative law judge found that the medical opinion evidence failed to establish the existence of pneumoconiosis. The administrative law judge found that Dr. Zaldivar's opinion that claimant does not suffer from pneumoconiosis outweighed Dr. Rasmussen's opinion that claimant does suffer from pneumoconiosis. Decision and Order at 10. In considering the evidence at Section 718.202(a)(4), the administrative law judge first improperly rejected the positive CT scan interpretation of Dr. Patel, because she found that it was not properly classified according to the ILO-U/C classification system for x-ray interpretations. *Id.* The ILO-U/C classification system for x-ray interpretations applies only to x-rays, and there is no requirement that CT scans conform to this classification system. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc)*; 20 C.F.R. §§718.102(b), 718.107(a).

Second, the administrative law judge improperly discounted Dr. Rasmussen's opinion that claimant suffers from pneumoconiosis at Section 718.202(a)(4) because she found that the only basis for his opinion was a positive x-ray and claimant's work history. Decision and Order at 10. Dr. Rasmussen stated that he based his opinion upon the positive x-ray interpretations of Drs. Patel and Navani as well as his own interpretation, and that he opined that claimant suffered from chronic bronchitis due, in part, to coal dust exposure, based upon his physical examination, the fact that claimant had a chronic, productive cough, and the results of his pulmonary function study. Employer's Exhibit 7 at 16-23, 30-34. The Director correctly asserts that although the administrative law judge made reference to Dr. Rasmussen's deposition, she failed to consider Dr. Rasmussen's actual deposition testimony, wherein he affirmatively stated that coal dust exposure was the primary contributing factor to claimant's respiratory condition, and described the basis for his opinion in greater detail. Decision and Order at 8-10; Employer's Exhibit 7 at 15.

Third, the administrative law judge erred in failing to consider that Dr. Rasmussen opined, in addition to clinical pneumoconiosis, that claimant also suffered from chronic bronchitis due, in part, to coal dust exposure, Director's Exhibit 7; Claimant's Exhibits 3, 8; Employer's Exhibit 7. The administrative law judge did not weigh the medical opinion evidence to determine whether it established legal pneumoconiosis, but only considered whether the evidence established clinical pneumoconiosis, as she discounted Dr. Rasmussen's opinion as based only upon a positive x-ray and coal mine employment history. Decision and Order at 8-11. A diagnosis of chronic bronchitis due, in part, to coal dust exposure, if credited, could support a finding of "legal" pneumoconiosis under the Act, and must he be evaluated by the administrative law judge. *See Perry v. Director, OWCP*, 9 BLR

U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

1-1 (1986); 20 C.F.R. §718.201(a)(2).

At Section 718.202(a)(4), the Director also asserts that the administrative law judge neglected to consider defects in Dr. Zaldivar's opinion and improperly credited Dr. Zaldivar's opinion that claimant does not suffer from legal pneumoconiosis, based upon evidence relevant to clinical pneumoconiosis alone. Director's Brief at 13. Inasmuch as we have held that the administrative law judge erred in her weighing of x-ray evidence of record, s*ee Scarbro*, 220 F.3d at 258-259, 22 BLR at 2-105-106 (4th Cir. 2000); *Lockhart*, 137 F.3d at 806, n. 6, 21 BLR at 2-312, n. 6 (4th Cir. 1998)*; Adkins*, 958 F.2d at 51-52, 16 BLR at 2-64-66 (4th Cir. 1992), the administrative law judge, on remand, must reconsider Dr. Zaldivar's opinion.

In light of the foregoing, we vacate the administrative law judge's finding at Section 718.202(a)(4). If, on remand, the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a)(1) and/or (a)(4), she must weigh all of the evidence relevant to the existence of pneumoconiosis at Section 718.202(a) together, consistent with the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F. 3d 203, 22 BLR 2-162 (4th Cir. 2000).

The Director next asserts that the administrative law judge erred by finding that claimant did not establish total respiratory disability pursuant to Section 718.204(b). The Director asserts that employer conceded the issue of total respiratory disability at the hearing, and thus, that the issue was not before the Board. During the hearing, employer's counsel stated: "We will withdraw our contest of Timeliness, the miner's identity, Post-'69 Employment, Total Disability- and after his testimony I think we can withdraw [the issue of] responsible operator." H. Tr. at 11. The administrative law judge therefore erred by rendering findings pursuant to Section 718.204(b), rather than accepting employer's withdrawal of its challenge to the issue of total disability during the hearing. *See Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc*); *Thorton v. Director, OWCP*, 8 BLR 1-272 (1985); 20 C.F.R. §725.462. Thus, we reverse the administrative law judge's finding that the evidence failed to establish total respiratory disability pursuant to Section 718.204(b), in light of employer's concession. *Id.*

Finally, on remand, if reached, the administrative law judge is instructed to render a finding on the issue of total disability due to pneumoconiosis pursuant to 20 C.F.R.§718.204(c). *See also Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded for further proceedings

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