BRB No. 07-0170 BLA

F.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GABRIEL MINING COMPANY	)	DATE ISSUED: 10/30/2007
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Sarah M. Hurley, (Jonathan L. Snare, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2004-BLA-5399) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) rendered on a subsequent 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 that the testimony and record supported the parties' stipulation to a coal mine employment history of twenty-years. Considering the newly submitted x-ray evidence, the administrative law judge concluded that the weight of such evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In addition, the administrative law judge concluded that the newly submitted medical opinion evidence supported a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, the administrative law judge concluded that because claimant established pneumoconiosis, one of the elements previously adjudicated against him, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on the merits, the administrative law judge reviewed the record evidence and determined that claimant established the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), that claimant was totally disabled, 20 C.F.R. §718.204(b), and that total disability was due to pneumoconiosis, 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the x-ray evidence established pneumoconiosis pursuant to Section 718.202(a)(1), both in determining that a change in an applicable condition of entitlement was established and on the merits. Employer further argues that the administrative law judge's flawed finding at Section 718.202(a)(1), in turn, affected the administrative law judge's finding of pneumoconiosis based on medical opinion evidence at Section 718.202(a)(4), both in finding that a change in an applicable condition of entitlement was established and on the merits. In addition, employer contends that the administrative law judge erred in finding that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204(c) on the merits.[2] Claimant responds, urging that the award of

[1] Claimant initially filed a claim for benefits on September 11, 1985, which contained no medical evidence and was denied as abandoned on December 12, 1985. Director's Exhibit 1. Claimant filed a second claim on November 5, 1991, which was finally denied by the Department of Labor on November 19, 1993, as claimant failed to establish any of the elements of entitlement. Director's Exhibit 2. No further action was taken by claimant until the filing of the instant claim on August 12, 2002. Director's Exhibit 4.

[2] As employer has not challenged the administrative law judge's findings that claimant's pneumoconiosis, if established, arose out of coal mine employment pursuant

benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief limited to responding to employer's assertions regarding the evidentiary limitations at 20 C.F.R. §725.414, and employer's assertions regarding the standard required to establish a change in an applicable condition of entitlement pursuant to Section 725.309. Employer reiterates its assertions in its reply brief.

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).

Employer first argues that the administrative law judge erred in finding that the newly submitted x-ray evidence established a change in an applicable condition of entitlement pursuant to Section 725.309, as the administrative law judge failed to consider whether the new x-ray evidence showed a "worsening" in claimant's physical condition. This argument is rejected. The revised regulations do not require a showing of "worsening" in order to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).[3]

We also reject employer's contention that the evidentiary limitations, as implemented at 20 C.F.R. §725.414, adversely affected employer's ability to defend this case as the limitations prevented employer from having Dr. Alexander's positive readings re-read by equally qualified physicians and precluded the administrative law judge from considering all of the relevant evidence as required by the Act. This argument is rejected, as the validity of the regulations imposing evidentiary limitations has been upheld, and employer does not contend that the number of readings the administrative law judge allowed claimant to submit was in excess of the evidentiary limitations. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).

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to 20 C.F.R. §718.203(b), and that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Prior to the amendment of the regulations, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the evidence must show a "worsening" in claimant's condition in order to establish a material change in conditions. 20 C.F.R. §725.309(d)(2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Likewise, employer's contention that the administrative law judge erred in failing to consider the medical opinion evidence along with the x-ray evidence at Section 718.202(a)(1), is rejected. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, has held that Section 718.202(a)(1)-(4) provides alternative methods of establishing pneumoconiosis. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000);[4] *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).

In addition, employer contends that the administrative law judge impermissibly relied on "numerical superiority" when she credited Dr. Alexander's two positive x-ray interpretations over Dr. Poulos's single negative interpretation, when the doctors were equally qualified. Moreover, employer contends that even if the administrative law judge could rely on "numerical superiority" in assessing the weight of the x-ray evidence, the administrative law judge, in this case, failed to accurately count the new x-ray evidence.[5]

In evaluating the readings of the three new x-rays, the administrative law judge determined whether each x-ray, which was read more than once, was positive or negative, by resolving the conflict in the x-ray readings as required at Section 718.202(a)(1).[6] In so doing, the administrative law judge considered the qualifications of the physicians who read the x-rays. The administrative law judge found that because the October 2, 2002 x-ray was read as positive for pneumoconiosis by Dr. Baker, who was a B reader, but negative by Dr. Poulos, who was both a B reader and Board-certified radiologist, that x-ray was negative for pneumoconiosis. Director's Exhibits 13, 15. Regarding the March 27, 2003 x-ray, the administrative law judge found it to be positive despite the fact it was read as negative by Dr. Dahhan, a B reader, since it was read as positive by Dr. Alexander, who was both a B reader and Board-certified radiologist, Director's Exhibits

[4] The record indicates that claimant's last coal mine employment took place in Kentucky. Director's Exhibits 1, 2, 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit in this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[5] Employer also notes that the new negative x-ray readings were buttressed by the weight of the earlier x-ray evidence, which was negative. In order to a establish a change in an applicable condition of entitlement, however, only new evidence may be considered. 20 C.F.R. §725.309(d).

[6] Section 718.202(a)(1) provides that where two or more x-ray reports are in conflict, the administrative law judge shall consider the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

15, 16. Likewise, the administrative law judge found the April 10, 2003 x-ray to be positive because it was read as positive by Dr. Alexander, a B reader and Board-certified radiologist, despite having been read as negative by Dr. Broudy, a B reader. Director's Exhibit 15; Claimant's Exhibit 1. Therefore, based on both a qualitative and quantitative assessment of the new x-ray evidence, the administrative law judge properly found the preponderance of the new x-ray evidence to be positive for pneumoconiosis. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 60, 19 BLR 2-271, 2-281 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Contrary to employer's assertions, the administrative law judge was not precluded from crediting Dr. Alexander's positive readings because they were interpretations of two separate x-rays. 20 C.F.R. §718.202(a)(1).[7] Accordingly, we affirm the administrative law judge's finding that claimant has established the existence of pneumoconiosis by the newly submitted x-ray evidence at Section 718.202(a)(1) and has thereby established a change in an applicable condition of entitlement at Section 725.309(d).

After finding that the newly submitted x-ray evidence established the existence of pneumoconiosis and, therefore, a change in an applicable condition of entitlement, the administrative law judge turned to the merits and properly found that the most recent x-rays taken in 2002-2003 showing pneumoconiosis were entitled to greater weight than the previously submitted x-ray evidence which was from 1991. *See* 20 C.F.R. §718.201(c); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *see also Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). We, therefore, affirm the administrative law judge's finding that pneumoconiosis was established on the merits pursuant to Section 718.202(a)(1).

Employer additionally argues that, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law erred in according greater weight to the opinion of Dr. Baker, diagnosing the existence of pneumoconiosis, over the contrary opinions of Drs. Dahhan and Broudy. As we have affirmed the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1) based on the x-ray evidence, however, we need not consider whether the medical opinion evidence established pneumoconiosis at Section 718.202(a)(4). *See Cornett*, 227 F.3d at 575, 22 BLR at 2-119; *Furgerson*, 22 BLR at 1-226-227; *Dixon*, 8 BLR at 1-345.

[7] We also reject employer's assertion that the negative x-ray readings of Drs. Broudy and Dahhan should have been accorded greater weight because those doctors reviewed claimant's complete history and physical examination results. Those additional factors are not relevant to determining whether the x-ray evidence establishes pneumoconiosis at Section 718.202(a)(1). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

We will, however, address employer's arguments at Section 718.202(a)(4) as they are relevant to the administrative law judge's finding at 20 C.F.R. §718.204(c). Specifically, employer contends that the administrative law judge erred in crediting Dr. Baker's opinion, finding both clinical and legal pneumoconiosis, over the contrary opinions of Drs. Dahhan and Broudy, as the opinion was more in keeping with the positive x-ray evidence. Employer also contends that, contrary to the administrative law judge's suggestion, Dr. Dahhan's opinion, finding that claimant did not have clinical or legal pneumoconiosis, was based on more than a negative x-ray, but also pulmonary function testing and blood gas testing. Further, employer contends that the administrative law judge failed to consider that Dr. Dahhan had examined claimant twice, while Dr. Baker examined claimant only once and never reviewed any prior evidence. Finally, employer contends that the administrative law judge erred in stating that obstructive airways disease, constituted legal pneumoconiosis, without attributing the disease to coal mine employment, and in analyzing Dr. Broudy's opinion in light of that definition.

Employer also contends that the administrative law judge erred in finding that pneumoconiosis was a substantially contributing cause of total disability pursuant to Section 718.204(c)(disability causation). Employer asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Baker that claimant's pneumoconiosis was, along with smoking, a substantially contributing cause of his total disability and in finding that Dr. Baker's opinion was well-reasoned and well-documented. Employer contends that Dr. Baker's opinion was not well-reasoned as it did not address the minimal nature of claimant's pneumoconiosis or explain why it was a substantially contributing cause of claimant's total disability.[8] Employer asserts that

[8] Dr. Baker, who is Board-certified in internal medicine with a subspecialty in pulmonary diseases, examined claimant on October 2, 2002, Director's Exhibit 13; Claimant's Exhibit 2. In addition to a positive x-ray and a normal electrocardiogram, Dr. Baker conducted a pulmonary function study showing a moderate obstructive defect, and a blood gas study showing mild resting hypoxemia. Dr. Baker also noted claimant's 25 years of underground coal mine employment, and noted that claimant was currently smoking and started at the age of 12 to 14, approximately 47 to 49 years. Dr. Baker stated that while claimant smoked a pack per day, he currently smoked fewer cigarettes per day. Dr. Baker diagnosed coal workers' pneumoconiosis due to coal mine employment and chronic obstructive pulmonary disease due to coal mine employment and cigarette smoking. Dr. Baker opined that claimant suffered from a moderate impairment due to cigarette smoking and coal dust exposure and that he no longer had the respiratory capacity to perform his usual coal mine employment. In a 2005 deposition, Dr. Baker noted that claimant had reported a smoking history of two packs per day to other physicians, which Dr. Baker acknowledged would be a significant change in

without sufficiently addressing Dr. Baker's opinion, the administrative law judge's acceptance of it on the issue of disability causation was conclusory. Employer also asserts that the administrative law judge erred in not crediting the opinions of Drs. Dahhan and Broudy,[9] who found that the sole cause of claimant's total disability was smoking.

Because, as employer asserts, there are errors in the administrative law judge's finding that the medical opinion evidence established the existence of both clinical and legal pneumoconiosis at Section 718.202(a)(4), and those findings affect the administrative law judge's disability causation finding at Section 718.204(c) on the merits, we vacate the administrative law judge's findings at Sections 718.202(a)(4) and

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claimant's smoking history. Dr. Baker, however, opined that this difference would not affect his opinion that coal dust caused a part of claimant's respiratory disability.

[9] Dr. Dahhan, who was Board-certified in internal medicine with a subspecialty in pulmonary diseases, examined claimant on March 27, 2003, noting claimant's 30 years of underground coal mine employment, and that claimant reported a smoking history of a ½ pack per day, starting at age 20. Dr. Dahhan noted that claimant's physical examination was essentially normal but noted that claimant's blood gas studies showed mild hypoxemia and a carboxyhemoglobin level indicating an individual who smoked 1½ packs per day. Dr. Dahhan concluded that claimant's x-ray was negative for pneumoconiosis and that claimant did not have pneumoconiosis based on x-ray, pulmonary function studies and blood gas studies, but that claimant had chronic obstructive pulmonary disease and could no longer perform his usual coal mine employment. Dr. Dahhan attributed claimant's total disability entirely to his lengthy smoking history, noting that there was no evidence that disability was caused by coal mine employment.

Dr. Broudy, who was Board-certified in internal medicine with a subspecialty in pulmonary diseases, examined claimant on April 10, 2003. Director's Exhibit 15. Dr. Broudy recorded a coal mine employment history of 32 years, noting that claimant smoked four cigarettes a day but had consumed up to one pack per day, beginning when he was 25. On blood gas studies, Dr. Broudy noted that the elevation in claimant's carboxyhemoglobin indicated continued exposure to cigarette smoking. He read claimant's x-ray as 0/1, which is negative for pneumoconiosis. Dr. Broudy also conducted a pulmonary function study. He opined that while claimant did not have coal workers' pneumoconiosis or silicosis, he did have a moderately severe obstructive airways disease which was due to cigarette smoking and which prevented him from performing coal mine work.

718.204(c) and we remand the case for further consideration of the medical opinion evidence at those Sections.

Although we have affirmed the administrative law judge's finding of clinical pneumoconiosis by x-ray evidence at Section 718.202(a)(1), *see Cornett*, employer's arguments, as they are relevant to whether the administrative law judge properly weighed the medical opinion evidence on the issue of pneumoconiosis and properly found Dr. Baker's opinion better reasoned than the contrary opinions of Drs. Dahhan and Broudy, are relevant to her finding of disability causation. Thus, on remand, in determining whether disability causation has been established on the merits, the administrative law judge should consider whether Dr. Dahhan, who examined claimant twice and issued an earlier opinion (which the administrative law judge failed to discuss) had a better understanding of the cause of claimant's disability than did Dr. Baker. *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). Likewise, while employer's argument that Dr. Baker's opinion is based, in part, on his positive reading of an x-ray that was subsequently re-read as negative, goes to the existence of clinical pneumoconiosis, it also affects the administrative law judge's determination of whether Dr. Baker's opinion on disability causation is better reasoned, *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984), as all of the doctors reviewed, in addition to x-rays, claimant's pulmonary function and blood gas testing, and Drs. Dahhan and Broudy specifically noted that claimant's carboxyhemoglobin level on blood gas testing, indicated continued cigarette smoking exposure. We also note that, on remand, the administrative law judge must clarify her statement and analysis of Dr. Broudy's opinion on page 14 of the decision where she stated that a finding of obstructive airway disease, without attribution to coal mine employment, constitutes a finding of legal pneumoconiosis. 20 C.F.R. §718.201.

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