BRB No. 07-0171 BLA

G.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 10/30/2007
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan & Voegelin, L.C.), Wheeling, West Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; 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 (05-BLA-5444) of Administrative Law Judge Ralph A. Romano (the administrative law judge) awarding benefits 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 accepted employer's concession that claimant has thirty years of coal mine employment and a totally disabling pulmonary impairment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Decision and Order at 2 n.3. Based on employer's concession of total disability, the administrative law judge found that the evidence developed since the prior denial established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Further, employer contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director filed a limited response, urging the Board to reject employer's assertion that the Director did not provide claimant with a complete pulmonary evaluation.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Claimant filed his first claim on June 11, 1982. Director's Exhibit 1. It was finally denied on April 20, 1987, because the evidence did not establish total disability. *Id*. Claimant filed his second claim on February 23, 1996. Director's Exhibit 2. It was finally denied on July 25, 1996, because the evidence did not establish total disability. *Id*. Claimant filed this claim on June 19, 2003. Director's Exhibit 4.

[2] Because the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Employer initially contends that the administrative law judge erred in finding that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge considered seven interpretations of four x-rays dated July 27, 1982, September 19, 1986, June 4, 1996, and August 7, 2003. Dr. Cole, a B reader and Board-certified radiologist, and Dr. Szalontay, who lacks radiological credentials, read the July 27, 1982 x-ray as positive for pneumoconiosis. Director's Exhibit 1. Dr. Altmeyer, a B reader, read the September 19, 1986 x-ray as positive for pneumoconiosis. *Id*. Dr. Sargent, a B reader and Board-certified radiologist, read the June 4, 1996 x-ray as positive for pneumoconiosis. Director's Exhibit 2. Dr. MacDonald, who lacks radiological credentials, stated that the June 4, 1996 x-ray showed moderate to moderately severe chronic lung disease with some interstitial pulmonary fibrosis. *Id*. Dr. Rao, who lacks radiological credentials, stated that the August 7, 2003 x-ray showed chronic interstitial pulmonary fibrosis probably secondary to pneumoconiosis.[3] Director's Exhibit 11. Dr. Wheeler, a B reader and Board-certified radiologist, read the August 7, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 12.

According greater weight to the three x-ray interpretations by physicians qualified as both B readers and Board-certified radiologists, the administrative law judge found that "the two positive readings by Drs. Sargent and Cole, outweigh the one negative reading rendered by Dr. Wheeler." Decision and Order at 14.

Employer argues that the administrative law judge erred by ignoring Dr. Sargent's narrative comments that claimant's x-ray did not reveal coal workers' pneumoconiosis. In Dr. Sargent's x-ray report, Dr. Sargent classified the June 4, 1996 film as "1/1," a classification that is considered positive for pneumoconiosis, and made the following comments: "Not CWP. [C]hanges mostly at bases – more marked on left, unknown etiology, compare to old films, need oblique views, smoking history ??, need detailed occupational history." Director's Exhibit 2; *see* 20 C.F.R. §718.102(b). Comments in an x-ray report that undermine the credibility of a positive ILO classification are relevant to the issue of the existence of the disease, but comments in an x-ray report that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the

[3] Dr. Barrett, a B reader and Board-certified radiologist, read the August 7, 2003 x-ray for quality only. Director's Exhibit 11.

existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999). Dr. Sargent's comment that the pneumoconiosis was not coal workers' pneumoconiosis addressed the source of the pneumoconiosis. Director's Exhibit 2. Because Dr. Sargent's comments do not undermine the credibility of his diagnosis of pneumoconiosis "1/1" by x-ray, we reject employer's assertion that the administrative law judge erred by ignoring Dr. Sargent's narrative comments in considering the evidence at 20 C.F.R. §718.202(a)(1). *See Cranor*, 22 BLR at 1-5.

Employer also argues that the counting of heads was the only rationale that the administrative law judge provided for weighing the conflicting x-ray evidence. Contrary to employer's assertion, the administrative law judge properly accorded greater weight to the x-ray readings by physicians who were B readers and Board-certified radiologists. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, because the administrative law judge considered both the quantitative and qualitative nature of the conflicting x-rays, we reject employer's assertion that the administrative law judge's weighing of the x-ray evidence was based solely on a head count. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[4]

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Cohen, Rao,[5] Perper, Altmeyer, Del Vecchio, Maas, Brooks, Rosenberg, Oesterling, and

[4] Employer argues that the administrative law judge failed to rationally consider all of the x-ray evidence that was presented to him. Specifically, employer notes that Dr. Rao's interpretation of the August 7, 2003 x-ray was equivocal and cannot establish pneumoconiosis. The administrative law judge noted that "[i]n 2003, Dr. Rao found changes 'probably secondary to pneumoconiosis.'" Decision and Order at 14. Dr. Rao was neither a B reader nor a Board-certified radiologist. Director's Exhibit 11. As discussed, in weighing the x-ray evidence, the administrative law judge credited the x-ray readings by physicians who were dually qualified as B readers and Board-certified radiologists. *Id.* Because the administrative law judge acted within his discretion in crediting only the x-ray readings by physicians who were dually qualified as B readers and Board-certified radiologists, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985), we reject employer's assertion that the administrative law judge failed to rationally consider Dr. Rao's x-ray reading.

[5] Employer asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete pulmonary evaluation,

Tomashefski. Dr. Cohen opined that claimant has coal workers' pneumoconiosis and a restrictive lung disease related to coal dust exposure. Director's Exhibit 16; Employer's Exhibit 3. Dr. Rao opined that claimant has chronic interstitial pulmonary fibrosis related to coal dust exposure. Director's Exhibit 11. Dr. Perper opined that claimant has an interstitial fibrosis type of coal workers' pneumoconiosis that was related to coal dust exposure and causally associated with severe centrilobular emphysema. Director's Exhibit 15; Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Altmeyer opined that claimant has mild simple coal workers' pneumoconiosis without airways obstruction, chronic bronchitis, and history of idiopathic thrombocytopenic purpura, which is a naturally occurring process that is not occupationally-related. Director's Exhibit 1. Dr. Del Vecchio opined that claimant has moderate pneumoconiosis and idiopathic thrombocytopenic purpura. Director's Exhibits 1, 2. Dr. Maas opined that claimant has pneumoconiosis and chronic obstructive pulmonary disease related to smoking and pneumoconiosis. Director's Exhibit 2. By contrast, Dr. Brooks opined that claimant has diffuse pulmonary fibrosis of unknown etiology,[6] and does not have coal workers' pneumoconiosis or any chronic dust disease of the lungs caused by, significantly related to, or substantially aggravated by coal mine employment. Director's Exhibit 14. Dr. Rosenberg opined that claimant's interstitial lung disease was of the idiopathic pulmonary fibrosis variety, and thus, it was not caused or hastened by coal dust exposure. Director's Exhibit 17; Employer's Exhibit 5. Based on claimant's lung biopsy, neither Dr. Oesterling nor Dr. Tomashefski was able to reach an opinion regarding the presence or absence of coal workers' pneumoconiosis or a lung disease related to coal dust exposure.[7] Director's Exhibit 17; Employer's Exhibit 2. However, Dr. Tomashefski

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sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Specifically, employer argues that Dr. Rao's opinion cannot be deemed a complete pulmonary evaluation, because it was based on an x-ray that was not classified according to the ILO system at 20 C.F.R. §718.102. The pertinent regulation provides that "[t]he Act requires the Department to provide each miner who applies for benefits with the opportunity to undergo a complete pulmonary evaluation at no expense to the miner. *See* 20 C.F.R. §725.406(a)." Employer lacks standing to argue that claimant did not receive a complete pulmonary evaluation. *See Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-197 (2002)(*en banc*). We therefore reject the argument. *See* 20 C.F.R. §802.201(a).

[6] Dr. Brooks noted that another name for diffuse pulmonary fibrosis was idiopathic interstitial pneumonia, and that claimant's clinical course and pathology are consistent with unusual interstitial pneumonia (UIP). Director's Exhibit 14.

[7] Dr. Oesterling stated that he was not able to comment on the presence or absence of coal workers' pneumoconiosis because the biopsy evidence was inadequate. Director's Exhibit 17. Similarly, Dr. Tomashefski stated that the transbronchial biopsy is non-diagnostic and insufficient for assessment of the presence or absence of coal

reviewed other evidence and opined that claimant has idiopathic pulmonary fibrosis. Employer's Exhibit 2.

Although the administrative law judge noted that Drs. Cohen, Rao, Brooks, and Rosenberg were all pulmonary specialists, he found that the opinions of Drs. Rao and Cohen were the most persuasive on the issue of pneumoconiosis. Decision and Order at 16. The administrative law judge then stated:

> In particular, I find the reasoning rendered by Dr. Cohen, in determining the etiology of interstitial lung disease to be compelling. As noted, the [c]laimant has at least thirty years of coal mine employment starting in 1948. No physician attributes his lung disease to his smoking history. The rationale given by Dr. Cohen for linking [c]laimant's condition to his coal mine dust exposure is persuasive and supported by the medical reports of several other physicians, including Drs. Rao, Maas, Altmeyer and Del Vecchio. Based upon the reports of these physicians, I find that the existence of pneumoconiosis, legal and clinical, has been established.

Id.

Employer argues that the administrative law judge erred in failing to explain why he found that Dr. Cohen's opinion that claimant has clinical and legal pneumoconiosis outweighed the contrary opinions of Drs. Brooks and Rosenberg. Employer's argument has merit. As noted above, the administrative law judge stated that "[t]he rationale given by Dr. Cohen for linking [c]laimant's condition to his coal mine dust exposure is persuasive and supported by the medical reports of several other physicians, including Drs. Rao, Maas, Altmeyer and Del Vecchio."[8] Decision and Order at 16. However, the administrative law judge did not specifically explain why Dr. Cohen's rationale was more persuasive than the rationales of Drs. Brooks and Rosenberg.

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workers' pneumoconiosis or coal dust associated lung disease. Employer's Exhibit 2. They both criticized Dr. Perper for relying on inadequate biopsy samples to diagnose coal workers' pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 2. Based on the opinions of Drs. Oesterling and Tomashefski, the administrative law judge found that the biopsy evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 15.

[8] Drs. Altmeyer, Del Vecchio, and Maas diagnosed clinical pneumoconiosis in reports associated with claimant's two prior claims. Director's Exhibits 1, 2. Drs. Altmeyer and Del Vecchio also opined that claimant has idiopathic thrombocytopenic purpura. *Id*.

The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge did not explain why he found that Dr. Cohen's opinion that claimant has pneumoconiosis was more compelling than the contrary opinions that claimant does not have pneumoconiosis. In addition, the administrative law judge did not explain why he found that Dr. Cohen's rationale for his diagnosis of restrictive lung disease related to coal dust exposure was more compelling than the contrary opinions of Drs. Brooks and Rosenberg, that claimant does not have a lung disease related to coal dust exposure. The administrative law judge merely noted that claimant has a history of at least thirty-one years of coal mine employment and no physician attributed claimant's lung condition to his smoking history. However, like Dr. Cohen, Drs. Brooks and Rosenberg also noted that claimant has a history of more than thirty years of coal mine employment. Thus, we hold that the administrative law judge erred in failing to provide an adequate explanation for giving greater weight to Dr. Cohen's opinion than to the contrary opinions of Drs. Brooks and Rosenberg. *See* 5 U.S.C. §557(c)(3)(A); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case to the administrative law judge to provide a valid basis for his findings in accordance with the APA.[9]

Citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), employer argues that the administrative law judge's decision is not based on substantial evidence because the CT scans, biopsy, and medical opinion evidence prove the absence of pneumoconiosis, not the presence of this disease. The administrative law judge noted the negative CT scan interpretations of Drs. Wiot and Carney,[10] as well as the opinions of Drs. Perper, Oesterling, and Tomashefski, which were based in part on biopsy evidence that the administrative law judge found insufficient to establish

[9] Employer correctly notes that the administrative law judge also did not provide a reason for discrediting the opinions of Drs. Oesterling and Tomashefski. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

[10] In a report of a CT scan taken on February 10, 2004, Dr. Wiot found that changes were not that of coal workers' pneumoconiosis but they were most consistent with unusual interstitial pneumonia (UIP) and idiopathic pulmonary fibrosis (IPF). Director's Exhibit 14. Similarly, in a report of a CT scan taken on February 10, 2004, Dr. Carney found diffuse interstitial fibrosis that was most consistent with IPF. *Id*.

pneumoconiosis. However, the administrative law judge did not weigh all of the evidence together at 20 C.F.R. §718.202(a). Thus, on remand, the administrative law judge must weigh all of the evidence together at 20 C.F.R. §718.202(a) in accordance with *Compton*.

Finally, in light of our decision to vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and because of the administrative law judge's failure to weigh all the evidence together at 20 C.F.R. §718.202(a) in accordance with *Compton*, we also vacate the administrative law judge's findings that the evidence established that the pneumoconiosis arose out of coal mine employment and that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §§718.203(b), 718.204(c), and remand the case for further consideration of the evidence, if reached.

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