BRB No. 09-0290 BLA

R.E.K.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WALCOAL, INCORPORATED	)	
	)	DATE ISSUED: 10/29/2009
Employer-Respondent	)	
	)	
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 and the Decision and Order Granting Request for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Decision and Order Granting Request for Reconsideration (07-BLA-5949) of Administrative Law Judge Linda S. Chapman 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). The administrative law judge credited claimant with thirty-three years of

coal mine employment,[1] found that the claim was timely filed, and found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Therefore, she denied benefits. Employer requested reconsideration. While employer agreed with the denial of benefits, it argued that the administrative law judge erred in admitting two positive x-ray interpretations that were submitted by claimant as treatment records.[2] The administrative law judge found merit in employer's assertion and excluded Dr. Ahmed's positive interpretation of the October 31, 2007 x-ray and Dr. De Ponte's positive interpretation of the July 19, 2006 x-ray, finding that they exceeded the evidentiary limitations of 20 C.F.R. §725.414. The administrative law judge found that the exclusion of these two positive interpretations did not alter her determination that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and she reaffirmed her denial of benefits.

On appeal, claimant challenges the administrative law judge's exclusion of the two x-ray interpretations that he contends were medical treatment records, not evidence generated in connection with his claim for benefits. Claimant further asserts that the administrative law judge erred in both her weighing of the x-ray evidence under Section 718.202(a)(1), and in her analysis of the medical opinion evidence pursuant to Section 718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a brief in this appeal.[3]

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

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[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See* Director's Exhibit 9; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[2] Employer objected to the admission of these two x-ray interpretations at the hearing, contending that the ILO interpretations were performed at claimant's request to generate evidence in support of his black lung claim. Hearing Transcript (Tr.) at 10-11; *see also* Closing Argument on Behalf of Employer at 4-6. The administrative law judge reserved a ruling on the issue. Tr. at 11.

[3] We affirm the administrative law judge's finding of thirty-three years of coal mine employment, and her finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2), (3), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Exclusion of x-ray interpretations

Claimant argues that the administrative law judge erred in excluding Dr. Ahmed's "1/2" interpretation of the October 31, 2007 x-ray and Dr. De Ponte's "1/1" interpretation of the July 19, 2006 x-ray, which claimant proffered as treatment records. Under Section 725.414, claimant could submit two x-ray readings "in support of his affirmative case," 20 C.F.R. §725.414(a)(2)(i), and one x-ray reading in rebuttal of each affirmative x-ray submitted by employer, and of the complete pulmonary evaluation x-ray submitted by the Director. 20 C.F.R. §725.414(a)(2)(ii). Claimant did so, Claimant's Exhibits 1, 2, 10-12, but he also submitted additional readings of the July 19, 2006 and October 31, 2007 x-rays as medical treatment records. Claimant's Exhibits 9, 10. Under Section 725.414(a)(4), medical treatment evidence is admissible without regard to the evidentiary limitations if the evidence is a "record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease. . . ." 20 C.F.R. §725.414(a)(4).

The administrative law judge found that Dr. Ahmed's interpretation of the October 31, 2007 x-ray, although designated by claimant as a treatment record, "did not reflect any indicia of a treatment record," and she found that there was no evidence that Stone Mountain Health Services[4] referred claimant to Dr. Ahmed "for treatment, as opposed to sending his x-ray to Dr. Ahmed for an ILO interpretation." Decision and Order on Reconsideration at 2. The administrative law judge further found that the record did not reflect that claimant was treated extensively at Stone Mountain. Therefore, the administrative law judge found nothing to suggest that Dr. Ahmed's interpretation was a part of any treatment by Dr. Ahmed or any other physician. Similarly, the administrative law judge found no evidence that Dr. DePonte's interpretation of the July 19, 2006 x-ray was performed as part of claimant's medical treatment.[5] Decision and Order on Reconsideration at 3.

Claimant's assertion that 20 C.F.R. §718.104(d) required the administrative law judge to admit the two x-ray interpretations as treatment records lacks merit. Claimant

[4] Claimant testified that he goes to Stone Mountain Health Services clinic for his breathing problems, and that the clinic sent his x-rays out to be read. Tr. at 36, 40-41.

[5] The administrative law judge noted that all of the x-ray readings that claimant submitted as his affirmative or rebuttal x-ray readings were also read by Dr. DePonte. Decision and Order on Reconsideration at 3.

relies on the provision that "in the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to" the nature and duration of the treatment relationship with the miner and the frequency and extent of treatment provided. 20 C.F.R. §718.104(d)(5). By its terms, Section 718.104(d) addresses the factors to be considered in weighing the opinion of a miner's treating physician; it does not address whether x-ray interpretations designated by a party as treatment records under Section 725.414(a)(4) actually constitute treatment records. *See* 20 C.F.R. §718.104(d). Moreover, the record in this case contains no statement by a physician that the July 19, 2006 or October 31, 2007 x-ray readings were conducted as part of claimant's medical treatment. *See* 20 C.F.R. §718.104(d)(4),(5). We therefore reject claimant's argument that Section 718.104 required the administrative law judge to admit the two x-ray interpretations as treatment records.

The regulation at Section 725.414(a)(4) does not define what constitutes a record of a miner's hospitalization or treatment for a respiratory or pulmonary or related disease. Detecting no abuse of discretion by the administrative law judge, we affirm her conclusion that there was no evidence that the x-ray readings in question were records of claimant's "hospitalization for . . . or medical treatment for a respiratory or pulmonary or related disease" under Section 725.414(a)(4). Thus, we affirm the administrative law judge's decision to exclude those interpretations from the record.[6]

The Merits of Entitlement

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989).

Claimant argues that the administrative law judge erred in weighing the x-ray evidence. In her Decision and Order, the administrative law judge considered thirteen interpretations of seven x-rays, considering the qualifications of the readers and the number of positive and negative interpretations of each individual x-ray.[7] She found that

[6] Claimant did not argue to the administrative law judge that good cause existed for exceeding the limits of 20 C.F.R. §725.414 with the two additional x-ray readings. *See* 20 C.F.R. §725.456(b)(1).

[7] Other than the two x-ray interpretations excluded by the administrative law judge on reconsideration, the record contains eleven interpretations of five x-rays. The July 26, 2006 x-ray was read as positive for pneumoconiosis by Dr. Forehand, a B reader, and by Dr. DePonte, a B reader and Board-certified radiologist. Director's Exhibit 14;

the sole interpretations of the July 19, 2006 and October 31, 2007 x-rays were positive for pneumoconiosis. She found that the readings of the July 26, 2006 x-ray, the March 12, 2007 x-ray, and the February 9, 2008 x-ray were in equipoise, in view of the conflicting positive and negative readings by dually qualified, Board-certified radiologists and B readers. She also found that it was unclear whether Dr. Ramakrishnan's reading of the March 15, 2007 x-ray, describing fibrosis "consistent with" coal workers' pneumoconiosis would establish the existence of pneumoconiosis. The administrative law judge also discussed the interpretations of claimant's December 13, 2007, digital x-ray, noting that one dually qualified physician read it as positive for pneumoconiosis, and that two dually qualified physicians interpreted it as negative for pneumoconiosis. Decision and Order at 13-14. The administrative law judge concluded:

> Thus, of the total of seven x-rays including the digital x-ray, I find that two establish the existence of pneumoconiosis, while the other five do not. In addition, [claimant's] most recent x-ray is not positive for pneumoconiosis. I find that, considering the totality of the x-ray interpretation evidence, [claimant] has not established the existence of pneumoconiosis by virtue of the x-ray evidence.

Decision and Order at 14. On reconsideration, after excluding Dr. Ahmed's interpretation of the October 31, 2007 x-ray and Dr. DePonte's interpretation of the July 19, 2006 x-ray, the administrative law judge stated that "[t]he exclusion of these two readings does not change that conclusion." Decision and Order on Reconsideration at 3.

Claimant argues that the administrative law judge erred in not crediting Dr. Ramakrishnan's interpretation of the March 15, 2007 x-ray, and that she failed to explain why Dr. Forehand's positive interpretation of the July 26, 2006 x-ray was entitled to no

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Claimant's Exhibit 11. Dr. Wheeler, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 5. Dr. DePonte interpreted the March 12, 2007 x-ray as positive for pneumoconiosis, while Dr. Scatarige, a B reader and Board-certified radiologist, read this x-ray as negative. Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Ramakrishnan, whose qualifications are not contained in the record, read the March 15, 2007 x-ray as showing nodular fibrotic changes consistent with changes of coal workers' pneumoconiosis. Claimant's Exhibit 10. The February 19, 2008 x-ray was read as positive by Dr. DePonte, and as negative by Dr. Scott, a B reader and Board-certified radiologist. Claimant's Exhibit 2; Employer's Exhibit 4. A December 13, 2007, digital x-ray was read as positive by Dr. DePonte, Claimant's Exhibit 12, and as negative by Drs. Scott and Scatarige. Employer's Exhibits 1, 2.

weight. Claimant asserts that the administrative law judge essentially relied on a headcount in considering the x-rays that she found to be in equipoise as negative for pneumoconiosis. Further, claimant maintains that the administrative law judge improperly considered the interpretations of the December 13, 2007, digital x-ray.

Contrary to claimant's assertion, the administrative law judge reasonably determined that Dr. Ramakrishnan's interpretation of the March 15, 2007 x-ray, which the physician stated was consistent with pneumoconiosis, was not a clear diagnosis of the disease sufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 13; *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Further, we reject claimant's assertion that the administrative law judge erred by finding that the positive interpretation of the July 26, 2006 x-ray by Dr. Forehand, a B reader, did not "tip the balance" after she found that the conflicting interpretations of the more highly qualified readers were in equipoise. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Additionally, as it is claimant's burden to establish the existence of pneumoconiosis, the administrative law judge did not err in determining that the x-rays for which the readings were in equipoise did not establish pneumoconiosis. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

However, there is merit in claimant's assertion that the administrative law judge erred in her consideration of three interpretations of the December 13, 2007, digital x-ray. Interpretations of digital x-rays constitute "other medical evidence" pursuant to 20 C.F.R. §718.107(a). The administrative law judge did not assess the digital x-rays pursuant to Section 718.107, and did not consider whether the party submitting the interpretation established that the digital x-ray is "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-112 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting). Moreover, regarding evidence that falls under Section 718.107, each party may submit one result or interpretation of each test or procedure, to best support its position.[8] *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006)(*en banc*)(J. Boggs, concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*). In light of the foregoing, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(1), and remand this case for her to determine whether the prerequisites of

[8] The record reflects that employer submitted two readings by Drs. Scott and Scatarige of the December 13, 2007, digital x-ray as affirmative evidence, and claimant submitted Dr. DePonte's positive reading of this x-ray as rebuttal evidence. *See* Claimant's undated Black Lung Benefits Act Evidence Summary Form; Employer's May 2, 2008, Black Lung Benefits Act Prehearing Evidence Summary Form.

Section 718.107 have been met for the admission of the digital x-ray, and, if so, to determine the admissibility of each reading submitted by the parties. The administrative law judge should then make separate findings as to whether the conventional chest x-ray readings and digital x-ray readings support a finding of pneumoconiosis pursuant to Section 718.202(a)(1), and Section 718.107, respectively.

Turning to the administrative law judge's findings pursuant to Section 718.202(a)(4), claimant asserts that the administrative law judge erred by failing to consider all of the relevant medical opinion evidence and by failing to adequately explain her findings. The administrative law judge accorded "little, if any" weight to Dr. Cruz's opinion, as she did not provide the basis for her diagnosis of pneumoconiosis.[9] Decision

[9] The record contains two reports from Dr. Cruz, claimant's treating physician. On September 22, 2006, Dr. Cruz diagnosed COPD exacerbation and noted an abnormal chest x-ray with "questionable lesion consistent with carcinoma." Claimant's Exhibit 6. On April 4, 2007, she diagnosed "black lung/COPD." *Id*. Additionally, Dr. Agarwal diagnosed coal workers' pneumoconiosis, a severe pulmonary impairment due to coal workers' pneumoconiosis, and coronary artery disease. Claimant's Exhibit 2. Dr. Forehand diagnosed coal workers' pneumoconiosis based on claimant's occupational history, a review of systems, a physical examination, x-ray and blood gas study; and cigarette smokers' lung disease based on a pulmonary function study. Director's Exhibit 14. He opined that claimant has a respiratory impairment and stated that claimant is totally disabled. Dr. Fino stated that there was insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis, found no respiratory impairment, and opined that, from a respiratory standpoint, claimant is not totally disabled. Employer's Exhibit 8. Dr. Zaldivar stated that there is no definite evidence of pneumoconiosis radiographically, but noted that some of the abnormalities seen on the chest x-rays "may be due to old infection or early simple pneumoconiosis," and opined that claimant has no pulmonary impairment. Employer's Exhibit 9. In his subsequent deposition, Dr. Zaldivar noted that the pattern of impairment claimant had is "never" seen with lung disease caused by coal mine dust. Employer's Exhibit 12 at 29. He also indicated that claimant has vascular and cardiac problems, not respiratory problems. *Id*. at 35.

Dr. Smiddy performed a bronchoscopy and stated that it showed bronchitis, and that "Coal Workers' Pneumoconiosis with adenopathy is possible." Employer's Exhibit 10. A November 10, 2006 CT scan was interpreted by Dr. Fletcher as showing "[d]iffuse tiny nodular and reticulonodular opacities of the lungs, mild hilar and mediastinal adenopathy and some larger nodular opacities of lower lobes." He noted several differential considerations, including pneumoconiosis. Claimant's Exhibits 7, 10; Employer's Exhibit 11.

and Order at 16. The administrative law judge found that Dr. Forehand's diagnosis of pneumoconiosis, which was based, in part, on his x-ray interpretation, was inconsistent with the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis, and she found that Dr. Forehand did not explain his opinion that claimant's hypoxemia was due to coal mine employment. *Id.* By contrast, the administrative law judge found that the opinions of Drs. Fino and Zaldivar explained in detail how the objective test results supported their opinions that claimant's pulmonary system is normal, and that his hypoxemia is due to non-pulmonary conditions. Decision and Order at 16-17.

We agree with claimant that the administrative law judge erred by failing to consider Dr. Agarwal's opinion in her weighing of the medical opinion evidence pursuant to Section 718.202(a)(4). *See* 30 U.S.C. §923(b). Consequently, we must vacate the administrative law judge's finding that pneumoconiosis was not established pursuant to Section 718.202(a)(4), and remand the case for consideration of all of the medical opinion evidence. However, we reject claimant's assertion that the administrative law judge erred by failing to list and consider all of the criteria for weighing a treating physician's opinion when she evaluated the opinion of Dr. Cruz.[10] The regulation states that a treating physician's opinion may be accorded controlling weight "[p]rovided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). Since the administrative law judge found that Dr. Cruz's opinion was not explained, a finding that claimant does not challenge on appeal, her analysis comports with Section 718.104(d). *See* 20 C.F.R. §718.104(d)(5).

Claimant argues that the administrative law judge did not adequately determine how Dr. Fino's consideration of a digital x-ray reading that was not admitted into the record[11] affected his opinion. Claimant made a similar argument to the administrative law judge, who found that Dr. Fino's opinion did not need to be discredited on that basis:

[10] Claimant argues that in considering Dr. Cruz's opinion, the administrative law judge failed to discuss the nature and duration of the doctor's treatment relationship with claimant, and the frequency and extent of treatment that Dr. Cruz provided. Claimant's Brief at 18-19, *quoting* 20 C.F.R. §718.104(d)(1)-(4).

[11] Dr. Fino's own reading of the December 13, 2007, digital x-ray that he conducted as part of his examination of claimant was not admitted into evidence. Employer's Exhibit 8.

> The Claimant argues that, because Dr. Fino's interpretation of his x-ray is outside the evidentiary limitations, I must disregard his entire report. However, even with the exclusion of Dr. Fino's interpretation, Dr. Fino correctly states that the majority of the x-ray readings are negative for pneumoconiosis, as I have also concluded. I find that Dr. Fino's reliance on his interpretation of [claimant's] x-ray does not materially affect his opinions.

Decision and Order at 16, n.5. The options available for addressing a medical opinion that is based, in part, on non-admitted evidence are excluding the report, redacting the objectionable content, asking the physician to submit a new report, or factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which the opinion is entitled. *Harris*, 23 BLR at 1-108. Given that Dr. Fino reviewed and relied upon admissible x-ray readings in his medical report, Employer's Exhibit 8, the administrative law judge reasonably found that Dr. Fino's consideration of an x-ray reading that was not admitted into evidence did not materially affect his opinion. *Id*.

In sum, on remand the administrative law judge must reconsider the admissibility of the digital x-ray evidence, and then determine whether the conventional and digital x-ray evidence supports a finding of pneumoconiosis pursuant to Section 718.202(a)(1) and 718.107. Pursuant to Section 718.202(a)(4), the administrative law judge must consider whether all of the relevant medical opinion evidence, including the opinion of Dr. Agarwal, establishes the existence of either clinical or legal pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202(a)(4); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). If so, the administrative law judge must then consider whether all of the relevant evidence weighed together establishes the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If the existence of pneumoconiosis arising out of coal mine employment is established, the administrative law judge must then consider whether claimant has established that he is totally disabled and that his total disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.203, 718.204(b), (c).

Finally, claimant argues that this case should be reassigned to a different administrative law judge. We deny this request because claimant has not demonstrated any bias or prejudice on the part of the administrative law judge. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Decision and Order Granting Request for Reconsideration are 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