BRB Nos. 97-1655 BLA
and 97-1655 BLA-A

JERRY R. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Decision on Reconsideration of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Marvin Krislov, Deputy Solicitor for National Operations; 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and employer cross-appeals, the Decision and Order and Decision on Reconsideration (95-BLA-873) of Administrative Law Judge Gerald M. Tierney

awarding 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).[1] In his Decision and Order, the administrative law judge found that claimant was a miner within the meaning of the Act for more than twenty-six years, that employer was improperly named as the responsible operator, and that the Director was responsible for the payment of benefits in this claim. Based on the filing date, the administrative law judge adjudicated this claim pursuant to the provisions of 20 C.F.R. Part 718 and concluded that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and the medical opinion evidence sufficient to demonstrate the presence of a totally disabling impairment due to pneumoconiosis at 20 C.F.R. §§718.204(c) and 718.204(b). Accordingly, benefits were awarded. On appeal, the Director challenges the dismissal of employer as the responsible operator and the findings of the administrative law judge at Sections 718.202(a)(1) and 718.204(c)(4). Employer, on cross-appeal, urges affirmance of its dismissal as responsible operator and challenges the findings of the administrative law judge at Sections 718.202(a)(1) and 718.204(c)(4). Claimant is not participating in this appeal.[2]

---

[1] Claimant initially filed his application for benefits on March 12, 1993, which the district director denied on August 13, 1993. Director's Exhibits 1, 27. On January 3, 1994, claimant submitted additional information to the district director. Director's Exhibit 28. The district director treated the submission as a timely request for modification pursuant to 20 C.F.R. §725.310, which was denied on August 23, 1994 and November 4, 1994. Director's Exhibits 30, 32.

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, and at 20 C.F.R. §718.204(c)(1), (2), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Although the administrative law judge did not make any findings at 20 C.F.R. §718.204(c)(3), the

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

---

failure to make a finding is harmless as the record does not contain any evidence of cor pulmonale. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Initially, we hold that the administrative law judge properly transferred liability for the present claim to the Black Lung Disability Trust Fund (Trust Fund). The record indicates that claimant last worked for more than one year for Blue Diamond Coal Company (Blue Diamond) which filed for reorganization under Chapter 11 of the Bankruptcy Code in 1991. The Director participated in the bankruptcy proceedings, and reached a settlement agreement with Blue Diamond which the bankruptcy court approved. In the settlement agreement, the Director agreed not to name Blue Diamond as the responsible operator in any black lung claims arising from workers whose employment with Blue Diamond terminated prior to June 19, 1991, such as claimant herein.[3] The Director further agreed that in exchange for receiving certain assets and payments from Blue Diamond, the Trust Fund would be the sole obligor to effect the payment of such black lung benefits. The Director also agreed to hold Blue Diamond harmless from any claim or liability resulting from any black lung claim asserted against Blue Diamond. *See* Government Exhibit A; Director's Motion for Reconsideration. Prior to his employment with Blue Diamond, claimant worked in excess of one year for Whitaker Coal Corporation. *See* Director's Exhibits 2, 3.

The administrative law judge considered the relevant evidence and concluded that claimant's last coal mine employment in excess of one year was with Blue Diamond. *See* Decision and Order at 2; Decision on Reconsideration at 1. The administrative law judge reviewed the bankruptcy settlement agreement and concluded that the agreement prohibited the Director from naming Blue Diamond a responsible operator in claims such as this and that the Director agreed to hold Blue Diamond harmless from any liability resulting from these specific black lung claims. The administrative law judge's finding is supported by substantial evidence since the bankruptcy settlement agreement specifically states that the Trust Fund will be the sole source for payment of valid black lung claims, and fails to indicate any intention on the part of the Director to attempt to name any prior responsible operators. As the administrative law judge's finding on this issue is rational and supported by law, it is affirmed.

[3] Claimant's employment with Blue Diamond Coal Company ended on June 11, 1991. Director's Exhibits 1, 6.

Turning to the merits, we find the arguments of the Director and employer concerning the findings of the administrative law judge at Section 718.202(a)(1) meritorious[4]. In finding the x-ray evidence sufficient to establish the presence of pneumoconiosis, the administrative law judge mistakenly counted the x-ray interpretations of Drs. Anderson and Baker twice.[5] We, therefore, vacate the findings of the administrative law judge at Section 718.202(a)(1) and remand this case for further consideration. On remand, the administrative law judge must not merely count the number of positive and negative x-ray interpretations, but he must consider a variety of factors before weighing the x-ray evidence to determine if claimant has established the existence of pneumoconiosis. *See Staton v. Norfolk & Western Railway 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). In weighing the x-ray evidence, the administrative law judge shall consider the qualifications of the readers when the x-ray interpretations are in conflict, although he is not required to accord

[4] We note that in the instant case, the administrative law judge did not err when he failed to make a preliminary determination as to whether claimant established a basis for modification of the district director's denial of benefits prior to reaching the merits of entitlement. Such a determination is subsumed into the administrative law judge's decision on the merits. *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

[5] Although Dr. Anderson's interpretation of his July 18, 1991 x-ray is included as part of two separate exhibits, *see* Director's Exhibits 16, 23, such inclusion does not equate to two readings. Likewise, although the administrative law judge identified two separate x-ray interpretations for Dr. Baker, the record contains only the August 21, 1991 x-ray reading by Dr. Baker, again in two separate exhibits. Director's Exhibits 17, 24. *See* Decision an Order at 3.

determinative weight on the basis of these qualifications. *See* 20 C.F.R. §718.202(a)(1); *Melnick v. Consolidation Coal Company*, 16 BLR 1-31 (1991)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Furthermore, the fact that a physician examined claimant is not the proper criteria for determining the weight to be accorded x-ray interpretations because the reliability and probative value of an x-ray interpretation depends upon the reader's personal examination of the x-ray, professional qualifications and use of accepted medical procedures. *See Lawson v. Secretary of Health and Human Services*, 688 F.2d 436, 438, 4 BLR 2-151, 2-155 (6th Cir. 1982). If, on remand, the administrative law judge finds the evidence of record insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), he must decide if the evidence in the record is sufficient to meet claimant's burden of proof at 20 C.F.R. §718.202(a)(2)-(4).

We also agree with the Director and employer that the findings of the administrative law judge at Section 718.204(c)(4) cannot be affirmed. In concluding that the weight of the more persuasive medical opinion evidence supported claimant's burden of proof, the administrative law judge improperly relied on the report of Dr. Wright because the physician clearly stated in his opinion that claimant was physically able, from a pulmonary standpoint, to perform his usual coal mine employment or comparable and gainful work. *See* Director's Exhibit 18; Claimant's Exhibit 3; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Additionally, since Dr. Anderson diagnosed pneumoconiosis, the administrative law judge improperly accorded less weight to his report on this basis. *See* Director's Exhibit 16; Claimant's Exhibit 2; *Tackett, supra*. We, therefore, vacate the findings of the administrative law judge that the evidence of record was sufficient to meet claimant's burden of proof at Section 718.204(c)(4) and remand this case for further consideration.[6] On remand, the administrative law judge should also review the report of Dr. Baker in its entirety before deciding whether the report supports claimant's burden of proof. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Cross Mountain Coal v. Ward*, 93 F.3d 211 (6th Cir. 1996).

In considering the evidence of record on remand, the administrative law judge must include in his Decision and Order sufficient analysis and findings of fact to indicate that he has weighed all the relevant evidence of record and the basis for his decision therein. *See* 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); *Ridings v. C&C Coal Co.,* 6 BLR 1-227 (1983).

[6] Because we vacate the findings of the administrative law judge at 20 C.F.R. §718.204(c)(4), we also vacate the conclusion of the administrative law judge that claimant's totally disabling respiratory impairment arose out of his coal mine employment at 20 C.F.R. §718.204(b).

Accordingly, the Decision and Order and Decision on Reconsideration of the administrative law judge awarding benefits are affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge