BRB Nos. 98-1305 BLA
and 98-1305 BLA-A

ROBERT PRICE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
COAL POWER CORPORATION	)	DATE ISSUED: 10/29/99
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri, Fogle, Pohl & Picklesimer), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denying Benefits (97-BLA-0862) of Administrative Law Judge Donald W. Mosser 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 twenty-one years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718, in light of claimant's November 1992 filing date. The administrative law judge found that Coal Power Corporation was the properly designated responsible operator. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that the evidence established a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(c). However, he found that the evidence was insufficient to establish that claimant's total respiratory disability was due, at least in part, to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). In addition, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish that claimant's total disability was due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal.[1]

In its cross-appeal, employer contends that the administrative law judge erred in finding that it was the properly designated responsible operator, arguing that the administrative law judge failed to discuss all of the relevant evidence. In particular, employer argues that the administrative law judge failed to provide an adequate rationale for his finding that employer was the properly designated responsible operator in light of the existence of subsequent employers. Claimant has not responded to employer's cross-appeal and the Director has filed a letter

[1] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-one years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3), 718.204(c). These findings, therefore, are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

stating that he will not be responding in the cross-appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

In challenging the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge erred in merely counting the number of negative x-ray readings versus the number of positive x-ray readings. In addition, claimant contends that the x-ray evidence of record, consisting of forty-six readings of eight x-ray films, is duplicative, cumulative and repetitious and, therefore, inadmissible under Rule 403 of the Federal Rules of Civil Procedure[2] and the Administrative Procedure Act (APA). These contentions lack merit.

Initially, we reject claimant's contention that the x-ray evidence is duplicative, cumulative and repetitious and, therefore, inadmissible under the Federal Rules of Evidence and the APA. Pursuant to 20 C.F.R. §725.455(b), the administrative law judge is not bound by common law or statutory rules of evidence. Instead, a less stringent standard is applicable to evidence submitted in administrative hearings under the pertinent provisions of the 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). Subject to the constraints of 20 C.F.R. §725.456, the administrative law judge is required to admit timely developed evidence. While relevancy is the critical issue in the admission of evidence, court rulings and treatise authorities favor the admission of all evidence, even where relevancy is questionable, with reliance on the trier-of-fact to determine the weight to be assigned to the evidence. *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Martinez v. Clayton Coal Co.*,

[2] In referring to the admissibility of evidence deemed cumulative, duplicative and repetitious, claimant apparently is referring to Rule 403 of the Federal Rules of Evidence, which addresses this issue. The Federal Rules of Civil Procedure do not include a Rule 403.

10 BLR 1-24 (1987). Inasmuch as claimant did not challenge the admissibility of the x-ray evidence at the time of its submission, the administrative law judge properly admitted all of the x-ray evidence into the record. 20 C.F.R. §725.456; *Cochran, supra*.

Moreover, contrary to claimant's contention, the administrative law judge did not rely solely on the numerical superiority of the negative x-ray readings. Rather, the administrative law judge considered individually each of the x-ray films and weighed the readings of each film, according greater weight to the interpretations provided by physicians who are dually-qualified as B readers and Board-certified radiologists. Decision and Order at 4-6; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.,* 14 BLR 1-710 (1990). The administrative law judge, therefore, found that the weight of the x-ray films, as shown through the interpretations of each film by the better qualified physicians, did not establish that claimant has pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 4-6; Director's Exhibits 13, 15-17, 35-41, 45-52, 59. Inasmuch as the administrative law judge is entitled to credit the negative x-ray interpretations by experts on the basis of their qualifications, as well as credit the preponderance of the negative readings, that is, to make a qualitative as well as a quantitative evaluation of the x-ray interpretations of record, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach, supra; Edmiston, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

However, we vacate the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). As claimant correctly contends, the administrative law judge, in finding that claimant has not established the existence of pneumoconiosis, did not consider whether the opinions of Drs. Baker and Myers are sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). Rather, the administrative law judge focused only on whether these opinions were sufficient to establish clinical pneumoconiosis, inasmuch as he accorded little weight to these opinions based on his finding that the opinions of Drs. Baker and Myers, that claimant suffered from pneumoconiosis, were based primarily on positive x-ray readings. Decision and Order at 6. The administrative law judge, however, failed to consider Dr. Baker's diagnosis of chronic bronchitis aggravated by coal dust exposure, Director's Exhibits 12, 36, and Dr. Myers's opinion that claimant's pulmonary disability was caused by a combination of his coal dust exposure as well as his smoking history, Director's Exhibits 36, 53. Inasmuch as both Dr. Baker and Dr. Myers have provided a diagnosis which, if credited, would

be sufficient to establish the existence of legal pneumoconiosis pursuant to Sections 718.201 and 718.202(a)(4), we remand the case for the administrative law judge to reconsider all of the medical opinions, in their entirety, and adequately explain the basis for his finding. 20 C.F.R. §§718.201, 718.202(a)(4); *see Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *see also Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Furthermore, in light of our holding vacating the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), we further vacate his finding that this evidence was insufficient to establish that claimant's total respiratory disability was due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). Consequently, if reached on remand, the administrative law judge must consider all of the relevant medical evidence to determine whether this evidence is sufficient to establish that claimant's pneumoconiosis was a contributing cause of his total respiratory disability pursuant to *Adams*.[3] 20 C.F.R. §718.204(b); *Adams, supra*; *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). In weighing the medical evidence on remand, the administrative law judge must consider all of the relevant medical opinions of record and adequately explain the bases for his findings, stating, with specificity, upon which opinions he relies. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); *see also* 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).

Finally, pursuant to employer's cross-appeal, we vacate the administrative law judge's finding that employer, Coal Power Corporation (Coal Power), was the properly designated responsible operator. The administrative law judge, noting that pursuant to 20 C.F.R. §725.493(a), in order to be named the responsible operator, an employer must be the last employer in the coal mining industry to have employed claimant for a period of at least one year, including one day after December 31, 1969, found Coal Power to be the last employer to meet these criteria. Decision and Order at 4. In so finding, the administrative law judge found

[3] The United States Court of Appeals for the Sixth Circuit, under whose jurisdiction the instant case arises, has held that in order to meet his burden under Section 718.204(b), a claimant must establish that his totally disabling respiratory impairment is due at least in part to his pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

that claimant may have been exposed to coal dust during his employment with College View Contracting, claimant's last employer, but the record, nonetheless, supports the Director's position that Coal Power is the properly designated responsible operator. *Id*.

However, as employer correctly contends, the administrative law judge has not adequately discussed the evidence of record relevant to claimant's employment history subsequent to his employment with Coal Power. In particular, the administrative law judge failed to discuss the conflicting evidence regarding claimant's employment with Britestar Mining Company, which occurred subsequent to his employment with Coal Power.[4] *See* Director's Exhibits 2, 4, 5, 8, 9, 59; Hearing Transcript dated August 29, 1996. Inasmuch as the record contains evidence of employment subsequent to claimant's employment with Coal Power, which may meet the criteria set forth at Section 725.493(a), we remand the case to the administrative law judge for further consideration of all of the evidence relevant to claimant's employment history. 20 C.F.R. §725.493(a); *see Mitchem v. Bailey Energy, Inc.,* 21 BLR 1-162 (1999); *see also Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348 (1985); *Sisko v. Helen Mining Co.*, 8 BLR 1-272 (1985); *Gration v. Westmoreland Coal Co.*, 7 BLR 1-90 (1984). Therefore, on remand, the administrative law judge must consider and discuss all of the evidence regarding claimant's employment history, particularly claimant's employment history

[4] The record contains conflicting reports of claimant's actual employment with Britestar Mining Company, with evidence showing employment as early as 1987 through 1989, *see, e.g.,* Director's Exhibits 2, 9. The Social Security Earnings statements show employment with Britestar Mining during 1988 and 1989, *see* Director's Exhibit 4. The record also contains a response to a Department of Labor questionnaire, in which claimant indicated he was employed with Britestar during 1989 and 1990, as a manager and also operating equipment, Director's Exhibit 8. However, the record also contains claimant's deposition, dated November 12, 1996, in which claimant stated that the last company for which he was employed at least one year was Coal Power Corporation. Director's Exhibit 59 - Deposition (11/12/96) at 40.

subsequent to his employment with Coal Power, and fully explain the bases for his findings, stating, with specificity, upon which evidence he relies. *See Wojtowicz, supra; Tenney, supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge