BRB No. 99-0969 BLA

TRAVIS MARVIN LUSK	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Mark E. Solomons, Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-BLA-0643) of Administrative Law Judge Daniel F. Sutton 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 accepted the parties' stipulation to "at least" thirty years of coal mine employment, Decision and Order at 2, and found that the medical evidence established that claimant is totally disabled due to pneumoconiosis arising out of coal mine

employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence pursuant to Sections 718.202(a)(1), (4) and 718.204(b). Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The administrative law judge found and employer concedes that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(c). Decision and Order at 6-7; Employer's Brief at 16. Employer argues, however, that the administrative law judge erred in determining that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) and that his total disability is due to pneumoconiosis pursuant to Section 718.204(b).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the twenty-four readings of fifteen x-rays taken between April 1986 and September 1998. Five readings were positive for pneumoconiosis, fourteen were negative, and five were not classified for pneumoconiosis under the ILO system. *See* 20 C.F.R. §718.102. Four of the positive readings were by physicians qualified as both Board-certified radiologists and B-readers and one was by a B-reader. Twelve of the negative readings were by Board-certified radiologist/B-readers and two were by B-readers.

The administrative law judge began his analysis with the eleventh x-ray in the series, which was taken on July 2, 1997. Dr. Patel, a Board-certified radiologist and B-reader, classified this x-ray

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[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and total disability pursuant to 20 C.F.R. §718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

as positive for pneumoconiosis, as did Dr. Gaziano, a B-reader. Director's Exhibits 11, 12. However, Dr. Wheeler, a Board-certified Radiologist and B-reader, read this x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Without mentioning Dr. Wheeler's negative reading or radiological credentials, the administrative law judge stated that he gave greatest weight to the positive readings by Drs. Patel and Gaziano based on their radiological credentials.

The next three x-rays, taken on August 27, October 29, and December 3, 1997, were read uniformly as negative for pneumoconiosis, but the administrative law judge accorded the six readings of these x-rays less weight because some of the readers noted that the film quality of the x-rays was less than ideal. The last x-ray, taken on September 15, 1998, was classified as positive for pneumoconiosis by three Board-certified radiologist/B-readers and negative for pneumoconiosis by two Board-certified radiologist/B-readers. Claimant's Exhibits 1-3; Employer's Exhibit 9. The administrative law judge found these conflicting readings to be inconclusive in view of the readers' credentials. Consequently, the administrative law judge accorded greatest weight to the July 2, 1997 x-ray to find that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Employer contends that the administrative law judge improperly discounted the negative readings of the August 27, October 29, and December 3, 1997 x-rays based on some readers' notations that the film quality was of a lower category. Employer's Brief at 10. Employer's contention has merit. Under the applicable quality standard, a chest x-ray need only be of suitable quality for the proper classification of pneumoconiosis; the film need not be of optimal quality. 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984). Here, the x-rays in question bear notations of film quality, they were not classified as unreadable, and thus were found by qualified readers to be of suitable quality for the proper classification of pneumoconiosis. Therefore, the administrative law judge did not supply a proper reason for the weight he accorded to

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[2] The ILO classification form requires the reader to indicate the x-ray film quality by checking Grades 1, 2, 3, or U/R (unreadable). Director's Exhibit 11. If the film is rated less than Grade 1, the reader must give the reason. Here, Drs. Wheeler and Gayler indicated that some of the x-rays were of Grade 2 quality because they were underexposed. Employer's Exhibits 2, 3. On one of these x-rays, Dr. Wheeler added that the "[l]ight film accentuat[ed] the pulmonary vessels," but he indicated that the x-ray was nevertheless negative for pneumoconiosis. Employer's Exhibit 2.

[3] The administrative law judge acknowledged that the x-rays "were found to be less-than-first quality, *though acceptable*, by several readers . . . ." Decision and Order at 5 (emphasis supplied).

the negative readings of the August 27, October 29, and December 3, 1997 x-rays. *See Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1215-16 (1984).

There is also merit in employer's argument that the administrative law judge did not indicate how much weight he accorded to Dr. Wheeler's negative reading of the July 2, 1997 x-ray, or explain how he weighed the readings of the ten earlier x-rays dating from April 1986 to April 1997. Employer's Brief at 11; Director's Exhibit 3; Employer's Exhibits 1-3. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand the case for him to weigh all of the x-ray readings in light of the readers' radiological credentials to determine whether the weight of the x-ray evidence supports a finding of the existence of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the administrative law judge must weigh together all types of evidence to determine whether the existence of pneumoconiosis is established pursuant to Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR , (4th Cir. 2000). Here, the administrative law judge purported to weigh the x-ray readings with the medical opinions pursuant to Section 718.202(a)(4) when he accorded less weight to the medical opinions submitted by employer because he found that "[e]mployer's experts all relied to some extent on their mistaken assumption that the x-ray evidence did not establish the existence of pneumoconiosis." Decision and Order at 6. Because we have vacated the administrative law judge's finding regarding the weight of the x-ray evidence pursuant to Section 718.202(a)(1), we also vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for him to weigh together all of the relevant evidence in light of *Compton*.

Additionally, employer contends that the administrative law judge did not adequately consider the physicians' reasoning or relative qualifications when he discussed the medical opinions pursuant to Section 718.202(a)(4). We agree that on remand the administrative law judge should discuss more explicitly how he assesses the quality of the physicians' medical reasoning and the impact of their credentials on his evaluation of the evidence. *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).

In crediting Dr. Rasmussen's opinion that claimant suffers from coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to both smoking and coal dust

exposure, the administrative law judge accorded less weight to the opinions of Drs. Zaldivar, Fino, and Tuteur attributing claimant's respiratory impairment to smoking, asthma, and heart disease because the administrative law judge found that these physicians "ruled out pneumoconiosis" merely because claimant did not have a reduction in his diffusing capacity. Decision and Order at 6. However, review of the record indicates that Drs. Zaldivar, Fino, and Tuteur gave several detailed reasons to support their conclusion that claimant does not have pneumoconiosis. Director's Exhibits 3, 22; Employer's Exhibits 4, 5. On remand, the administrative law judge must discuss and compare all of the reasoning offered by the physicians. *See Hicks, supra*; *Akers, supra*. Additionally, the administrative did not indicate whether or how the physicians' comparative credentials affected the weight to be accorded to their opinions, and should do so on remand. *Id*.

Pursuant to Section 718.204(b), employer challenges the administrative law judge's determination to accord "little probative weight" to the disability causation opinions of Drs. Zaldivar, Fino, and Tuteur because they did not diagnose pneumoconiosis. Decision and Order at 7; Employer's Brief at 17. Where a physician acknowledges that a claimant has a disabling respiratory or pulmonary impairment, but explains that an ailment other than pneumoconiosis caused claimant's total disability, the physician's opinion is relevant to disability causation and should not be discounted merely because the physician did not diagnose pneumoconiosis. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193-94, 19 BLR 2-304, 2-315-16 (4th Cir. 1995). Here, Drs. Zaldivar, Fino, and Tuteur concluded that claimant has a totally disabling respiratory impairment, and explained in detail why they believe that claimant's total disability is unrelated to pneumoconiosis, but is instead related to the effects of smoking, asthma, and possibly heart disease. In view of the erroneous

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[4] Because Dr. Rasmussen based his diagnosis on claimant's coal dust exposure and smoking histories, medical history, Dr. Rasmussen's physical examination of claimant, and objective test results, we reject employer's contention that Dr. Rasmussen's opinion is undocumented and unreasoned as a matter of law. Employer's Brief at 13-14. It will be for the administrative law judge to assess the quality of Dr. Rasmussen's reasoning and determine the weight to be accorded his opinion. *See Hicks, supra*; *Akers, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993).

[5] Although Dr. Rasmussen's qualifications are not in the record, the administrative law judge cited published circuit court decisions in which Dr. Rasmussen's expertise has been recognized. Decision and Order at 4 n.2. On remand, the administrative law judge should also assess the qualifications of Drs. Zaldivar, Fino, and Tuteur, who the record indicates are Board-certified in both Internal Medicine and Pulmonary Disease. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341 (noting that Dr. Rasmussen is Board-certified in Internal Medicine only).

reason the administrative law judge provided for according these opinions little weight, and because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a), we vacate the administrative law judge's finding pursuant to Section 718.204(b) and remand the case for him to reweigh the medical opinions in light of *Ballard*, *Hicks*, and *Akers* to determine whether pneumoconiosis is at least a contributing cause of claimant's totally disabling respiratory impairment. *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990).

[6] Dr. Tuteur even acknowledged that claimant "may have radiographic evidence of simple coal workers' pneumoconiosis," but concluded that it would be of insufficient severity to produce any symptoms, which were instead due to cigarette smoke-induced chronic obstructive pulmonary disease. Employer's Exhibit 5.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge