BRB No. 00-1188 BLA

WILLIAM W. ULBIN, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Michelle S. Gerdano (Howard M. Radzely, Acting Solicitor of Labor; 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1073) of Administrative Law Judge Paul H. Teitler denying 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] The administrative law judge found five years of coal mine employment

---

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

established and adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Initially, the administrative law judge found that, while the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(4), it was established by the x-ray evidence of record pursuant to 20 C.F.R. §718.202(a)(1), and that finding was not undermined by a review of all relevant evidence in accordance with the holding of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). However, the administrative law judge found that the evidence did not establish that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c) or that claimant was totally disabled pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in determining the length of claimant's coal mine employment, in failing to find pneumoconiosis arose out of coal mine employment pursuant to Section 718.203 and total disability pursuant to Section 718.204. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand in response, also contending that the administrative law judge erred in his findings pursuant to Sections 718.203 and 718.204, as well as in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1).[3]

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

---

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant filed a claim on December 2, 1998, Director's Exhibit 1.

[3] We accept the Director's Motion to Remand as his response brief , and herein decide the case on its merits.

disturbed. 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 order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(b)(2), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Initially, claimant contends, and the Director agrees, that the administrative law judge failed to adequately explain his determination as to the length of claimant's coal mine employment. The administrative law judge found that claimant established five years of coal mine employment, noting that much of claimant's coal mine employment, the last of which occurred in 1949, was not full-time, Decision and Order at 3-5. Claimant contends that the determination of the length of claimant's coal mine employment is important as it may affect the administrative law judge's weighing of the medical opinion evidence regarding causation and/or whether claimant has a respiratory impairment arising from his coal mine employment.

The administrative law judge has a duty to make a specific, complete finding on the length of claimant's coal mine employment, *see Boyd v. Director, OWCP*, 11 BLR 1-39 (1988), which must be based on a reasonable method of computation and be supported by substantial evidence, *see Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, n. 1 (1988)(*en banc*). Moreover, an administrative law judge must provide a full detailed opinion which complies with the Administrative Procedure Act (APA), 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), and which fully explains the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Inasmuch as the administrative law judge did not adequately explain his determination of the length of claimant's coal mine employment, *see Tenney*, *supra*, we vacate the administrative law judge's finding and remand the case for the administrative law judge to reconsider his finding as to the length of claimant's coal mine employment pursuant to the holdings in *Dawson*, *supra*, and *Boyd*, *supra*, when considering claimant's entitlement to benefits on the merits.[4]

[4] In this case arising within the jurisdiction of the Third Circuit, part-time employment

or employment that is not year round must be prorated, *see Shendock v. Director, OWCP*, 861 F.2d 408, 12 BLR 2-48 (3d Cir. 1988), and that the Third Circuit has held that the absence of Social Security records for some years does not necessarily establish that claimant was not employed as a miner for those years, *see Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *see also Marx v. Director, OWCP*, 870 F.2d 114, 118-119, 12 BLR 2-199, 2-205 - 2-207 (3d Cir. 1989).

In regard to the administrative law judge's findings on the merits of entitlement, the Director contends in his Motion to Remand that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a).[5] The Third Circuit has held that "all types of relevant evidence must be weighed together" in determining whether claimant has met his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202, *see Williams*, *supra*. The record contains readings of two x-rays. The administrative law judge noted that a January, 1999, x-ray was read as positive by four readers who are both board-certified radiologists and B-readers[6] and by one B-reader and was read as negative by three readers who are both board-certified radiologists and B-readers. Director's Exhibits 14, 25, 27; Claimant's Exhibits 1, 3, 5, 7, 9.[7] The administrative law judge also noted that an August, 1999, x-ray was read as positive by two readers who are both board-certified radiologists and B-readers and as negative by two readers who are both board-certified radiologists and B-readers. Director's Exhibits 23, 28; Claimant's Exhibits 17, 19. After noting that there were more positive than negative readings of the January, 1999, x-ray and "considering the qualifications" of the readers "and the recency of the x-ray film," the administrative law judge found the existence of pneumoconiosis established by the x-ray evidence of record pursuant to Section 718.202(a)(1). Decision and Order at 5-7. The administrative law judge further found that his finding that the existence of pneumoconiosis was demonstrated by the x-ray evidence was not altered by a review of all of the relevant evidence of record in accordance with the holding enunciated by the Third Circuit in *Williams*, *supra*.[8]

---

[5] Although claimant argues that the Director's contention should be disregarded because the Director did not file a cross-appeal on this issue, the Board has held that the Director, having filed a Motion to Remand, is not limited to raising arguments that either respond to arguments raised in claimant's brief or which support the decision below, *see Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994)(*en banc*).

[6] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[7] In addition, Dr. Rogovitz, whose qualifications are not in the record, read the January, 1999, x-ray as indicating chronic obstructive pulmonary disease, Director's Exhibit 15.

[8] Inasmuch as the administrative law judge's findings that the existence of pneumoconiosis was not demonstrated pursuant to Section 718.202(a)(2)-(4) have not been

As the Director contends, except for noting the fact that the positive readings of the January, 1999, x-ray outweigh by one the negative readings from physicians who are both board-certified radiologists and B-readers, the administrative law judge did not explain why he credited the positive readings of the January, 1999, and August, 1999, x-rays over the negative readings from physicians with similar qualifications. The Third Circuit has held that "[a] bare statement that items of evidence pointing one way outnumber or outweigh others pointing in a different direction does not demonstrate a reasoned choice," *see Wensel v. Director, OWCP*, 888 F.2d 14, 16, 13 BLR 2-88, 2-92 (3d Cir. 1989); *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); *Tenney*, *supra*. Moreover, claimant must establish the existence of pneumoconiosis by a preponderance of the x-ray evidence in accordance with the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In *Ondecko*, the Supreme Court held that the reference to the "burden of proof" in §7(c) of the APA, 5 U.S.C. §556(d), refers to the burden of persuasion, and therefore held that when the evidence is evenly balanced, the claimant must lose pursuant to Section 7(c), *see Ondecko*, *supra*. In any event, the administrative law judge also did not adequately explain why his finding that the existence of pneumoconiosis was demonstrated by the x-ray evidence pursuant to Section 718.202(a)(1) was not altered by a review of all of the relevant evidence of record in accordance with the holding enunciated by the Third Circuit in *Williams*, *supra*, including the medical opinion evidence of record which the administrative law judge found did not demonstrate the existence of pneumoconiosis pursuant to Section 718.202(a)(4), *see* 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); *Tenney*, *supra*. Thus, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a) and remand the case for reconsideration of all relevant evidence in accordance with the standard enunciated in *Williams*, *supra*.

Next, the administrative law judge found that the evidence did not establish that the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). The administrative law judge considered the opinion of Dr. Kraynak, who found that claimant suffered from coal workers' pneumoconiosis arising from his coal mine employment, Claimant's Exhibits 21, 25, and the opinion of Dr. Hyman, who found that claimant was

---

challenged by any party on appeal, the administrative law judge's findings are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabled due to anthracosilicosis, Claimant's Exhibit 3. The administrative law judge found the opinions of Drs. Kraynak and Hyman were not competent and sufficient evidence to establish that claimant's pneumoconiosis arose out of his coal mine employment under Section 718.203(c) because they failed to adequately account for and/or explain why claimant's subsequent 44 years of employment and/or asbestos exposure as a pipe-fitter and his ten-year smoking history were not causative factors of claimant's pulmonary condition, Decision and Order at 10.

As both claimant and the Director contend, the administrative law judge did not specifically and fully address Dr. Kraynak's opinion under Section 718.203(c), *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Dr. Kraynak stated that claimant's smoking history ended in 1964 and was not significant, Claimant's Exhibit 25 at 6. Dr. Kraynak also acknowledged claimant's asbestos exposure, but stated that it was minimal, Claimant's Exhibit 25 at 12-13, and when asked what was the significance of claimant's asbestos exposure, responded that there was no evidence of significant pleural thickening that would be associated with asbestosis, Claimant's Exhibit 25 at 9. Consequently, we vacate the administrative law judge's finding pursuant to Section 718.203(c) and remand the case for the administrative law judge to specifically and fully address Dr. Kraynak's opinion in accordance with the APA, *see* 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); *Tenney*, *supra*.

Finally, the administrative law judge found that total disability was not established pursuant to Section 718.204. Pursuant to Section 718.204(b)(2)(i), formerly 20 C.F.R. §718.204(c)(1), the administrative law judge considered the two pulmonary function studies of record. The administrative law judge noted that a non-qualifying January, 1999, pulmonary function study from Dr. Auerbach, Director's Exhibit 11, was found valid by Dr. Auerbach, but was found invalid by Drs. Simelaro, Venditto and Kraynak, Director's Exhibit 22; Claimant's Exhibits 25-26.[9] In addition, the administrative law judge noted that a qualifying August, 1999, pulmonary function study from Dr. Kraynak was found to be valid by Drs. Kucera, Simelaro and Venditto, Director's Exhibit 20; Claimant's Exhibits 11-12, 14. The administrative law judge found that, because pulmonary function studies are effort dependent and can result in "spurious low values," but "spurious high values are not possible," the qualifying August, 1999, pulmonary function study was not sufficient to demonstrate total disability in light of the qualifying January, 1999, pulmonary function

[9] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii).

study. Decision and Order at 11.[10]

As both claimant and the Director contend, in discrediting the qualifying August, 1999, pulmonary function study and crediting the non-qualifying January, 1999, pulmonary function study, the administrative law judge did not address or resolve the opinions validating the results of the August, 1999, pulmonary function study and invalidating the January, 1999, pulmonary function study, which conflict with the administrative law judge's finding. The administrative law judge's function is to resolve the conflicts in the medical evidence, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989). Thus, the administrative law judge did not adequately explain why the results of the non-qualifying pulmonary function study is necessarily more reliable than the contrary results of the qualifying pulmonary function study, *see* 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); *Tenney*, *supra*. In any event, the Director concedes on appeal that claimant established total disability pursuant to Section 718.204(b)(2)(i), formerly 20 C.F.R. §718.204(c)(1), *see generally Pendley v. Director, OWCP*, 13 BLR 1-23 (1989).

While the Director states in his subsequent response brief regarding the application of the revised regulations that "the Director conceded that claimant is totally disabled," it is unclear whether the Director is conceding that total disability was established pursuant to Section 718.204 or merely that total disability was demonstrated by the pulmonary function study evidence pursuant to 718.204(b)(2)(i), formerly 20 C.F.R. §718.204(c)(1). Thus, inasmuch as there is contrary probative evidence, which must be weighed with the evidence supportive of a finding of total respiratory disability, *see Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*, we will address the administrative law judge's findings and claimant's contentions under Section 718.204(b)(2)(iv), formerly Section 718.204(c)(4).

The administrative law judge considered the relevant medical opinion evidence pursuant to Section 718.204(b)(2)(iv), formerly Section 718.204(c)(4). Dr. Auerbach, a board-certified physician in internal medicine and pulmonary disease and a B-reader, found

---

[10] Inasmuch as the administrative law judge's findings that the one blood gas study of record did not demonstrate total disability pursuant to Section 718.204(b)(2)(ii) and that total disability was not demonstrated pursuant to Section 718.204(b)(2)(iii) have not been challenged by any party on appeal, they are affirmed, *see Skrack*, *supra*.

no definite pulmonary impairment, Director's Exhibit 12, while Drs. Kraynak and Hyman, claimant's treating physicians, found that claimant was totally disabled, Claimant's Exhibits 3, 21, 25. Dr. Kraynak is board-eligible in family medicine and Dr. Hyman is an osteopathic physician board-certified in internal medicine. Contrary to claimant's contention, the administrative law judge gave greatest weight to Dr. Auerbach's opinion for the same reasons he did under Section 718.202(a)(4), *see* Decision and Order at 9, 11. The administrative law judge noted that Dr. Auerbach was the only physician who was board-certified in pulmonary disease and who administered a blood gas study, and the administrative law judge found that Dr. Auerbach's opinion was supported by the objective evidence upon which he relied, which included the non-qualifying January, 1999, pulmonary function study. While the administrative law judge noted that Drs. Kraynak and Hyman were claimant's treating physicians, the administrative law judge nevertheless found that their reports were not well reasoned or documented.

Inasmuch as the Director concedes that the pulmonary function study evidence demonstrated total disability pursuant to 718.204(b)(2)(i), formerly 20 C.F.R. §718.204(c)(1), we vacate the administrative law judge's findings that Dr. Auerbach's opinion was supported by the objective evidence upon which he relied, including the non-qualifying January, 1999, pulmonary function study that he administered, and that the opinion of Dr. Kraynak, who relied in part on the qualifying August, 1999, pulmonary function study he administered, was not documented and reasoned. Thus, the administrative law judge's findings under Section 718.204(b)(2)(iv) are vacated and the case is remanded for reconsideration of all relevant evidence, like and unlike, pursuant to Section 718.204(b)(2), *see Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*; *but see generally Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984); (because pulmonary function studies and blood gas studies measure different types of impairments, a medical opinion of no respiratory or pulmonary impairment based only on a pulmonary function study does not necessarily rule out the existence of a respiratory or pulmonary impairment); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984),[11] and, if

[11] Contrary to claimant's contentions, the fact that Dr. Auerbach offered no etiology for the mild restriction he diagnosed or that his opinion may have been based on an inaccurate occupational history is relevant to causation, *i.e.*, whether total disability due to pneumoconiosis is established pursuant to 20 C.F.R. §718.204(c), but not to a determination of total respiratory disability pursuant to Section 718.204(b)(2). The fact that Dr. Auerbach may not have reviewed x-ray evidence is also irrelevant to total disability under Section 718.204(b)(2), as x-rays are not diagnostic of the extent of respiratory disability, *see Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n. 4 (1987). Although, as claimant contends, Dr. Auerbach examined claimant only once, that fact does not *per se* render his opinion unreasoned or undocumented, *see Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985).

necessary, consideration of whether total disability due to pneumoconiosis is established pursuant to the standard enunciated at 20 C.F.R. §718.204(c).

Finally, claimant contends that Dr. Auerbach's opinion is unreasoned because Dr. Auerbach did not consider the functional demands of claimant's last coal mine employment when rendering his opinion. Contrary to claimant's contention, where the record contains an opinion providing an assessment of physical limitations due to pulmonary disease or an assessment of a miner's impairment, as well as evidence of the exertional requirements of the miner's usual coal mine employment, such an opinion may be sufficient to allow the administrative law judge to deduce a finding on the issue of total disability, by comparing the physician's opinion as to the miner's physical limitations or extent of impairment to the exertional requirements of the miner's usual coal mine employment, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Parson v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1987); *Ridings v. C & C Coal Co.*, 6 BLR 1-227 (1983), and the ultimate finding regarding total disability is a legal determination to be made by the administrative law judge, not the physician, through consideration of the exertional requirements of the miner's usual coal mine employment in conjunction with the physician's opinion regarding the miner's physical abilities, *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Aleshire*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge