BRB No. 07-0147 BLA

E.R. (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROYAL COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 09/28/2007
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-6337) of Administrative Law Judge Michael P. Lesniak 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 instant case is governed by the regulations that took effect on January 19, 2001, as it was filed on November 29, 2002. Director's Exhibit 2. The administrative law judge credited claimant with at least twelve years of coal mine employment, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), and 718.203(b), total disability at 20 C.F.R. §718.204(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings at Sections 718.202(a)(1), (4), and 718.204(c).[1] Employer also argues, pursuant to 20 C.F.R. §725.414, that the administrative law judge erred in denying its request to submit rebuttal evidence to seven x-rays and one computerized tomography (CT) scan contained in claimant's hospital records. Employer also asserts that, pursuant to Section 725.414, the administrative law judge erred in considering the x-ray reading of Dr. Binns, which employer contends was not designated as evidence by any party. Claimant responds in support of the administrative law judge's award of benefits, to which employer replied. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's Section 725.414 arguments, asserting that they are without merit.

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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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).

---

[1] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (3), and 718.204(b) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer first argues that the administrative law judge erred by denying its request to submit evidence to rebut claimant's seven x-rays and one CT scan performed while claimant was hospitalized. Employer's Brief at 7-11. Employer specifically contends that the administrative law judge's denial of an opportunity to rebut this evidence deprived employer of due process, and that employer's rebuttal evidence should have been admitted for good cause. We disagree.

As the administrative law judge correctly found, the revised regulation at Section 725.414 contains no provision for the rebuttal of treatment records, and subsection (a)(4) does not create an exception to the evidentiary limitations for evidence submitted in response to treatment records. *See* 20 C.F.R. §725.414(a)(3)(ii), (a)(4); Decision and Order at 3. In addition, comments to the regulations specifically state that, "The Department has not included an independent provision governing rebuttal" of treatment records, and that "the Department does not believe that independent rebuttal provisions are appropriate" for evidence admitted under the hospital and medical treatment records exception. 64 Fed. Reg. 54,996 (Oct. 8, 1999). The regulations further provide that "Medical evidence in excess of the limitations contained in [20 C.F.R.] §725.414 shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

The administrative law judge's denial of employer's opportunity for rebuttal did not constitute a denial of due process. As the Director correctly asserts, employer had the opportunity to respond to claimant's hospitalization records, including the x-ray and CT scan readings therein, because Dr. Ghio, employer's expert, reviewed these records and discussed them in his deposition.[2] Director's Brief at 2-3; Employer's Exhibit 5 at 35-37. Additionally, employer concedes on appeal that Dr. Zaldivar also had the opportunity to review the CT scan. Employer's Exhibit 4 at 20-21; Employer's Brief at 17. Furthermore, as the Director asserts, the administrative law judge's exclusion of rebuttal evidence to these records did not impede employer's ability to support its case. The administrative law judge correctly found that the seven x-rays were "entitled to little weight" because they were not classified in compliance with the standards set forth at 20 C.F.R. §718.102 and Appendix A to Part 718. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring); Decision and Order at 12. The administrative law judge also found that the CT scan, which was not performed for the purpose of diagnosing pneumoconiosis, and did not address the presence of the disease, did not rebut the x-ray evidence. Decision and Order at 13. While the administrative law

[2] Dr. Ghio specifically concluded that these x-ray readings and computerized tomography scan, none of which diagnosed pneumoconiosis, *supported* his opinion that claimant did not suffer from either clinical or legal pneumoconiosis. Employer's Exhibit 5 at 35-37.

judge also noted that the CT scan showed findings of a focal mass, chronic obstructive pulmonary disease (COPD), and pulmonary fibrosis, there is no merit to employer's contention that this comment "impl[ies] he relied upon it in some way to establish the existence of clinical or legal" pneumoconiosis. Employer's Brief at 8; Decision and Order at 5, 13, 14.

Moreover, we reject employer's assertion that its rebuttal evidence should have been admitted for good cause. Employer has not shown, and the record does not reflect, that employer was prejudiced by the administrative law judge's decision to exclude the evidence. As set forth above, neither the treatment x-rays nor the CT scan diagnosed pneumoconiosis, and the administrative law judge did not rely on any of this evidence to support his award of benefits; moreover, employer's own expert, Dr. Ghio, reviewed this evidence and explained why it *supported* employer's position that claimant does not have clinical or legal pneumoconiosis. Employer asserts that good cause existed to admit the proposed rebuttal evidence because employer's experts might have established that the treatment x-rays "could not have been used as evidence in this claim," or because employer's rebuttal evidence "would have been of assistance" in determining the existence of pneumoconiosis. These assertions amount to nothing more than a claim by employer that its proposed evidence would have been relevant. Employer's Brief at 10-11. As the Director correctly contends, relevancy, by itself, is insufficient to establish good cause. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 n.18, 23 BLR 2-430, 2-460, 2-461 n.18 (4th Cir. 2007); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-62 (2004)(*en banc*); Director's Brief at 3. Therefore, we affirm the administrative law judge's decision to deny employer's request to submit rebuttal evidence to claimant's treatment and hospitalization records.

Employer next challenges the administrative law judge's evaluation of the x-ray evidence pursuant to Section 718.202(a)(1). Employer initially argues that the administrative law judge erred by considering the positive reading by Dr. Binns of the x-ray dated February 5, 2003, as it was not designated by any party, pursuant to Section 725.414, for the administrative law judge's consideration.[3] Employer's argument lacks merit. As claimant and the Director correctly respond, Dr. Binns's reading of the February 5, 2003 x-ray was properly designated by claimant as rebuttal to the x-ray reading performed by Dr. Patel as part of the Director's evaluation; thus, the administrative law judge properly considered it.[4] *See* 20 C.F.R. §725.414(a)(2)(ii),

---

[3] Dr. Binns's positive reading of the x-ray dated February 5, 2003 was admitted as Director's Exhibit 14 at the hearing. Transcript at 4-5.

[4] Dr. Patel read the February 5, 2003 x-ray as positive for pneumoconiosis. Director's Exhibit 13.

(3)(ii); Claimant's Evidence Summary Form dated March 25, 2006 at 2; Decision and Order at 4, 12-13; Director's Exhibits 13, 14.

Employer further contends that in weighing the x-ray evidence, the administrative law judge erred in failing to consider that Dr. Wiot is a professor of radiology and a nationally and internationally recognized expert. Employer also contends that the administrative law judge erred by crediting the dually qualified Board-certified radiologists and B readers over the B readers who are also Board-certified pulmonologists, and further erred by mechanically applying the later evidence rule. Employer's arguments lack merit.

The record contains readings of two x-rays, dated February 5, 2003 and September 17, 2003. Director's Exhibits 13-15; Claimant's Exhibits 4-6; Employer's Exhibits 2, 5. The February 5, 2003 x-ray was read as positive for pneumoconiosis by Drs. Patel and Binns, both dually qualified Board-certified radiologists and B readers, and by Dr. Rasmussen, a B reader, but was read as negative for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B reader.[5] Director's Exhibits 13, 14; Claimant's Exhibit 6; Employer's Exhibit 2. The September 17, 2003 x-ray was interpreted as positive for pneumoconiosis by Drs. Cappiello and Ahmed, both Board-certified radiologists and B readers, and as negative for pneumoconiosis by Drs. Zaldivar and Ghio, both B readers and Board-certified pulmonologists. Director's Exhibit 15; Claimant's Exhibits 4, 5; Employer's Exhibit 5.

The administrative law judge concluded that the weight of the readings by dually qualified readers established clinical pneumoconiosis, stating:

> There is only one dually-qualified negative reading, to which I gave great weight considering Dr. Wiot's extensive experience. His negative reading, however, is rebutted by two positive dually-qualified readings. Also, I credit the more recent x-ray, as read by two dually-qualified physicians, as positive for clinical pneumoconiosis. I find that Claimant has established clinical pneumoconiosis by a preponderance of the x-ray evidence.

Decision and Order at 12-13.

As the administrative law judge specifically gave "great weight" to Dr. Wiot's negative reading of the February 5, 2003 x-ray based on his "extensive experience," there is no merit to employer's contention that the administrative law judge failed to consider Dr. Wiot's additional qualifications. Decision and Order at 13. Moreover, contrary to

[5] Dr. Gaziano, a B reader, interpreted the February 5, 2003 x-ray for quality purposes only. Director's Exhibit 13.

employer's argument, the administrative law judge was not required to accord additional weight to the x-ray readings by Drs. Zaldivar and Ghio, because, in addition to being B readers, they are both Board-certified pulmonologists. Board-certification in pulmonology is not a radiological qualification, hence, it is not a qualification which the regulations require to be considered when evaluating the x-ray evidence. *See* 20 C.F.R. §718.202(a)(1). Finally, we hold that the administrative law judge's decision reveals that he simply identified the September 17, 2003 x-ray as the more recent one, but accorded no additional weight to this x-ray based upon its recency, and instead permissibly relied upon the preponderance of the positive x-ray readings by dually qualified readers. *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). For the foregoing reasons, we reject employer's arguments and affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(1).

Employer further argues, pursuant to Section 718.202(a)(4), that the administrative law judge erred by discrediting the opinions of Drs. Ghio and Zaldivar, and erred by failing to provide sufficient reasoning for granting greater weight to Dr. Rasmussen's opinion.[6] Drs. Ghio and Zaldivar stated that claimant did not have clinical or legal pneumoconiosis, while Dr. Rasmussen opined that claimant had both clinical and legal pneumoconiosis. In evaluating the opinions of Drs. Ghio and Zaldivar, that claimant did not have clinical pneumoconiosis, the administrative law judge permissibly found that these opinions were inconsistent with the preponderance of the radiological evidence, which the administrative law judge found was positive for pneumoconiosis.[7] *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); Decision and Order at 13. Moreover, the administrative law judge properly found that Dr. Ghio's opinion, that claimant did not have clinical pneumoconiosis, was inconsistent with the regulations at Section 718.201, because in reviewing the x-ray evidence, Dr. Ghio based his opinion on a later negative reading, which he credited over two earlier positive readings.[8] *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65

---

[6] The administrative law judge's crediting of Dr. Butcher's March 21, 2006 opinion of pneumoconiosis with little weight is affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Claimant's Exhibit 3.

[7] In addition, we note that at 20 C.F.R. §718.202(a)(1), the September 17, 2003 negative x-ray reading, upon which Dr. Ghio relied, was found to be positive by the administrative law judge based on the preponderance of readings by better qualified readers. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 13.

[8] After reviewing the positive readings of the February 5, 2003 x-ray by Drs. Patel and Binns, and the negative reading of the September 17, 2003 x-ray by Dr. Zaldivar, Dr.

(4th Cir. 1992); 20 C.F.R. §718.201(c); Decision and Order at 14. Therefore, we affirm the administrative law judge's weighing of the opinions of Drs. Ghio and Zaldivar, that claimant did not have clinical pneumoconiosis, as within his discretion and in accordance with law.

We also reject employer's contention that the administrative law judge erred in according diminished weight to Dr. Ghio's opinion, that claimant does not have legal pneumoconiosis, based on his qualifications. Contrary to employer's argument, the administrative law judge acted within his discretion in concluding that "while Dr. Ghio has substantial occupational pulmonary experience . . . he is not as experienced in the field of coal workers' pneumoconiosis as are Drs. Zaldivar and Rasmussen," because, when asked during his deposition whether he was aware that the Act included a legal definition of pneumoconiosis, Dr. Ghio responded that he "was made aware of this fact recently." Employer's Exhibit 5 at 9; Decision and Order at 14; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993).

In evaluating Dr. Zaldivar's opinion, that claimant does not have legal pneumoconiosis, the administrative law judge noted that, when asked during his deposition whether his opinion took into account the potential additive effect coal dust exposure can have on an impairment, Dr. Zaldivar responded:

> Yes, because the additive effect does not operate in this particular case because: to have an additive effect, one has to have the two conditions in the first place. One has to have the coal workers' pneumoconiosis, which he doesn't have, and then one smokes and has the damage from the smoking, and the two add to each other.

Ghio stated: ". . . there are positive B readings and a negative B read[ing] on a more recent chest radiograph. It should be concluded that [claimant] does not have medical pneumoconiosis." Employer's Exhibit 1 at 3. We reject employer's argument that the administrative law judge acted irrationally because the administrative law judge "himself credited the later evidence [inconsistent] with the precedent of the Fourth Circuit." Employer's Brief at 12-13. In evaluating the x-ray evidence at Section 718.202(a)(1), the administrative law judge did not rely on the more recent evidence, but found that the preponderance of the positive readings by the more highly qualified readers established the existence of pneumoconiosis. The administrative law judge referred to the "more recent" x-ray simply to distinguish it from the other x-ray with conflicting readings at issue. Decision and Order at 13.

> Well, here, there's no coal workers' pneumoconiosis. Here, what we have is the additive of the effect of asthma and emphysema together. Those two are adding, but coal mining has nothing to do with it.

Employer's Exhibit 4 at 35-36. The administrative law judge permissibly accorded little weight to Dr. Zaldivar's opinion because it depended on his determination that claimant did not suffer from clinical pneumoconiosis, a conclusion that is inconsistent with the administrative law judge's finding at Section 718.202(a)(1). Therefore, we reject employer's allegations of error. *See Mays*, 176 F.3d at 756, 21 BLR at 2-591; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; Decision and Order at 14. We also reject employer's contention that the administrative law judge erred in crediting, as thorough, well-reasoned, and well-documented, Dr. Rasmussen's opinion that claimant has both clinical and legal pneumoconiosis. Decision and Order at 14. Whether a physician's opinion is well-reasoned and well-documented is a determination within the discretion of the administrative law judge. *See Compton,* 211 F.3d at 211, 22 BLR at 2-174; *Mays*, 176 F.3d at 756, 21 BLR at 2-591; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Thus, as the administrative law judge permissibly accorded diminished weight to the opinions of Drs. Ghio and Zaldivar, and acted within his discretion in crediting the opinion of Dr. Rasmussen, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of clinical and legal pneumoconiosis at Section 718.202(a)(4).

Finally, turning to the issue of disability causation at Section 718.204(c), employer argues that the administrative law judge erred by discrediting the opinions of Drs. Ghio and Zaldivar, because they disagreed with the administrative law judge's findings of clinical and legal pneumoconiosis. We reject employer's contention. The administrative law judge rationally found that the opinions of Drs. Ghio and Zaldivar were worthy of little weight regarding disability causation because they opined that the claimant did not suffer from either clinical or legal pneumoconiosis, contrary to the administrative law judge's findings. *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-373, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 115-116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 3-306 (4th Cir. 1994). Citing the holdings in *Mays*, 176 F.3d at 761-762, 21 BLR at 2-603; *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 BLR 2-304, 2-319 (4th Cir. 1995); and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821-822, 19 BLR 2-86, 2-92 (4th Cir. 1995), employer contends that the administrative law judge could have credited the causation opinions of Drs. Ghio and Zaldivar, notwithstanding their failure to diagnose pneumoconiosis, because both doctors diagnosed pulmonary symptoms consistent with legal pneumoconiosis. Employer's reliance on these decisions is misplaced because unlike the doctors in those cases, who diagnosed only the absence of clinical pneumoconiosis, Drs. Ghio and Zaldivar diagnosed the absence of both clinical and legal

pneumoconiosis, in direct contradiction of the administrative law judge's findings. *See Scott*, 289 F.3d at 269-70, 22 BLR at 2-383-84. Consequently, we affirm the administrative law judge's findings pursuant to Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge