BRB No. 09-0271 BLA

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| L. M.<br><br>Claimant-Respondent<br><br>v.<br><br>INTERNATIONAL COAL GROUP, KNOTT COUNTY, LLC<br><br>and<br><br>AMERICAN INTERNATIONAL SOUTH INSURANCE GROUP<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 09/30/2009<br><br>DECISION and ORDER |

Appeal of the Decision and Order - Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (07-BLA-5224) of Administrative Law Judge Donald W. Mosser 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).[1] The administrative law judge accepted the parties' stipulation that claimant worked for at least twenty-four years[2] in coal mine employment.[3] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. 718.202(a)(1), (4), 718.203(b). The administrative law judge further found that the evidence established that claimant was totally disabled and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), 718.204(c).[4] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence established the existence of clinical pneumoconiosis, and in "failing to make a ruling regarding the existence of legal pneumoconiosis," pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b).[5] Employer

[1] Claimant filed his claim for benefits on February 13, 2006. Director's Exhibit 2. The district director awarded benefits in a proposed decision and order issued on September 13, 2006. Director's Exhibit 42. Employer requested a formal hearing on October 4, 2006. Director's Exhibit 43. The claim was transferred to the Office of the Administrative Law Judges on November 7, 2006. Director's Exhibit 47.

[2] After accepting the parties' stipulation of twenty-four years of coal mine employment, the administrative law judge stated that he credited claimant with thirteen years of coal mine employment. Decision and Order at 3. This appears to be an editorial error.

[3] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 6, 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[4] Because no party challenges the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii) and (iv), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or

further argues that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this 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 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).

Employer asserts that the administrative law judge erred in relying solely on the numerical superiority of the x-ray interpretations in evaluating the evidence pursuant to 20 C.F.R. §718.202(a)(1). Employer's Brief at 4. Employer's assertion lacks merit. In finding that the x-ray evidence established the existence of pneumoconiosis, the administrative law judge properly noted that the relevant evidence of record consists of six readings of three x-rays. Decision and Order at 3, 8. The administrative law judge noted, correctly, that the March 20, 2006 x-ray was read as positive for pneumoconiosis by both Dr. Alexander, a Board-certified radiologist and B reader, and Dr. Forehand, a B reader, but was read as negative for pneumoconiosis by Dr. Wiot, who is also a Board-certified radiologist and B reader.[6] Decision and Order at 8; Director's Exhibits 13, 15; Employer's Exhibit 3. The administrative law judge concluded that this x-ray was positive for pneumoconiosis. Decision and Order at 9. The administrative law judge further noted, correctly, that the June 21, 2006 x-ray was read as negative for pneumoconiosis by Dr. Dahhan, a B reader. Decision and Order at 8; Employer's Exhibit 1. Contrary to employer's contention, the administrative law judge properly found this x-ray to be negative, based on Dr. Dahhan's uncontradicted interpretations. Decision and

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pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2)(b).

[6] Dr. Barrett, a Board-certified radiologist and B reader, reviewed the March 20, 2006 x-ray for quality purposes only. Director's Exhibit 14.

Order at 9; Employer's Brief at 5. Finally, the administrative law judge noted that the August 31, 2006 x-ray was read as positive for pneumoconiosis by Dr. Halbert, a Board-certified radiologist and B reader, and as negative for pneumoconiosis by Dr. Jarboe, a B reader. Decision and Order at 8-9; Claimant's Exhibit 3; Employer's Exhibit 2. The administrative law judge permissibly found this x-ray to be positive for the existence of pneumoconiosis, based on Dr. Halbert's superior radiological qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 9; Claimant's Exhibit 1; Employer's Exhibit 2.

In discussing and weighing the x-ray evidence as a whole, the administrative law judge relied on the weight of the readings rendered by physicians who are dually qualified as Board-certified radiologists and B readers to find that the positive readings of the March 20, 2006 and August 31, 2006 x-ray outweighed the negative B reading of the June 21, 2006 x-ray by Dr. Dahhan. Decision and Order at 9. As employer assets, this was incorrect because the March 20, 2006 x-ray could only have been found to be in equipoise, as the administrative law judge found that Drs. Alexander and Wiot are equally qualified as they are both Board-certified radiologists and B readers.[7] Employer's Brief at 4. Any error is harmless, however, as Dr. Halbert's positive reading of the August 31, 2006 x-ray still outweighs Dr. Dahhan's negative reading of the June 21, 2006 x-ray, given the administrative law judge's permissible reliance on Dr. Halbert's superior radiological qualifications. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 9.

Thus, contrary to employer's assertion, substantial evidence supports the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Although the administrative law judge need not have gone on to discuss whether the medical opinions also established pneumoconiosis, *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985), he considered them and permissibly discounted the opinions of Drs. Jarboe and Dahhan, that claimant does not suffer from clinical pneumoconiosis, because they based their conclusions on negative x-ray evidence,

[7] Contrary to employer's suggestion, the administrative law judge was not required to defer to Dr. Wiot's radiological experience or to his status as a professor of radiology. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); Chaffin v. Peter Cave Coal co., 22 BLR 1-294, 1-302 (2003); Employer's Brief at 4-5.

contrary to the administrative law judge's finding that the x-ray evidence as a whole is positive. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); Decision and Order at 9; Employer's Exhibits 1, 2, 5, 6. Thus, the administrative law judge permissibly concluded that the better supported opinion of Dr. Forehand, diagnosing clinical coal workers' pneumoconiosis, established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 9-10. The administrative law judge's finding of clinical pneumoconiosis is sufficient to support claimant's burden to establish the existence of pneumoconiosis. *See Martin*, 400 F.3d at 306, 23 BLR at 2-285. Thus, there is no merit to employer's contention that the administrative law judge erred in "fail[ing] to make a ruling regarding the existence of legal coal workers' pneumoconiosis." Employer's Brief at 5. We therefore affirm the administrative law judge's finding that the existence of clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a).[9] In addition, employer raises no challenge to the administrative law judge's finding that claimant's twenty-four years of coal mine employment entitles him to the presumption that his clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b), or to the administrative law judge's finding that employer has proffered no evidence to rebut this presumption. Decision and Order at 10. We, therefore, affirm these findings. *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).

Employer next challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.204(c), that the medical evidence establishes that claimant is totally disabled due to clinical pneumoconiosis. As the administrative law judge correctly

[8] Contrary to employer's assertion, Dr. Forehand's opinion is not undermined by Dr. Wiot's negative re-reading of the March 20, 2006 x-ray, which Dr. Forehand read as positive. Employer's Brief at 8. As discussed above, while Dr. Wiot, a Board-certified radiologist and B reader possesses superior radiological qualifications to Dr. Forehand, the March 20, 2006 x-ray was also read as positive by Dr. Alexander, who possesses equal radiological qualifications to Dr. Wiot. Moreover, Dr. Forehand did not base his diagnosis of clinical pneumoconiosis on his positive x-ray reading alone, but stated that his conclusion was also based on claimant's abnormal arterial blood gas study results, occupational history, and physical examination findings. Director's Exhibit 13,

[9] As the administrative law judge did not find that claimant suffers from legal pneumoconiosis, we need not address employer's arguments that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Jarboe, that claimant does not suffer from legal pneumoconiosis. Employer's Brief at 12-15.

summarized, a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis:

> is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 610-11, 22 BLR 2-288, 2-303 (6th Cir. 2001); Decision and Order at 11.

The record reflects that Dr. Forehand indicated that claimant's totally disabling respiratory impairment is due to both clinical coal workers' pneumoconiosis and "cigarette smoker's lung disease." Director's Exhibit 13; Employer's Exhibit 4. Dr. Forehand specifically opined:

> Claimant has [a] 17 pack-year history of smoking cigarettes which has caused an obstructive ventilatory pattern. Claimant's 26 ½ years in underground coal mining has caused coal workers' pneumoconiosis and an arterial blood gas study abnormality. The 2 conditions combine to totally and permanently impair lung function.

Director's Exhibit 13. The administrative law judge found Dr. Forehand's opinion to be well-reasoned because the physician explained his determinations and rationale for finding that both clinical pneumoconiosis and "cigarette smoker's lung disease" were causes of the miner's disability. Decision and Order at 10, 11; Director's Exhibit 13; Employer's Exhibit 4. By contrast, the administrative law judge discounted the contrary opinions of Drs. Dahhan and Jarboe, that claimant's total disability is due entirely to smoking-related obstructive lung disease, because Drs. Dahhan and Jarboe did not diagnose pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 11. Thus the administrative law judge concluded that the opinion of Dr. Forehand was entitled to the greatest weight. Decision and Order at 11.

Employer's challenges to the above findings lack merit. Employer argues that Dr. Forehand's opinion is "equivocal" and "waffling" because he stated that both coal workers' pneumoconiosis and cigarette smokers' lung disease contributed to claimant's respiratory disability. Employer's Brief at 7; Director's Exhibit 13; Employer's Exhibit

4. Employer further asserts that Dr. Forehand's opinion, that both conditions contributed to claimant's impairment, is undermined by Dr. Forehand's reliance on a smoking history of seventeen years, when claimant's actual smoking history may have been greater.[10] Employer's Brief at 8.

Contrary to employer's assertion, the administrative law judge properly found that Dr. Forehand's affirmative statement, that clinical pneumoconiosis and cigarette smokers' lung disease both contributed to claimant's respiratory disability, is sufficient to establish that claimant's coal mine dust exposure was a substantially contributing cause of his disability. *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003); Decision and Order at 11; Employer's Brief at 7. Further, whether Dr. Forehand's opinion is sufficiently reasoned is for the administrative law judge to decide. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). In addition, while employer correctly asserts that Dr. Forehand relied, in part, on a smoking history of seventeen years to conclude that claimant's cigarette smokers' lung disease was not the sole cause of his dramatically reduced pulmonary function study values, Employer's Exhibit 4 at 23, Dr. Forehand did not rely on claimant's smoking history, accurate or otherwise, to determine that claimant suffered from disabling hypoxemia, as evidenced by his uniformly qualifying blood gas study values. Director's Exhibit 13; Employer's Exhibit 4 at 32. Moreover, Dr. Forehand specifically stated that claimant's disabling hypoxemia was causally related to his clinical pneumoconiosis, and combined with claimant's smoker's lung disease to render him totally disabled from a respiratory standpoint. Director's Exhibit 13; Employer's Exhibit 4 at 32. Thus, any error in the administrative law judge's failure to resolve the inconsistent smoking histories of record is harmless. *See Larioni*, 6 BLR at 1-1278.

Finally, contrary to employer's contention, the administrative law judge acted within his discretion in according less weight to the opinions of Drs. Dahhan and Jarboe

[10] Claimant testified that he smoked between one-half and one pack of cigarettes per day from 1974 or 1975 until 2003 or 2004, for a smoking history of approximately fourteen to thirty years. Decision and Order at 3; Hearing Transcript at 20-25. In his written report, Dr. Forehand recorded a smoking history of one-half pack of cigarettes per day from 1972-2004, or eleven pack-years. Director's Exhibit 13. In his deposition, however, Dr. Forehand relied on a smoking history of seventeen pack-years. Employer's Exhibit 4 at 15. In a report dated June 28, 2006, Dr. Dahhan recorded a history of one pack per day from 1976 to 2003, or approximately twenty-seven pack years. Employer's Exhibit 1. In a report dated September 21, 2006, Dr. Jarboe recorded a history of one-half to one pack per day from 1976 to 2003, or approximately thirteen and one-half to twenty-seven pack years. Employer's Exhibit 2.

regarding the etiology of claimant's disability, as their conclusions, that claimant did not suffer from clinical pneumoconiosis, were contrary to the administrative law judge's own finding that the evidence establishes the presence of the disease. *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Gross*, 23 BLR at 1-17; *Clark*, 12 BLR at 1-155; *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 11; Employer's Brief at 11-12.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6, and explained whether the diagnoses contained therein constituted reasoned medical judgments, we affirm the administrative law judge's finding that Dr. Forehand's opinion was a well-reasoned judgment, based on objective evidence, that clinical pneumoconiosis is a substantially contributing cause of claimant's total disability. *See Martin*, 400 F.3d at 306, 23 BLR at 2-284; *Cornett*, 227 F.3d at 576, 22 BLR at 2-120; Decision and Order at 11-12; Director's Exhibit 13; Employer's Exhibit 4. We therefore affirm the administrative law judge's finding that clinical pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). *See Kirk*, 264 F.3d at 610-11, 22 BLR at 2-303.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge