BRB No. 09-0782 BLA

JAMES R. ALSBROOKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PITTSBURG & MIDWAY COAL MINING COMPANY	)	DATE ISSUED: 09/10/2010
	)	
Employer-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Errata Decision and Order – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton, Keith A. Utley (Morton Law LLC), Henderson, Kentucky, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Errata Decision and Order – Award of Benefits (2005-BLA-05862) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006),

amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act). Based on a stipulation of the parties, the administrative law judge credited claimant with twenty-nine years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, in light of the May 3, 2004 filing date. Addressing entitlement, the administrative law judge determined that the evidence was sufficient to establish clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). In addition, he found that the evidence was sufficient to establish that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). Finally, the administrative law judge found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits on the claim.

On appeal, employer contests the administrative law judge's finding of clinical pneumoconiosis at Section 718.202(a)(1), and disability causation under Section 718.204(c).[1] Claimant responds, urging affirmance of the award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this case.[2]

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).

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant suffers from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[2] In response to the Board's Order of May 10, 2010, allowing supplemental briefs to address the impact of the 2010 amendments on this claim, the Director, Office of Workers' Compensation Programs, and employer agree that the amendments do not apply in this case. Claimant responds that, although his claim was filed prior to January 1, 2005, because the award of benefits was made after that date and because his claim was still pending after January 1, 2005, the amendments apply to his claim. Claimant is incorrect. The amendments apply only to claims that were filed *after* January 1, 2005 and were pending on March 23, 2010. Because the instant claim was filed prior to January 1, 2005, the amendments do not apply.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first challenges the administrative law judge's finding of clinical pneumoconiosis at Section 718.202(a)(1), based on the administrative law judge's evaluation of the readings of the April 25, 2008 x-ray, the most recent x-ray of record. Employer argues that the administrative law judge's award of benefits was "preponderantly based on conflicting interpretations of a marginally usable film," dated April 25, 2008. Employer's Brief at 4-5. Additionally, employer argues that the administrative law judge's reliance on the positive interpretation of the April 25, 2008 film is questionable, as the reading of that film, 1/0, shows an improvement in claimant's condition, compared with the readings of an earlier (June 4, 2004) film, as 1/1 and 1/2. Employer submits that, because pneumoconiosis is a progressive disease, the inconsistency in the readings demonstrates either that the "physicians misread one or both of the x-rays, or that plainly [claimant] does not have clinical pneumoconiosis." *Id*. at 5. Additionally, employer argues that, although the administrative law judge noted that Dr. Selby's negative reading of the July 5, 2005 x-ray was unrebutted, he failed to take this fact into consideration in his weighing of the x-ray evidence. In conclusion, therefore, employer contends that the administrative law judge's finding of clinical pneumoconiosis at Section 718.202(a)(1) is not rational or supported by substantial evidence.

Addressing the most recent, April 25, 2008 x-ray, the administrative law judge stated:

> Drs. Baker and Broudy, both of whom are 'B' readers, are conflicting in their readings of the April 25, 2008 x-ray. Actually Dr. Broudy states that the film was not of 'optimal quality.' Although he determined that the film was unreadable, he noted the presence of multiple calcified granulomas, that he opined were not due to pneumoconiosis. Employer's Exhibit 4. However, Dr. Alexander, who is dually qualified, read the x-ray as 1,0 [sic]. [Claimant's Exhibit 2.] Whereas Dr. Broudy indicated that the film

[3] As claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3 at 1; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

> was a '3' in quality, Dr. Alexander indicated that it was a '2'. [*Id*. at 3.] Although I find that his rehabilitative note is not useful, Dr. Alexander is better qualified and his "vote" constitutes the more preponderant view, and his [reading] is attributed with greater weight. His [reading] is substantiated by that of Dr. Baker, another 'B' reader. Although I note that the readings of the 2004 OWCP x-ray were 1,1 [sic], and pneumoconiosis is supposed to be progressive, the more numerous readings and the reading by the most qualified reader in this record convince me to attribute more weight to the 2008 x-ray [readings] than to the earlier [x-ray readings].
>
> After a review of the designated x-rays, I give greater weight to the readings of the April 2008 x-ray, and find that pneumoconiosis is established by x-ray. 20 C.F.R. §718.202(a)(1).

Decision and Order at 7.[4]

Initially, we reject employer's argument, based on Dr. Broudy's quality reading, that the April 25, 2008 x-ray was "a marginally usable film." Employer's Brief at 4-5. The regulations do not require an x-ray film to be of optimal quality, but only that the film "shall be of suitable quality for proper classification of pneumoconiosis…." 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-229, 1-233 (1984).[5] Dr. Alexander, who was a dually qualified physician and was found to be the best qualified reader, determined that the April 25, 2008 x-ray was of quality "2," and read the x-ray as positive for pneumoconiosis. Consequently, because Dr. Alexander was able to read the x-ray, the administrative law judge did not err in crediting his reading and concluding that the April 25, 2008 x-ray was positive for pneumoconiosis. 20 C.F.R. §§718.102(a), 718.202(a)(1); *Preston*, 6 BLR at 1-233. Therefore, contrary to employer's assertion that the April 25, 2008 x-ray was of "marginal" probative value, the administrative law judge properly found that it was of sufficient quality to be read for pneumoconiosis and properly credited Dr. Alexander's positive reading.

[4] The administrative law judge also found that the majority of the readings of the four x-rays taken between 2004 and 2008 were read as positive for pneumoconiosis. Decision and Order at 4-5, 7.

[5] The Department of Labor (DOL) roentgenographic form for designating an x-ray reading provides a box to check the quality of the x-ray film as grade 1, 2, 3, or U/R. Films graded 1, 2, and 3 are deemed to be of acceptable quality, with technical quality 3 denoted as "Poor, with some technical defect but still acceptable for classification purposes," while a designation of U/R is deemed to be of inferior quality. DOL Form CM-133.

We also reject employer's argument that the administrative law judge erred in crediting Dr. Alexander's 1/0 reading of the April 25, 2008 x-ray, when an earlier 2004 x-ray had been read as 1/1 and 1/2. When weighing the conflicting evidence, the administrative law judge permissibly exercised his discretion, as trier-of-fact, by giving greater weight to the interpretation of Dr. Alexander because he possessed superior radiological qualifications, than the readers of the 2004 x-ray. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Further, contrary to employer's argument, the administrative law judge did not err in finding that Dr. Selby's negative interpretation of the July 5, 2005 x-ray was outweighed by the positive reading of the more recent April 25, 2008 x-ray by Dr. Alexander, a better qualified physician. *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dillon*, 11 BLR at 1-114; *see also Eastover Mining Co. v. Williams*, 338 F.2d 501, 22 BLR 2-625 (6th Cir. 2003); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). Accordingly, we conclude that the administrative law judge's finding of clinical pneumoconiosis pursuant to Section 718.202(a)(1), was rational, supported by substantial evidence, and in accordance with law. *See* 20 C.F.R. §718.202(a)(1); *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); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). It is, therefore, affirmed.

Next, pursuant to 20 C.F.R. §718.204(c), employer challenges the administrative law judge's finding that claimant's total disability was due to pneumoconiosis, based on the opinions of Drs. Simpao and Baker, "that the pulmonary disability was due to occupational exposure." Decision and Order at 11. Specifically, employer challenges the administrative law judge's rejection of Dr. Selby's opinion that disability was due to asthma, and not occupationally related. In support of this argument, employer contends that the administrative law judge erred in finding that claimant's pulmonary function study results supported a finding that claimant's disability was due to coal dust exposure. According to employer, "the administrative law judge [erroneously] regarded the pulmonary function values of 2007 and 2008 as effectively rebutting Dr. Selby's view that the pulmonary function values evidenced change and improvement inconsistent [with] pneumoconiosis." Employer's Brief at 6-7.

At Section 718.204(c), the administrative law judge reviewed the three medical opinions of record, addressing disability causation, by Drs. Simpao,[6] Baker[7] and Selby.[8] Decision and Order at 10-11. He found that while Drs. Simpao and Baker opined that the miner's total disability was due to his occupational exposure, Dr. Selby excluded occupational exposure as a causative factor, based on his assessment that claimant had "asthma and that asthma can not [sic] come from coal mine employment." Decision and Order at 11. The administrative law judge acknowledged that Dr. Selby's opinion was based, in part, on his belief that the results of claimant's pulmonary function studies did not reflect a disability due to coal dust exposure because claimant used his asthma medications intermittently and may have developed an "acute bronchitis" just prior to his testing, thereby accounting for the range in fluctuations that are not normally the result of a coal-induced disease. Further, the administrative law judge assigned "little weight" to Dr. Selby's opinion under Section 718.204(c) because Dr. Selby found an obstructive impairment only, while "later testing by Drs. Simpao and Baker replicated [Dr. Simpao's] initial finding that the [c]laimant has both a restrictive and an obstructive

[6] Dr. Simpao conducted claimant's DOL examination on June 4, 2004, and diagnosed coal workers' pneumoconiosis by x-ray, "moderate restrictive and severe obstructive airway disease on pulmonary function study, and indicated "multiple years of coal dust exposure is medically significant in his pulmonary impairment." Director's Exhibit 12 at 4, 5, 10-11.

[7] Dr. Baker examined claimant on April 28, 2008, and diagnosed coal workers' pneumoconiosis, resting arterial hypoxemia and severe obstructive defect, all significantly due to, or substantially aggravated by, dust exposure in his coal mine employment. Claimant's Exhibit 4 at 2.

[8] Dr. Selby performed a full pulmonary examination on July 7, 2005, which included an x-ray that he interpreted as negative for pneumoconiosis, and a pulmonary function study interpreted as "[m]oderate obstructive defect with mild hyperinflation by lung volumes and a very good improvement post-bronchodilator," Employer's Exhibit 3 at 4, and that showed "obstructive lung disease that was highly reversible…and would be significant evidence against pneumoconiosis." Employer's Exhibit 2 at 6, 10. He opined that the variability between his own pulmonary function study and the pulmonary function study performed by Dr. Simpao a year earlier "speaks more importantly to the variability that this gentleman has, which would be strong evidence for asthma, for example, and it would be against any pneumoconiosis." *Id*. at 12. Additionally, he ruled out the possibility that the progressive nature of pneumoconiosis could account for the decline in the pulmonary function study values. *Id*. at 13-14. He also diagnosed chronic obstructive pulmonary disease (COPD) "primarily emphysema, as a direct result of cigarette smoking." Employer's Exhibit 2 at 18, 25-26.

impairment."[9] *Id*. In conclusion, therefore, the administrative law judge discounted the opinion of Dr. Selby, while crediting the opinions of Dr. Simpao and Baker. The administrative law judge concluded, therefore, that the totality of the medical opinion evidence established total disability due to pneumoconiosis under Section 718.204(c).

At the outset, we note that the administrative law judge's finding at Section 718.204(c) must be vacated and the case remanded for the administrative law judge to clarify his finding thereunder. The administrative law judge found clinical pneumoconiosis established in this case, but he did not determine whether legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4). However, because the administrative law judge appears to have found claimant disabled due to legal pneumoconiosis at Section 718.204(c), he must first determine whether legal pneumoconiosis has been established at 20 C.F.R. §718.202(a)(4), or determine whether the medical opinion evidence establishes that clinical pneumoconiosis is the cause of claimant's disability. *See Toler v. Eastern Assoc. Coal Corp*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Further, we find merit in employer's specific challenge to the administrative law judge's finding that disability causation was established at Section 718.204(c). Employer argues that the administrative law judge failed to properly credit Dr. Selby's theory of the significance of the variability of the pulmonary function studies, as to whether claimant's disability was due to pneumoconiosis or smoking. Although employer's arguments co-mingle objections to the administrative law judge's analyses respecting the issues of total disability and disability causation,[10] it is apparent that the administrative law judge

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[9] Since Dr. Selby's opinion was based on his pulmonary function study dated July 7, 2005, the administrative law judge's reference to the "later [pulmonary function study] testing by Drs. Simpao and Baker" clearly refers to their pulmonary function studies of November 19, 2007, and April 25, 2008, respectively. Moreover, in his previous discussion of the pulmonary function study evidence under Section 718.204(b)(2), the administrative law judge stated:

> The claimant argues that both Dr. Simpao and Dr. Baker performed testing that replicated almost the same outcome and about six months apart. I agree. I find that both are substantially the same and that the Baker studies confirm Dr. Simpao's findings.

Decision and Order at 9.

[10] Notably, employer does not contest the administrative law judge's finding that a totally disabling respiratory impairment was established at Section 718.204(b)(2)(i) and

essentially adopted claimant's view of the medical evidence, *i.e.*, that Dr. Simpao and Dr. Baker's pulmonary function study interpretations of 2007 and 2008, were "substantially the same," and that Dr. Baker's finding confirmed Dr. Simpao's findings. Decision and Order at 9. However, the administrative law judge's finding is in error.

Dr. Simpao's January 19, 2007 pulmonary function study was interpreted as showing, a "[m]oderate degree of restrictive and a severe degree of obstructive airway disease." Claimant's Exhibit 3 at 2. Dr. Baker interpreted his pulmonary function study of April 28, 2008 as showing "severe obstructive defect." Claimant's Exhibit 4 at 2. Since Dr. Simpao found both a restrictive and an obstructive defect, while Dr. Baker found only an obstructive defect, the administrative law judge's finding that both doctors found a restrictive and obstructive impairment is inaccurate. Alternatively, even if the administrative law judge actually compared the numerical values on the pulmonary function studies and interpreted them as consistent, in agreement with claimant's post-hearing argument[11] that they had "almost the same outcome," such a finding would be

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(iv), based on the pulmonary function studies and medical opinion evidence. *See* Decision and Order at 9-10.

[11] The administrative law judge appears to reference claimant's post-hearing brief, which was incorporated by reference into claimant's brief in response to employer's Petition for Review, *see* Claimant's Brief at 1. In that brief, claimant asserts:

> At [Dr. Simpao's report at] Claimant's Exhibit 3, one finds qualifying values in a pulmonary function study done….on November 19, 2007. [Claimant's] FEV_1 was 29 percent of predicted pre-bronchodilator and 45 percent post-bronchodilator, whereas his FVC was 68 and 74, respectively. …Dr. Simpao noted reduced vital capacity and flow volume curve and some response to bronchodilation. However it should be noted that even with response on his FEV_1, it is still in the severe range. Dr. Simpao notes that there is a moderate degree of restriction and a severe degree of obstructive airways disease consistent with his findings on the Department of Labor exam….[Dr. Baker's pulmonary function] testing further indicated a severe obstructive airway disease.…[with] an FEV_1 of 49 and an FVC of 73.
>
> Both Dr. Simpao and Dr. Baker show qualifying values of almost the same outcome and about six months apart. They show total disability based upon coal mining and dust inhalation.
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> Claimant's Post-Hearing Brief at 11, 12-13 (pages misnumbered).

erroneous as well, since the values are not the same and the studies were interpreted differently by the medical experts. In either case, the administrative law judge's finding that "later testing by Drs. Simpao and Baker replicated the initial [*i.e.*, Dr. Simpao's June 4, 2004 opinion at Director's Exhibit 12] finding that [c]laimant has both a restrictive and an obstructive impairment" is incorrect. Decision and Order at 11. Therefore, while Dr. Simpao's reports of 2005 and 2007 are consistent in diagnosing both a restrictive and an obstructive impairment, Dr. Baker's opinion does not add to the credibility of Dr. Simpao's opinion, as found by the administrative law judge, because he did not find both a restrictive and obstructive impairment.

The administrative law judge's assignment of probative value to the medical opinion of Dr. Simpao, on this basis, is unsubstantiated. Consequently, the administrative law judge's determination to discredit the opinion of Dr. Selby at Section 718.204(c), because he diagnosed only an obstructive impairment, cannot be reconciled with his determination to credit the opinions of Drs. Simpao and Baker, on the basis that they found both restrictive and obstructive impairments. We conclude, therefore, that with a basic contradiction at the core of the administrative law judge's analysis, his ultimate finding under Section 718.204(c) is irrational, and unsupported by substantial evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Consequently, we vacate his Section 718.204(c) finding, and we remand the case for the administrative law judge to accurately assess the weight due each medical opinion of record for the purpose of determining whether claimant's total disability is due to pneumoconiosis,[12] and to fully explain his deliberative rationale. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). However, before determining whether claimant has established disability causation, due to legal pneumoconiosis, at Section 718.204(c), the administrative law judge must first determine whether the medical opinion evidence is sufficient to establish legal pneumoconiosis at Section 718.202(a)(4). *See Toler*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

[12] The administrative law judge did not address whether the emphysema diagnosed by Dr. Selby could be aggravated by coal dust exposure, 20 C.F.R. §718.201(a)(2), or discuss Dr. Selby's testimony as to why he believed the emphysema or asthma he diagnosed was not aggravated by claimant's coal dust exposure. *See* 65 Fed. Reg. 79,943 (Jan. 19, 2001), *citing Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 124, 7 BLR 2-72, 2-81 (4th Cir. 1984); *see* Employer's Exhibit 2 at 26-28, 32-35.

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

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