BRB No. 97-1722 BLA

VERNON DOTSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (91-BLA-0988) of Administrative Law Judge Clement J. Kichuk with respect to a claim filed on February 22, 1977, 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 relevant procedural history of this case is as follows: In the initial Decision and Order with respect to this claim, Administrative Law Judge Frederick D. Neusner credited claimant with "more than ten" years of coal mine employment and considered the claim pursuant to the

regulations set forth in 20 C.F.R. Part 727. Judge Neusner determined that claimant established invocation of the interim presumption under 20 C.F.R. §727.203(a)(2) and that the evidence of record was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. Employer appealed to the Board, which held that rebuttal under Section 727.203(b)(2) was established as a matter of law and, therefore, reversed Judge Neusner's Decision and Order awarding benefits. *Dotson v. Peabody Coal Co.*, BRB No. 83-1663 BLA (March 18, 1987)(unpublished). After granting claimant's Motion for Reconsideration, the Board denied the relief requested and affirmed its previous holding reversing the award of benefits. *Dotson v. Peabody Coal Co.*, BRB No. 83-1663 BLA (Oct. 21, 1987)(unpublished).

Claimant filed an appeal with the United States Court of Appeals for the Seventh Circuit.[1] The court held that Judge Neusner erred in finding invocation of the interim presumption established under Section 727.203(a)(2) and further held that rebuttal of the interim presumption could not be established as a matter of law. The court, therefore, remanded the case to the administrative law judge for reconsideration of claimant's entitlement to benefits in light of all relevant medical evidence, including any new evidence proffered by the parties. *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988).

In a Decision and Order issued on May 24, 1989, Judge Neusner found that claimant failed to establish invocation pursuant to Section 727.203(a). Judge Neusner further determined that even if invocation was established, the evidence supported a finding of rebuttal under Section 727.203(b)(2)-(4). Judge Neusner also considered and rejected entitlement under 20 C.F.R. §410.490 and 20 C.F.R. Part 718. Accordingly, benefits were denied.

Claimant filed a Motion to Reopen Record Instanter dated June 16, 1989, requesting that Judge Neusner accept newly developed medical evidence and reconsider his claim. Director's Exhibit 49. Judge Neusner granted the request and both parties submitted additional evidence. On January 17, 1990, Judge Neusner issued an Order to Show Cause, instructing the parties to present arguments as to why the claim should not be remanded to the district director for further proceedings under 20 C.F.R. §§725.405, *et seq.*. Director's Exhibit 53. Judge Neusner then remanded the case to the district director on February 20, 1990, for further proceedings under 20 C.F.R. §§725.351, *et seq.*. Director's Exhibit 54. The district director made an initial finding of entitlement on

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment occurred in Illinois. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

June 21, 1990. Director's Exhibit 59. Employer requested a hearing and the case was transferred to the Office of Administrative Appeals Judges. Director's Exhibit 70.

Due to Judge Neusner's unavailability, the case was assigned to Administrative Law Judge Sheldon R. Lipson. In his Decision and Order, issued on January 5, 1993, Judge Lipson accepted the parties' stipulation to twenty-eight years of coal mine employment and considered the claim under the regulations set forth in 20 C.F.R. Part 727. He rejected employer's contention that claimant's Motion to Reopen Record Instanter should be treated as a request for modification pursuant to 20 C.F.R. §725.310. Upon consideration of the evidence of record, Judge Lipson found that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(1) and that employer failed to establish rebuttal of the interim presumption under Section 727.203(b). Accordingly, benefits were awarded.

Employer appealed to the Board which held that Judge Lipson did not err in declining to treat claimant's request to reopen the record as a request for modification. *Dotson v. Peabody Coal Co.*, BRB No. 93-0945 BLA (Sept. 28, 1995)(unpublished), *slip opinion at 5*. The Board also held, however, that it was required to vacate Judge Lipson's findings under Sections 727.203(a)(1) and 727.203(b) and remand the case to him for reconsideration, as he weighed only the evidence submitted after the record was reopened. *Id.*, *slip opinion at 6*. In addition, the Board vacated Judge Lipson's determination with respect to the date of onset of total disability on the ground that he did not provide an adequate explanation of his finding. *Id.*, *slip opinion at 7-8*.

On remand, the case was reassigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge) due to Judge Lipson's unavailability. The administrative law judge found that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to support a finding of entitlement under the regulations set forth in 20 C.F.R. Part 718. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the x-ray evidence under Section 727.203(a)(1) or the medical opinion evidence under Section 727.203(a)(4). Claimant also alleges that the administrative law judge erred in finding entitlement precluded under Part 718. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

[2]We affirm the administrative law judge's findings under 20 C.F.R. §727.203(a)(2) and (a)(3), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge's finding that the x-ray evidence was insufficient to establish invocation of the interim presumption under Section 727.203(a)(1) must be vacated, as the administrative law judge relied upon a "nose count" to resolve the conflicting x-ray interpretations in contravention of the holding of the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). In addition, claimant argues that the administrative law judge should have considered for which party the individual physicians prepared their readings. Finally, claimant maintains that the administrative law judge erred in neglecting to weigh the readings of physicians who are not B readers or Board-certified radiologists.

Regarding claimant's "nose count" argument, we hold that it is without merit. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians. Decision and Order on Remand at 5; *see Fitts*, *supra*; *Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Thus, the administrative law judge did not rely solely on the preponderance of x-ray readings.

Concerning claimant's reference to the "party affiliation" of the physicians who performed x-ray interpretations, absent specific evidence of bias on the part of a physician, an administrative law judge is not required to consider this factor in weighing the relevant evidence of record. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Inasmuch as claimant has offered no proof of bias in this case, the fact that the administrative law judge did not refer to the "party affiliation" of the x-ray readers was not error.

With respect to claimant's allegation that the administrative law judge erred in ignoring the positive readings submitted by physicians who are not specially qualified to interpret x-rays, the administrative law judge was not required to consider the readings by Drs. Khan and West as evidence of pneumoconiosis under Section 727.203(a)(1), as neither physician classified the film as positive for pneumoconiosis under the ILO/UICC system recognized in the regulations.[3] 20 C.F.R. §410.428(a); Director's Exhibits 49, 52;

[3]Although the administrative law judge did not weigh Dr. Khan's reading of the x-ray dated June 20, 1988, under 20 C.F.R. §727.203(a)(1), he referred to it when considering Dr. Khan's medical opinion pursuant to 20 C.F.R. §727.203(a)(4). Decision and Order on Remand at 9-10; Director's Exhibit 49. The administrative law judge noted that Dr. Khan was not qualified as a B reader or Board-certified radiologist and referred to his determination that the x-ray evidence is insufficient to establish the

see Canton v. Rochester & Pittsburgh Coal Co., 8 BLR 1-475 (1986). Moreover, the administrative law judge's failure to consider the positive readings submitted by Drs. Tuteur and Taylor was harmless error in light of the administrative law judge's permissible decision to accord greater weight to the readings performed by physicians qualified as Board-certified radiologists and B readers. *See Vance v. Eastern Associated Coal Corp.,* 8 BLR 1-68 (1985); Director's Exhibits 16, 51. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish invocation under Section 727.203(a)(1).

With respect to Section 727.203(a)(4), claimant alleges that the administrative law judge did not apply the appropriate standard in weighing the medical opinions of record, as the administrative law judge referred to the issue of the existence of pneumoconiosis rather than total disability and relied upon his findings under Section 727.203(a)(2) and (a)(3) in discrediting the opinions which contain a diagnosis of a totally disabling respiratory or pulmonary impairment. Claimant also argues that the administrative law judge did not properly weigh the medical opinions of Drs. Tuteur, Khan, and West. These contentions have merit, in part.

Claimant is correct in noting that when considering the medical opinions of record pursuant to Section 727.203(a)(4), the administrative law judge mentioned his finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. Decision and Order on Remand at 9. Section 727.203(a)(4) provides in relevant part that invocation of the interim presumption may be established by a documented and reasoned medical opinion establishing the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §727.203(a)(4). The administrative law judge's reference to the issue of the existence of pneumoconiosis and his finding with respect to the x-ray evidence was, therefore, inapposite. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). This does not constitute error requiring the Board to vacate the administrative law judge's findings under Section 727.203(a)(4), however, as the administrative law judge also rendered findings strictly with respect to the issue of whether the medical opinions at issue demonstrate the existence of a totally disabling respiratory impairment. Decision and Order on Remand at 9-11; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Claimant's assertion that the administrative law judge erred in considering the credibility of the medical opinions of record in light of his finding under Section

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existence of pneumoconiosis. *Id.*. Dr. Khan indicated that the June 1988 x-ray exhibited interstitial fibrosis and mottling consistent with simple coal workers' pneumoconiosis. Director's Exhibit 49. Dr. West stated that the film dated August 28, 1989, showed several small nodular densities and an increase in interstitial markings. Director's Exhibit 52. Dr. West noted that the x-ray findings, when coupled with claimant's history of coal mine employment, were compatible with a diagnosis of coal workers' pneumoconiosis. *Id.*.

727.203(a)(2), that the qualifying pulmonary function studies are not valid, is also without merit. The administrative law judge may, within his discretion as fact-finder, rely upon this factor in determining the extent to which a medical opinion, in which the physician diagnoses a totally disabling respiratory or pulmonary impairment, is documented and reasoned. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Casey v. Director, OWCP*, 7 BLR 1-337 (1984). The administrative law judge did not, therefore, err in referring to the validity of the pulmonary function studies when assessing the medical opinions relevant to Section 727.203(a)(4).

Nevertheless, claimant is correct in maintaining that the administrative law judge did not properly weigh the medical opinion of Dr. Khan. The administrative law judge determined that inasmuch as Dr. Khan "relied heavily" upon an invalidated pulmonary function study "which he opined demonstrated severe impairment consistent with coal workers' pneumoconiosis and obstructive and restrictive pulmonary disease," Dr. Khan's diagnosis of a totally disabling impairment was entitled to little weight. Decision and Order on Remand at 9. As claimant notes, however, Dr. Khan also cited claimant's abnormal blood gas study results and symptoms of shortness of breath and cough with sputum production in support of his diagnosis. Director's Exhibit 49. It appears, therefore, that the administrative law judge did not accurately characterize Dr. Khan's opinion when he stated that the physician "relied heavily" upon an invalidated pulmonary function study. Decision and Order on Remand at 9. Thus, the administrative law judge's finding with respect to Dr. Khan's medical report is vacated and the administrative law judge must reconsider it on remand. *See Tackett*, *supra*.

Regarding Dr. West's opinion, the administrative law judge gave it no weight on the grounds that it is not well reasoned or sufficiently explained. Decision and Order on Remand at 11; Director's Exhibit 52. The administrative law judge noted that Dr. West admitted that he had difficulty in interpreting the pulmonary function study that he reviewed and that he found the blood gas study results that he reviewed to be normal. *Id.*. The administrative law judge also determined that Dr. West's diagnosis of total disability "rests upon a conclusory statement which he leaves unexplained." Decision and Order on Remand at 11.

We hold that the administrative law judge did not abuse his discretion in finding that Dr. West's opinion is not adequately reasoned and documented, inasmuch as Dr. West did not identify the studies upon which he relied when he set forth his conclusion that claimant has a disabling respiratory impairment.[4] Director's Exhibit 52; *see Fields v.*

[4]Dr. West examined claimant on October 23, 1989. Director's Exhibit 52. Dr. West indicated that he reviewed the results of pulmonary function studies but did not report any values or otherwise identify which studies he reviewed. *Id.*. He stated that claimant's pO2 was 83.2, but did not report the pCO2 value or further identify the blood gas study. *Id.*.

Island Creek Coal Co., 10 BLR 1-19 (1987). Moreover, the administrative law judge rationally determined that Dr. West did not fully explain the significance of his statement that the restriction in the expendability of the chest wall could account for the reduction in claimant's MVV and would make it "difficult to interpret additional pulmonary function studies." Director's Exhibit 52; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984).

Concerning Dr. Tuteur's opinion, the administrative law judge found that it was entitled to the greatest weight based upon Dr. Tuteur's qualifications as a physician who is Board-certified in both Internal Medicine and Pulmonary Disease. Decision and Order on Remand at 10; Director's Exhibits 35, 51, 56. The administrative law judge also determined that Dr. Tuteur's opinion was the most thorough, well-reasoned, and well-documented opinion of record, inasmuch as Dr. Tuteur both examined claimant and reviewed his medical records and reached a conclusion regarding the extent to which claimant is totally disabled that is better supported by the underlying objective evidence. *Id.*. Although the administrative law judge acted within his discretion in giving more weight to Dr. Tuteur's opinion on these grounds, *see Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), the administrative law judge did not recognize or resolve the ambiguity in Dr. Tuteur's statements concerning whether claimant is totally disabled.[5]

Dr. Tuteur stated that claimant has pneumoconiosis manifested by exertional limitation, late inspiratory crackles, and an interstitial pulmonary process seen radiographically. He explained that claimant's exertional limitation, which is characterized by perceived breathlessness, hyperventilation, acute respiratory alkalosis and dizziness, could be attributed to "decreased lung compliance." Director's Exhibit 51. In addition, Dr. Tuteur stated that claimant's pneumoconiosis is not associated with abnormal physiologic testing or a measurable impairment, as claimant's valid objective studies produced normal results. Director's Exhibits 51, 56 at 11-12. Dr. Tuteur testified at his deposition, however, that the totality of his findings of clinically and radiologically significant pneumoconiosis and decreased lung compliance would preclude claimant from engaging in coal mine employment or comparable work. Director's Exhibit 56 at 16. The

[5]Contrary to claimant's argument, however, the administrative law judge did not clearly act irrationally in according greatest weight to Dr. Tuteur's opinion under 20 C.F.R. §727.203(a)(4) while failing to accord greatest weight to Dr. Tuteur's positive x-ray interpretation under 20 C.F.R. §727.203(a)(1). The administrative law judge is permitted to defer to the interpretations made by physicians who are Board-certified radiologists and/or B readers. Decision and Order on Remand at 4-5; *see Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985). The extent to which Dr. Tuteur's medical report otherwise contains a reasoned and documented diagnosis of pneumoconiosis based upon claimant's employment history and symptoms is relevant to rebuttal of both the interim presumption under 20 C.F.R. §727.203(b)(4) and the presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.305.

administrative law judge did not indicate that he was aware that Dr. Tuteur made this statement nor did he acknowledge the statements in Dr. Tuteur's reports concerning claimant's reduced lung compliance resulting in exertional limitation manifested by breathlessness, hyperventilation, respiratory alkalosis, and dizziness. Inasmuch as Dr. Tuteur's statements, if credited, may constitute a diagnosis of a totally disabling respiratory or pulmonary impairment, we vacate the administrative law judge's findings with respect to Dr. Tuteur's opinion. *See McMath*, *supra*; *Turner v. Director, OWCP*, 7 BLR 1-419 (1984). The administrative law judge must reconsider this opinion on remand.

In light of the foregoing, the administrative law judge's findings under Section 727.203(a)(1) are affirmed, however the administrative law judge's findings under Section 727.203(a)(4) are vacated in part and the case is remanded to the administrative law judge for reconsideration of the medical opinions of Drs. Khan and Tuteur. If the administrative law judge finds that claimant has established invocation of the interim presumption under Section 727.203(a)(4), he must determine whether employer has rebutted the presumption pursuant to Section 727.203(b). If the administrative law judge denies entitlement under Part 727, he must reconsider entitlement under the regulations set forth in 20 C.F.R. Part 718, in light of the errors noted herein. *See Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987). Should the administrative law judge determine that claimant has, by proving that he is totally disabled pursuant to 20 C.F.R. §718.204(c), invoked the presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.305, he must consider whether employer has rebutted the presumption by demonstrating that claimant is not suffering from pneumoconiosis or that claimant's total disability did not arise in whole or in part out of dust exposure in coal mine employment. *See* 20 C.F.R. §718.305(d).

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge