BRB No. 04-0416 BLA

BENNIE ALLEN Claimant-Petitioner v. SANDY FORK MINING COMPANY, INCORPORATED and TRAVELERS INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/22/2004 DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, PSC), Hyden, Kentucky, for claimant.

J. Logan Griffith (Porter, Schmitt, Jones & Banks), Paintsville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (01-BLA-0163) of Administrative Law Judge Robert L. Hillyard 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] This case has previously been before the Board.[2] In a Decision and Order dated July 19, 2002, the administrative law judge credited the miner with twenty-five and one-half years of coal mine employment,[3] and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Assuming *arguendo* that claimant had established the existence of pneumoconiosis, the administrative law judge found that claimant would have been entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). However, the administrative law judge further found that the evidence was insufficient 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 denied benefits.

On appeal, with respect to the existence of pneumoconiosis, the Board affirmed the administrative law judge's finding that the medical evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). The Board further held, however, that in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), while the administrative law judge permissibly discredited Dr. Fino's diagnosis of pneumoconiosis, the administrative law judge failed to provide a basis for crediting the opinions of Drs. Lane, Powell and Broudy, that claimant does not suffer from pneumoconiosis, over the contrary opinions of Drs. Westerfield and Baker. *Allen v. Sandy Fork Mining Co., Inc.*, BRB No. 02-0802 BLA (Jun. 13, 2003)(unpublished), slip op. at 7-8. The Board specifically held that although the administrative law judge noted that Drs. Lane, Powell and Broudy are

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The complete procedural history of this case is contained in the Board's prior Decision and Order. *Allen v. Sandy Fork Mining Co., Inc.*, BRB No. 02-0802 BLA (Jun. 13, 2003) (unpublished).

[3] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction 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*).

highly qualified physicians and found that their opinions were thorough and reasoned, he failed to address whether Drs. Westerfield and Baker were also highly qualified and whether their reports were similarly thorough and reasoned. Consequently, the Board held that the administrative law judge's analysis of the medical opinion evidence did not comply with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Allen*, slip op. at 7-8. Therefore, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remanded the case for further consideration. The Board directed the administrative law judge, on remand, to separately consider whether the medical opinion evidence is sufficient to establish (1) clinical pneumoconiosis and (2) legal pneumoconiosis. *See* 20 C.F.R. §718.201.

With respect to the issue of total disability, the Board affirmed the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i)-(iv), but found that the administrative law judge erred in not weighing the pulmonary function study and medical opinion evidence of record against the arterial blood gas study evidence of record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*); *Allen*, slip op. at 8-9. The Board directed the administrative law judge that should he, on remand, find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh all of the relevant evidence together to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). Finally, with respect to the administrative law judge's finding that claimant did not establish that his respiratory impairment was due to coal mine employment, pursuant to 20 C.F.R. §718.204(c)(1), the Board held that the administrative law judge's analysis did not comply with the requirements of the APA because he did not provide a basis for crediting the opinions of Drs. Westerfield, Broudy, Fino, Lane and Powell over that of Dr. Baker. Consequently, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). *Allen*, slip op. at 10. The Board held that, on remand, should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(b), he must reconsider whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

In a Decision and Order on Remand dated January 20, 2004, the administrative law judge found that the medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, the administrative law judge denied benefits without reaching the issue of total disability. On

appeal, claimant generally contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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 a finding of 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).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in discrediting the opinions of Drs. Baker and Westerfield. Claimant's Brief at 3. We disagree. In considering, on remand, whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that a finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Six physicians offered opinions regarding the existence of pneumoconiosis. Dr. Baker's opinion supports a finding of both clinical and legal pneumoconiosis.[4] Director's Exhibit 9. The opinions of Drs. Westerfield and Fino support a finding of clinical pneumoconiosis.[5] Finally, the opinions of Drs. Lane, Powell and Broudy support a

[4] Dr. Baker examined claimant on July 30, 1999. In a report dated July 30, 1999, he diagnosed coal workers' pneumoconiosis. Director's Exhibit 9. Dr. Baker also diagnosed chronic obstructive pulmonary disease and chronic bronchitis. *Id.* Dr. Baker attributed these latter diseases to claimant's coal dust exposure and cigarette smoking. *Id.* He further indicated that claimant had an occupational lung disease that was caused by his coal mine employment. *Id.*

[5] Dr. Westerfield reviewed Dr. Baker's July 30, 1999 report. In a report dated November 29, 1999, Dr. Westerfield opined that claimant suffered from severe chronic obstructive pulmonary disease "most likely due to cigarette smoking." Director's Exhibit 21. Although Dr. Westerfield noted that Dr. Baker diagnosed coal workers'

finding that claimant does not suffer from pneumoconiosis.[6] Director's Exhibits 22, 23. The administrative law judge permissibly declined to credit the opinions of Drs. Westerfield and Baker, that claimant suffers from clinical coal workers' pneumoconiosis, on the grounds that as neither physician offered an explanation for their diagnosis, beyond citing to a positive x-ray interpretation and a history of coal dust exposure, their

---

pneumoconiosis, Dr. Westerfield opined that claimant's reduction in lung function could not be due to this disease. *Id.* Dr. Westerfield opined that claimant was totally disabled due to his chronic obstructive pulmonary disease. *Id.* Dr. Westerfield found no evidence that claimant's respiratory disability was due to coal workers' pneumoconiosis. *Id.*

Dr. Westerfield subsequently examined claimant on December 9, 1999. In a report dated December 9, 1999, he diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibit 22. Dr. Westerfield attributed claimant's chronic obstructive pulmonary disease to cigarette smoking. *Id.*

During a deposition taken on January 10, 2000, Dr. Westerfield reiterated that claimant suffered from coal workers' pneumoconiosis. Director's Exhibit 25 at 21. He also diagnosed chronic obstructive pulmonary disease due to cigarette smoking. *Id.* at 23. Dr. Westerfield indicated that claimant's chronic obstructive pulmonary disease was not attributable to his coal dust exposure. *Id.* at 30.

Dr. Fino reviewed the medical evidence of record. In a report dated December 17, 1999, he opined that coal workers' pneumoconiosis was present radiographically. Director's Exhibit 24.

[6] Dr. Lane examined claimant on March 1, 1990. In a report dated March 5, 1990, he diagnosed chronic obstructive pulmonary disease. Director's Exhibit 22. Dr. Lane further indicated that claimant did not have an occupational lung disease caused by his coal mine employment. *Id.* During a July 2, 1990 deposition, he reiterated that claimant's chronic obstructive pulmonary disease was not attributable to his coal dust exposure. *Id.*

Dr. Powell examined claimant on February 23, 1990. In a report dated May 31, 1990, he opined that there was "no coal pneumoconiosis." Director's Exhibit 22. Dr. Powell opined that claimant suffered from an obstructive ventilatory defect. *Id.* During a July 2, 1990 deposition, Dr. Powell opined that claimant's obstructive ventilatory defect was due to cigarette smoking. *Id.*

Dr. Broudy examined claimant on December 10, 1999. In a report dated December 10, 1999, he diagnosed severe chronic obstructive airways disease due to cigarette smoking. Director's Exhibit 23.

opinions were undocumented and unreasoned. Director's Exhibits 9, 21, 22, 25; Decision and Order on Remand at 4. The administrative law judge properly found that such an explanation is warranted, as the United States Court of Appeals for the Sixth Circuit has held that "[a]n ALJ may not rely on a doctor's opinion that a patient had medical pneumoconiosis when the physician bases his opinion entirely on x-ray evidence the ALJ has already discredited," *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003), and that "a mere restatement of an x-ray should not count as a reasoned medical judgment," *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Decision and Order on Remand at 4-5.

Further, while the administrative law judge credited Dr. Baker's additional diagnosis of legal pneumoconiosis as supported by objective data and thus well reasoned, he permissibly found Dr. Baker's opinion outweighed by the contrary opinions of Drs. Powell and Broudy, that none of claimant's lung conditions are attributable to coal dust exposure, based on their superior qualifications. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); Director's Exhibits 9, 22, 23; Decision and Order at 5.

Finally, we held in our prior decision, that the administrative law judge permissibly discredited Dr. Fino's diagnosis of coal workers' pneumoconiosis because it was based entirely on his x-ray interpretations, when the administrative law judge had previously found that the weight of the x-ray evidence of record was negative for pneumoconiosis.[7] *See Anderson*, 12 BLR at 1-111; *see generally Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Allen*, slip op. at 10; Decision and Order on Remand at 6.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). 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 Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983), and explained whether the diagnoses contained therein constituted reasoned medical judgments under Section 718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120. Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis, an

[7] Dr. Fino reviewed three interpretations of the July 30, 1990 x-ray (positive interpretations rendered by Drs. Baker and Barrett and a negative interpretation rendered by Dr. Sargent). Director's Exhibit 24. In his December 17, 1999 report, Dr. Fino opined that coal workers' pneumoconiosis was "present radiographically." *Id.* Dr. Fino, however, subsequently independently interpreted the July 30, 1999 x-ray as negative for pneumoconiosis. *See* Director's Exhibit 30.

essential element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a). We therefore affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge