BRB No. 03-0730 BLA

GARY L. KEARNS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 07/23/2004
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2000-BLA-0402) of Administrative Law Judge Robert L. Hillyard 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] In adjudicating this case pursuant to 20

[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

C.F.R. Part 718, based on claimant's January 5, 1999 filing date, the administrative law judge credited claimant with "at least" twenty-one years of coal mine employment, finding that the evidence of record supported employer's stipulation. Decision and Order at 3. Addressing the merits of entitlement, the administrative law judge found the weight of the x-ray evidence of record and the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge, however, found the medical evidence insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). In addition, the administrative law judge found the medical evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish entitlement to benefits. In particular, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv) or total disability causation at Section 718.204(c). Claimant also contends that the administrative law judge erred in crediting claimant with only twenty-one years of coal mine employment. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. Employer, in the alternative, challenges the administrative law judge's finding that the medical evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4). The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief on the merits of 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 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).

Initially, claimant contends that the administrative law judge erred in crediting claimant with only twenty-one years of coal mine employment and not the twenty-three

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The parties do not challenge the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii), therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

years and two months of coal mine employment alleged by claimant at the hearing. Claimant asserts that the administrative law judge erred in not rendering a specific length of coal mine employment finding, arguing that the administrative law judge must provide a specific finding and may not approximate the number of years of coal mine employment. Claimant's Brief at 4. In particular, claimant contends that it was not proper for the administrative law judge to determine that employer's stipulation to twenty-one years of coal mine employment was supported by the record, but rather, the issue is whether claimant meets his burden of establishing the number of years actually worked. *Id*.

Based on the facts of this case, error, if any, in the administrative law judge's decision to credit claimant with "at least" twenty-one years of coal mine employment is harmless. Decision and Order at 3. The administrative law judge found that employer stipulated to at least twenty-one years of coal mine employment and that the evidence of record, including claimant's testimony and employment records, supports the stipulation. Decision and Order at 3. Therefore, the administrative law judge credited claimant with "at least" twenty-one years of coal mine employment. *Id*. While the administrative law judge is required to provide a specific finding regarding the length of coal mine employment, *see Boyd v. Director, OWCP*, 11 BLR 1-39 (1988), the administrative law judge's finding of "at least" twenty-one years of coal mine employment, in this case, is not prejudicial to either party. Under 20 C.F.R. Part 718, the number of years of coal mine employment determines which presumptions are applicable and which elements of entitlement must be affirmatively proven. *Boyd*, 11 BLR at 1-41. Herein, claimant was reasonably credited with over ten years of coal mine employment, thus, invoking the Section 718.203(b) presumption, the only presumption available to claimant in this claim filed after January 1, 1982. *See* 20 C.F.R. §§718.203(b), 718.305(e). Moreover, the administrative law judge has not accorded diminished weight to any of the medical evidence of record based upon his decision to credit claimant with twenty-one years of coal mine employment. Therefore, since the administrative law judge's decision to credit claimant with "at least" twenty-one years of coal mine employment is not prejudicial to either claimant or employer, we hold that error, if any, in the administrative law judge's determination is harmless and affirm his decision to credit claimant with "at least" twenty-one years of coal mine employment. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In challenging the administrative law judge's finding that the medical opinion evidence is insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in failing to fully and adequately set forth the factual and legal basis for his findings. Claimant argues that the administrative law judge provided only a summary conclusion and not a detailed explanation of his weighing of the medical evidence. This contention has merit.

The administrative law judge initially set forth all of the relevant medical evidence, including the physicians' credentials, a summary of the physicians' opinion as well as the evidence and objective studies relied upon by each of the physicians. Decision and Order at 11-17. However, in weighing the relevant evidence, the administrative law judge did not discuss any of the conflicting opinions in detail, other than stating that the opinions of Drs. Repsher, Renn and Tuteur are supported by the weight of the objective evidence and are reasoned opinions.[3] Decision and Order at 19. The administrative law judge then concluded that these opinions "are entitled to at least as much weight, if not more, than the opinions of Drs. Dahhan, Fino, Cohen, Paul, Houser and Prabhu," *id*., without further explanation.

The administrative law judge's conclusory analysis that the medical evidence is insufficient to establish that a totally disabling respiratory impairment does not comply with 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). Herein, the administrative law judge failed to provide a sufficient basis for crediting the opinions of Drs. Repsher, Renn and Tuteur, that claimant was not suffering from a totally disabling respiratory or pulmonary impairment, over the contrary opinions of Drs. Dahhan, Fino, Cohen, Paul, Houser and Prabhu. Consequently, we vacate the administrative law judge's findings at

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[3] In finding that the medical opinion evidence is insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), the administrative law judge stated:

> This issue is hotly contested by the physicians of record. The opinions of Drs. Repsher, Renn, and Tuteur are supported by the weight of the objective medical evidence on this issue and their opinions are well reasoned. Based on a review of all of the reports, along with the objective medical evidence, I find that the Claimant has failed to carry his burden of demonstrating by a preponderance of the evidence that he is totally disabled from a pulmonary or respiratory impairment caused by his coal mine employment. Rather, I find that the opinions of Drs. Repsher, Renn, and Tuteur on this issue are entitled to at least as much weight, if not more, than the opinions of Drs. Dahhan, Fino, Cohen, Paul, Houser, and Prabhu.

Decision and Order at 19.

Section 718.204(b)(2)(iv) and remand the case for the administrative law judge to provide a more detailed explanation of his weighing of the medical evidence and the rationale for the conclusions he reaches. *See Wojtowicz*, 12 BLR 1-162; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Moreover, on remand, the administrative law judge must consider the entirety of each of the physicians' opinions, including the supplemental reports and deposition testimony, in determining the credibility of the relevant medical reports. *See Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Similarly, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish disability causation pursuant to Section 718.204(c), arguing that the administrative law judge failed to adequately explain the basis for his conclusions. In particular, claimant contends that the administrative law judge failed to consider all of the relevant evidence and to provide a detailed discussion of this evidence. Rather, claimant argues that the administrative law judge made a "simple conclusory finding." Claimant's Brief at 13. We agree.

In discussing the evidence pursuant to Section 718.204(c), the administrative law judge merely stated:

> Further, I find that the opinions of Drs. Fino and Dahhan support the conclusion, shared by Drs. Renn, Repsher, and Tuteur, that even if the Claimant was totally disabled from a respiratory standpoint, the total disability was not caused by his coal mine employment.

Decision and Order at 19.

As claimant correctly contends, the administrative law judge has not provided specific findings regarding his rationale for according greater weight to the opinions stating claimant's total disability was not due to pneumoconiosis, and, therefore, it is not possible to determine whether his findings are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe*, 380 U.S. 359. Specifically, the administrative law judge has not provided sufficient analysis of the evidence and as a result, these findings by the administrative law judge fail to satisfy the requirements of the APA. *See Wojtowicz*, 12 BLR 1-162; *Tenney*, 7 BLR 1-589; *see also Collins v. J & L Steel*, 21 BLR 1-181 (1999).

We, therefore, vacate the administrative law judge's finding at Section 718.204(c) and remand the case for the administrative law judge to provide specific explanations of his weighing of the conflicting evidence and the rationale for his conclusions. *Wojtowicz*, 12 BLR 1-162; *Tackett*, 12 BLR 1-11; *Tenney*, 7 BLR 1-589. On remand, the

administrative law judge must weigh all of the relevant evidence to determine whether the evidence is sufficient to establish that claimant's pneumoconiosis is a contributing cause of his total disability. 20 C.F.R. §718.204(c); *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 15 BLR 2-116 (7th Cir. 1991).

In addition, on remand the administrative law judge must also address employer's contention that claimant is precluded from an award of Black Lung benefits as he was forced to retire from coal mine employment due to a totally disabling non-pulmonary condition, that is, his leg injuries. Employer's Response Brief at 22-24. Citing the decisions of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994) and *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995), employer argues that because claimant was "forced to retire because of non-respiratory problems, his pre-existing disability removes him from the ambit of the Black Lung Disability Act." Employer's Response Brief at 22. Herein, the administrative law judge has not addressed whether claimant's entitlement to benefits is precluded by a preexisting totally disabling impairment inasmuch as claimant states that he left the mines due to a leg injury following a mine accident. Consequently, on remand, the administrative law judge must address whether claimant's entitlement to benefits is precluded by a preexisting non-pulmonary or non-respiratory condition or disease. In considering this issue, the administrative law judge must determine whether claimant's pneumoconiosis, in and of itself, is totally disabling or if not totally disabling, when it is combined with another condition which also is not totally disabling, renders claimant totally disabled.[4] *Midland Coal Company v. Director, OWCP* [*Shores*], 358 F.3d 486,

[4] In *Shores*, the Seventh Circuit court has provided a description of four different scenarios, reflecting varying degrees to which disability is caused by claimant's pneumoconiosis, and the resultant finding on the issue of disability causation. Specifically, the court stated:

> First, in cases in which pneumoconiosis is both necessary and sufficient to the miner's disability – that is, where pneumoconiosis is unaccompanied by any other disabling condition – a miner who satisfies the other elements of entitlement will receive benefits. Second, a miner whose pneumoconiosis is necessary but not sufficient – perhaps because her non-disabling pneumoconiosis, when combined with another condition that is also not by itself disabling, renders her totally disabled – is also entitled to benefits…. Third, a miner whose pneumoconiosis is neither necessary nor sufficient to her disability – that is, she does not suffer from pneumoconiosis, or her mild pneumoconiosis is accompanied by a totally disabling non-respiratory and non-pulmonary condition – will not receive benefits. Finally, we have

BLR (7th Cir. 2004). Specifically, the court in *Shores* cited its previous holding in *Amax Coal Co. v. Director, OWCP* [*Peavler*], 801 F.2d 358 (7th Cir. 1986), that "[t]he concurrence of two sufficient disabling medical causes, one within the ambit of the Act, and the other not, will in no way prevent a miner from claiming benefits under the Act." *Peavler*, 801 F.2d at 963; *Shores*, 358 F.3d at 495.

Lastly, in its response brief, employer contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Specifically, employer contends that the administrative law judge's finding at Section 718.202(a)(1) does not amount to a reasoned choice or "an explanation that passes muster under the APA." Employer's Response Brief at 25. Furthermore, employer contends that the administrative law judge's treatment of the "other evidence" is also deficient, arguing that the administrative law judge failed to explain his conclusion that the opinions of no pneumoconiosis are outweighed by the contrary opinions. *Id*. These contentions have merit.

In finding the x-ray evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge determined that the record contains 75 readings of 10 x-ray films. Of these readings, 30 were interpreted as positive for the existence of pneumoconiosis and most were read by dually qualified physicians. Decision and Order at 17. Weighing this evidence, the administrative law judge concluded that:

> Moreover, there are a number of readings that show evidence consistent with pneumoconiosis but the reading physician opined that the x-ray did not support a finding of pneumoconiosis. Based on the numerous positive interpretations by highly qualified physicians, I find that the

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> the situation of a miner whose pneumoconiosis is sufficient, but not necessary, to render her totally disabled. In such a case, the miner suffers from multiple conditions, including those related exposure to coal dust and those that are not, that are each independently sufficient to render the miner totally disabled…. the sufficiency of the pneumoconiosis is enough, given the purposes of this Act, to support an award of benefits in this situation as well.

Midland Coal Company v. Director, OWCP [*Shores*], 358 F.3d 486, 496, BLR (7th Cir. 2004).

> Claimant has carried his burden of showing by a preponderance of the x-ray evidence that he suffers from pneumoconiosis.

Decision and Order at 17.

We vacate the administrative law judge's findings pursuant to Section 718.202(a)(1) because the administrative law judge has not adequately discussed how the positive interpretations are entitled to greater weight than the contrary x-ray interpretations by equally qualified physicians, as the administrative law judge did not discuss the negative x-ray interpretations. *See* Decision and Order at 17; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Consequently, we remand this case for the administrative law judge to provide a more detailed explanation of his findings. *Wojtowicz*, 12 BLR 1-162; *Tackett*, 12 BLR 1-11; *Tenney*, 7 BLR 1-589.

With regard to the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that the opinions of Drs. Cohen, Paul, Houser and Prabhu support a finding of pneumoconiosis, whereas, the opinions of Drs. Dahhan, Repsher, Renn, Fino and Tuteur agree that claimant does not suffer from pneumoconiosis. Decision and Order at 18. The administrative law judge then concluded that:

> Although all of these physicians have excellent credentials and submitted well-documented and reasoned reports, I find that their opinions are outweighed on this issue by the reports finding pneumoconiosis.

Decision and Order at 18.

Likewise, as the administrative law judge does not adequately explain the rationale for his determination that the negative reports are outweighed by opinions supporting a finding of pneumoconiosis, we vacate the administrative law judge's Section 718.202(a)(4) finding and remand the case for further explanation of his findings. *Wojtowicz*, 12 BLR 1-162; *Tackett*, 12 BLR 1-11; *Tenney*, 7 BLR 1-589.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge 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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REGINA C. McGRANERY
Administrative Appeals Judge