

BRB No. 04-0159 BLA

CHARLES W. BAUGHAN)
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 Claimant-Respondent)
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 v.)
)
 PRATT MINING COMPANY) DATE ISSUED: 07/23/2004
)
 and)
)
 WEST VIRGINIA COAL-WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-Petitioners)
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert Weinberger (State of West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Decision and Order - Awarding Benefits (2002-BLA-0448) of Administrative Law Judge Michael P. Lesniak 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 credited claimant with twelve and one-half years coal mine employment,² as stipulated by the parties, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and further established the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c). Accordingly, the administrative law judge awarded benefits.

The relevant procedural history of this case is as follows: Claimant filed a claim for benefits on June 23, 1998, and was initially found entitled to benefits by a claims examiner on October 29, 1998. Director's Exhibits 1, 20. Following a hearing, Administrative Law Judge Richard E. Huddleston issued a Decision and Order dated September 15, 2000. Director's Exhibit 33. Judge Huddleston found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000) and denied the claim. Director's Exhibit 33. On appeal, the Board affirmed the denial of benefits. *Baughan v. Pratt Mining Co.*, BRB No. 00-1194 BLA (Sept. 26, 2001)(unpub.).

Claimant filed a timely petition for modification with the district director, asserted a mistake in fact, and submitted medical evidence in support of his modification request. Director's Exhibit 44. The case was subsequently assigned to Administrative Law Judge Michael P. Lesniak, who issued a Decision and Order dated September 25, 2003, wherein he found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and further established the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c). Thus, Judge Lesniak found the evidence sufficient to establish a mistake in a determination of fact

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 record indicates that claimant's coal mine employment occurred in West Virginia. Decision and Order at 3; Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

pursuant to Section 725.310, and, therefore, awarded benefits. Employer then filed the instant appeal with the Board.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the issues of the existence of pneumoconiosis and the cause of claimant's totally disabling respiratory impairment. Claimant has not responded to the employer's petition and the Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.³

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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. A petition for modification may be based on an allegation that the ultimate fact, disability due to pneumoconiosis, was mistakenly decided. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Pursuant to Section 718.202(a)(4), the administrative law judge accorded greater weight to the opinion of Dr. Rasmussen than to the opinion of Dr. Zaldivar, and found that the medical opinion evidence established the existence of pneumoconiosis. Decision

³ The administrative law judge's findings that claimant has twelve and one-half years of coal mine employment, that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(3), but that he established the existence of total disability pursuant to 20 C.F.R. §718.204(b) are affirmed as unchallenged on appeal. 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).

and Order at 15-16. Employer asserts that the administrative law judge erred by crediting Dr. Rasmussen's opinion because it was based in part on a positive reading of an August 21, 1998 x-ray, without considering that he previously found the single positive reading of the August 21, 1998 x-ray outweighed by negative readings of the same x-ray pursuant to Section 718.202(a)(1). Employer's Brief at 3-4. Employer's contention has merit.

In his evaluation of the medical opinion evidence, the administrative law judge found that Dr. Rasmussen diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease, both due to coal mine dust exposure, while Dr. Zaldivar opined that claimant did not have coal workers' pneumoconiosis and explained that the positive x-ray readings were actually indicative of pulmonary fibrosis unrelated to coal mine employment. Decision and Order at 7-8, 15; Director's Exhibits 10, 26, 30. In crediting Dr. Rasmussen's opinion over that of Dr. Zaldivar, the administrative law judge noted that Dr. Rasmussen took into account claimant's history of coal mine work, the positive x-ray, his smoking history, and his heart disease, and "set forth clearly and methodically" his reasons for concluding that claimant has pneumoconiosis. Decision and Order at 7, 15. While an administrative law judge may credit the opinion of a physician he finds better reasoned, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997)(the administrative law judge, as trier of fact, must evaluate the evidence, weigh it, and draw his own conclusions); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*)(whether a medical report is sufficiently reasoned is for the administrative law judge to decide), in this case the administrative law judge did not offer any rationale for crediting Dr. Rasmussen's opinion based in part on the positive x-ray reading, when the administrative law judge previously found that the x-ray relied on by Dr. Rasmussen was negative for the existence of pneumoconiosis. In *Sterling Smokeless Coal. Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that it is error for an administrative law judge to ignore a physician's reliance on a discredited x-ray. Because the administrative law judge has not adequately explained his reason for crediting Dr. Rasmussen's opinion, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand this case for him to reconsider the medical opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998).

Employer further asserts that the administrative law judge did not properly weigh together the x-ray and medical opinion evidence to determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis, as required by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000). We agree. In finding the existence of pneumoconiosis established pursuant to Section 718.202(a), the administrative law judge stated that he weighed the x-rays and medical opinions together, yet did not specifically discuss the impact of the negative x-ray

findings or explain why he found that Dr. Rasmussen's medical opinion outweighed the negative x-rays. In this case that arises in the Fourth Circuit, the administrative law judge's failure to explain his weighing of the evidence under Compton is complicated by his failure to specify whether he was finding clinical or legal pneumoconiosis established by the medical opinions.⁴ The Fourth Circuit in *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187 n.2, 22 BLR 2-564, 2-571 n.2 (4th Cir. 2002)(Gregory, J., dissenting), noted that "neither the physician-witness nor the ALJ sufficiently distinguishes between medical and legal pneumoconiosis, a distinction that is imperative for proper resolution of this type of case." See also *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999)(noting that the administrative law judge did not sufficiently distinguish between legal or clinical pneumoconiosis). Based on the foregoing, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4) and remand this case for the administrative law judge to weigh the x-rays and medical opinions together in accordance with Compton.⁵

Pursuant to Section 718.204(c)(1), employer challenges the administrative law judge's determination to accord less weight to the disability causation opinion of Dr. Zaldivar because he did not diagnose pneumoconiosis. Employer's Brief at 2. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we also vacate his disability causation finding and instruct him to reweigh the medical opinions after he has reassessed the existence of pneumoconiosis.

⁴ The Board notes that Dr. Rasmussen's opinion, which was credited by the administrative law judge, contains diagnoses of both coal worker's pneumoconiosis, or clinical pneumoconiosis, and chronic obstructive pulmonary disease due to coal dust exposure, or legal pneumoconiosis. Director's Exhibit 8.

⁵ Employer also correctly argues that the administrative law judge erred pursuant to Section 718.202(a) in that he stated that "having carefully considered the X-ray, pulmonary function tests, and medical reports together, I find that Claimant has established the existence of pneumoconiosis pursuant to §718.202(a)." Decision and Order at 16; Employer's Brief at 3. Pulmonary function studies are not properly considered at Section 718.202(a). See *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge