BRB No. 08-0656 BLA

R.J.O.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 07/21/2009
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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 Decision and Order - Award of Benefits (2005-BLA-5937) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim[1] 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). The administrative law judge credited claimant with at least thirty-three years of qualifying coal mine employment, and adjudicated this claim, filed on April 26, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718 and 20 C.F.R. §725.309. The administrative law judge accepted, as supported by the record, employer's stipulation that claimant has a totally disabling respiratory impairment, an element of entitlement previously adjudicated against claimant, and found that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found the weight of the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings of clinical and legal pneumoconiosis at Section 718.202(a)(1), (4), and disability causation at Section 718.204(c). Employer further contends that liability for any payment of benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the Trust Fund should be deemed liable for the payment of any benefits in this case. Employer has filed a combined reply to claimant and the Director in support of its position.[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,

[1] Claimant's first claim for benefits, filed on January 19, 1981, was denied on April 28, 1981, because claimant did not establish any element of entitlement. Director's Exhibit 1-16.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment, and his finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), based on the parties' stipulation that claimant has established total disability pursuant to 20 C.F.R. §718.204(b) since the prior denial. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[3] 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).

Employer challenges the administrative law judge's weighing of the x-ray evidence of record at Section 718.202(a)(1), arguing that the administrative law judge, in crediting the August 15, 2005 film over the September 16, 2004 film, improperly relied on a presumption that pneumoconiosis is always progressive and latent. Employer further contends that the administrative law judge treated the evidence inconsistently and failed to weigh the CT scan evidence with the x-ray evidence. Employer's Brief at 8-14. Some of employer's arguments have merit.

We reject employer's contention that the administrative law judge should have weighed the CT scan evidence with the x-ray evidence, as CT scan evidence is properly considered at Section 718.107(b). *See* 20 C.F.R. §718.202(a)(1); *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

At Section 718.202(a)(1), the x-ray evidence considered by the administrative law judge consisted of seven interpretations of three x-rays dated March 30, 1981, September 16, 2004, and August 15, 2005. The March 30, 1981 x-ray, submitted in claimant's first claim, was read as Category 1/0 by Dr. Stokes, a Board-certified radiologist, and as negative by Dr. Cole, a dually qualified Board-certified radiologist and B reader.[4] Director's Exhibits 1-23, 1-42. The September 16, 2004 x-ray was interpreted as Category 1/1 by Dr. Simpao, who possesses no special radiological qualifications, and as negative by Dr. Wiot, a dually qualified physician. Director's Exhibits 13, 15. The

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1-94.

[4] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

August 15, 2005 x-ray was interpreted as Category 1/0 by Dr. Ahmed, a dually qualified physician, and as negative by Dr. Repsher, a B reader. Employer's Exhibits 1, 4; Claimant's Exhibit 1.

The administrative law judge summarily concluded that "the [x-ray] in the prior record [did] not establish pneumoconiosis," and determined that Drs. Wiot and Ahmed were the best qualified experts in the current record. Decision and Order at 7. Reviewing the two most recent x-rays, the administrative law judge found the September 16, 2004 x-ray to be negative,[5] and the August 15, 2005 x-ray to be positive, based on the comparative qualifications of the interpreting physicians. The administrative law judge also accorded less weight to Dr. Repsher's opinion, finding that the physician became an advocate for employer due to his "impeachment of the reliability of Dr. Ahmed without substantiation." *Id*. As the x-ray Dr. Ahmed read was eleven months more recent than the x-ray Dr. Wiot read, the administrative law judge concluded that application of the later evidence rule was appropriate, and found that claimant established clinical pneumoconiosis at Section 718.202(a)(1). Decision and Order at 8.

An administrative law judge has discretion to accord greater weight to the x-ray interpretation of a physician with superior qualifications, 20 C.F.R. §718.202(a)(1); *see Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984), and may, in some instances, grant greater weight to the most recent x-ray evidence of record. In this case, however, where every x-ray in the prior record and the present record has been interpreted as both positive and negative for pneumoconiosis, and claimant was last exposed to coal dust in 1993, the administrative law judge has failed to provide a sufficient explanation for his finding that, in light of the progressive nature of pneumoconiosis, the August 15, 2005 x-ray was significantly more recent and entitled to greater weight than an x-ray taken just eleven months earlier. Accordingly, we vacate the administrative law judge's findings at Section 718.202(a)(1), and remand this case for further consideration and weighing of all relevant evidence thereunder.

[5] With respect to the 2004 x-ray, however, the administrative law judge added: "I note that Dr. Wiot did say that the findings were consistent with emphysema . . . . I find that the Dr. Wiot reading is not dispositive." Decision and Order at 8. While the administrative law judge's meaning is not clear, we agree with employer's argument that Dr. Wiot's diagnosis of emphysema, absent any attribution of the condition to coal dust exposure, does not support a finding of clinical or legal pneumoconiosis. Employer's Brief at 11; *see* 20 C.F.R. §718.201; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Employer next challenges the administrative law judge's reliance on the medical opinion of Dr. Cohen over the contrary opinions of Drs. Fino and Repsher on the issue of legal pneumoconiosis at Section 718.202(a)(4). Employer argues that the administrative law judge shifted the burden of proof to employer in violation of the regulations and the provisions of the Administrative Procedure Act (APA), 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), 30 U.S.C. §932(a), and failed to subject the opinions of claimant's physicians to the same standard and scrutiny as he did the opinions of employer's physicians. Employer further contends that the administrative law judge has relieved claimant of his burden of proving a relationship between his pulmonary disease and coal dust exposure. Employer's Brief at 14-18. Some of employer's arguments have merit.

In evaluating the conflicting medical opinions, the administrative law judge summarized the physicians' findings and acknowledged that Dr. Simpao was not as well-qualified as Drs. Repsher, Fino, and Cohen.[6] Decision and Order at 10. While stating that he would not rely on Dr. Simpao's report as a "reasoned" medical report, the administrative law judge "accepted Dr. Simpao's testing as accurate," and then credited Dr. Simpao's "testimony on 'legal' causation," without explanation, in violation of the APA. *Id.*; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge accorded the opinion of Dr. Cohen[7] the greatest weight, finding it to be reasoned and well-documented because the doctor "based his opinion on the examinations of both Drs. Simpao and Repsher and his observations and laboratory findings," and because Dr. Cohen cited to journal articles that substantiated his position, *i.e.*, that claimant had a severe obstructive lung disease consistent with exposure to coal mine dust as well as tobacco smoke. Decision and Order at 10; Claimant's Exhibit 1. Decision and Order at 10. However, as Dr. Repsher[8] examined and tested the miner, and

[6] Drs. Repsher, Fino, and Cohen are Board-certified in internal medicine with a subspecialty in pulmonary disease. Employer's Exhibits 1, 2; Claimant's Exhibit 1.

[7] Dr. Cohen prepared a consultative report on September 7, 2007, and opined that claimant's forty years of exposure to coal mine dust was "significantly contributory to the development of [claimant's] pulmonary dysfunction including severe obstructive lung disease and severe diffusion impairment," and that the 20-42 pack years of tobacco smoke exposure was also a contributing factor. Claimant's Exhibit 1.

[8] Dr. Repsher examined claimant on August 15, 2005, and diagnosed hypertension and very severe chronic obstructive pulmonary disease with bullous emphysema. Dr. Repsher found a mild to moderate impairment of claimant's diffusing capacity, consistent with cigarette smoking. He found no evidence of any other pulmonary or respiratory disease caused by or aggravated by coal dust exposure. Employer's Exhibit 1.

Dr. Fino[9] also based his opinion on the examinations of Drs. Simpao and Repsher, his observations and laboratory findings, and cited to medical literature that supported his position, the administrative law judge has not explained how Dr. Cohen's opinion was better documented, "the most rational in this record," and sufficient to meet claimant's burden at Section 718.202(a)(4). Rather, the administrative law judge appears to have impermissibly substituted his own opinion for that of a physician.[10] *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Specifically, the administrative law judge noted that "[t]here is a stipulation to at least 33 years of exposure, which I find is competent to produce legal pneumoconiosis. . . . I note that Dr. Fino alleged that only 5% to 8% of all miners have an appreciable loss of FEV_1 due to exposure [to] coal mine dust. . . . [b]ut I do not accept his premise about the combined effects from a combination of mining and smoking, as this logic does not apply to this claimant who has a documented loss of FEV_1 with 33 years of exposure and smoking. . . . I also note that during Dr. Repsher's examination, the FEV_1 was not completely reversible." Decision and Order at 10. As a loss of FEV_1 and an exposure to coal dust and smoking do not necessarily require a diagnosis of legal pneumoconiosis, and determinations as to the significance of FEV_1 reversibility and whether thirty-three years is a sufficient amount of time to produce legal pneumoconiosis are for the physicians, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4), and remand this case for further consideration. On remand, the administrative law judge is cautioned not to provide his own interpretation of the medical data, but is instructed to reassess the conflicting medical opinions of record and provide a

[9] Dr. Fino prepared a consultative report dated March 12, 2006, and a supplemental report dated December 10, 2007, and diagnosed pulmonary emphysema. He opined that claimant's disabling respiratory impairment was due solely to smoking. Employer's Exhibits 2, 5.

[10] Citing to 65 Fed. Reg. 79940 (Dec. 20, 2000), the administrative law judge additionally noted that the preamble to the amended regulations recognized that smokers who mine have an additive risk for developing significant obstruction; that "[n]one of the papers that Dr. Repsher or Dr. Fino refer to address the new regulations;" and that "I also find that in reading the literature, there is no support for Dr. Fino's contention that there is any way to distinguish the effects from smoking and mining." Decision and Order at 10. However, the administrative law judge failed to identify the literature that he found did not support Dr. Fino's position, and it is not clear why the administrative law judge considered it significant that the medical literature relied upon by Drs. Repsher and Fino did not address the new regulations. While the administrative law judge may rely on the preamble for guidance as to the interpretation of the regulations promulgated by the Department of Labor, he may not provide his own interpretation of the medical data.

thorough analysis and explanation of his credibility determinations at Section 718.202(a)(4).

Because the administrative law judge relied upon his findings on the issue of legal pneumoconiosis in assessing the weight to be accorded to the conflicting medical opinions on the issue of disability causation, we also vacate his findings at Section 718.204(c) for a reevaluation and weighing of the evidence thereunder on remand, if reached.

Lastly, employer contends that liability for any payment of benefits herein should transfer to the Trust Fund because claimant's first claim for benefits was denied for failure to establish any element of entitlement, several years after claimant ceased working for employer in 1978, and claimant subsequently worked another twelve years as a federal mine inspector. While employer acknowledges that the regulations exempt the federal government from liability as a responsible operator under the Act, employer argues that any coal dust-related impairment could not be due to exposure during claimant's employment with employer, and thus, the Trust Fund should assume liability because there is no operator after the prior denial that could be held liable for benefits.[11] Employer's Brief at 18; Employer's Reply Brief at 3. As employer conceded at the hearing that it was properly designated the responsible operator herein, however, employer has waived this argument. Decision and Order at 3; Hearing Transcript at 8; *see Big Horn Coal Co. v. Director, OWCP* [*Madia*], 55 F.3d 545, 19 BLR 2-209 (10th Cir. 1995). Moreover, we note that employer is not insulated from liability for the payment of benefits in any subsequent claim, as employer's argument ignores the latent and progressive nature of pneumoconiosis. 20 C.F.R. §§718.201(c), 725.309; 65 Fed. Reg. 79,937 (Dec. 20, 2000).

[11] Claimant last worked for employer in 1978. He filed his first claim for benefits in 1981, which was denied for failure to establish any element of entitlement, and the case was administratively closed by reason of abandonment after claimant took no further action within one year. In 1983, claimant began work as a mine safety and health inspector for the Department of Labor. Claimant filed this subsequent claim in 2004. Director's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed in part and vacated in part, and this 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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BETTY JEAN HALL
Administrative Appeals Judge