BRB No. 98-0210 BLA

ALFRED FRANCIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 6/25/99
	)	
A&A TRUCKING COMPANY	)	
	)	
and	)	
	)	
ITT HARTFORD INSURANCE GROUP	)	
	)	
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 Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

David L. Murphy (Clark, Ward, & Cave), Louisville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (97-BLA-0285) of Administrative Law Judge Alfred Lindeman 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] After determining that A&A Trucking Company (employer) is the

[1]This claim was filed on November 15, 1993. Director's Exhibit 1.

responsible operator for this claim, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(c)(2), (c)(4), and (b). Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings under Sections 718.202(a)(4), 718.204(c)(4), and 718.204(b).[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board, and may not be disturbed. 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 makes several arguments challenging the administrative law judge's finding of the existence of pneumoconiosis under Section 718.202(a)(4). Employer initially argues that the administrative law judge erred in relying upon the opinions of Drs. Lane, Baker, Myers and Harrison, alleging that their opinions are merely a restatement of their positive x-ray readings.

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(c)(1)-(3), and the administrative law judge's finding that employer conceded claimant had at least 30.62 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Contrary to employer's argument, the administrative law judge acknowledged that Dr. Lane's opinion was a restatement of his positive x-ray reading, and did not rely on Dr. Lane's opinion in finding pneumoconiosis established at Section 718.202(a)(4). Decision and Order-Awarding Benefits at 13; Director's Exhibit 42. In addition to noting the positive readings considered by Drs. Baker, Myers and Harrison, the administrative law judge properly found their opinions that claimant suffers from pneumoconiosis reasoned, based on their analyses of findings on physical examination, symptoms, pulmonary function studies, blood gas studies, coal mine employment history and the absence of a smoking history.[3] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.* 10 BLR 1-19 (1987); Decision and Order-Awarding Benefits at 13-15; Director's Exhibits 11, 12, 42, 76. The administrative law judge is not compelled to discredit these doctors' opinions because of the conflicting x-ray evidence of record. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986).

Employer next argues that the administrative law judge erred in relying in the medical opinions of Drs. Baker, Myers and Thompson in finding the existence of pneumoconiosis under Section 718.202(a)(4) because they generally considered "quality 2" x-rays. Employer's Brief at 3. As discussed, supra, the administrative law judge properly found that the doctors did not base their opinions only on x-ray evidence. Decision and Order-Awarding Benefits at 7, 9, 11. Moreover, x-rays only need to be of suitable, not optimal, quality for interpretation. 20 C.F.R. §718.102(1); *Lambert v. Itman*, 6 BLR 1-256 (1983). Inasmuch as the x-rays were read by Board-certified radiologists and B readers as positive and negative for the existence of pneumoconiosis, they were suitable for interpretation. Director's Exhibits 14-16, 42, 58, 59, 65, 66, 68, 70-72, 74, 75 78; Employer's Exhibits 4, 5, 7.

Employer also argues that the administrative law judge erred in relying on the opinions of Drs. Myers and Thompson in finding the existence of pneumoconiosis under Section 718.202(a)(4) because these doctors relied on invalid pulmonary function studies. Dr. Myers' pulmonary function study was non-qualifying, but was

[3]Contrary to employer's assumption, Dr. Baker diagnosed pneumoconiosis. The administrative law judge correctly noted that Dr. Baker reiterated his opinion that claimant suffers from pneumoconiosis and chronic obstructive pulmonary disease aggravated by coal dust exposure even after considering that the x-ray taken on January 24, 1994 that he interpreted as positive for the existence of pneumoconiosis was also read as negative by other B readers. Decision and Order-Awarding Benefits at 8; Director's Exhibits 11, 12.

valid, or conforming. 20 C.F.R. §718.103; *see also, Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). While pulmonary function studies, by themselves, are not diagnostic of the absence of pneumoconiosis, *Lambert, supra,* the administrative law judge could properly rely upon Dr. Myers' opinion that claimant's moderate restrictive defect is related to coal mine dust exposure. *Id;* Decision and Order-Awarding Benefits at 14, 19; Director's Exhibit 31. Similarly, the administrative law judge acknowledged that the pulmonary function study relied upon by Dr. Thompson was not valid but, within a proper exercise of his discretion, gave his opinion greater weight, due to his status as claimant's treating physician, and based on the doctor's analysis of the qualifying blood gas study, physical examination, clinical history, coal mine employment history, and absence of a smoking history. *Clark, supra;* Decision and Order-Awarding Benefits at 14-16, 19.

Employer next argues that the administrative law judge improperly gave little weight to the contrary opinion of Dr. Vuskovich that claimant does not suffer from pneumoconiosis. We disagree. The administrative law judge permissibly found Dr. Vuskovich's opinion insufficient to rule out the existence of any pulmonary condition related to coal dust in part because Dr. Vuskovich did not consider any of the qualifying blood gas studies of record. *Clark, supra*; Decision and Order-Awarding Benefits at 14; Director's Exhibits 11, 13, 42, 56, 63, 64, 76, 78. Moreover, contrary to employer's assumption, Dr. Vuskovich's opinion that claimant retained the respiratory ability to return to his normal work based on the August 11, 1995 pulmonary function study values, Employer's Exhibit 6, is not relevant under 718.202(a)(4).

Employer next argues that the administrative law judge provided no reasonable basis to discredit the opinions of Drs. Fino and Broudy that claimant did not suffer from pneumoconiosis. We disagree. The administrative law judge gave little weight to Dr. Fino's consulting opinion because he identified no etiology for the changes found on the pulmonary function studies, and did not address the opinions of Drs. Harrison and Myers regarding claimant's pulmonary restriction and pneumoconiosis.[4] Decision and Order Awarding Benefits at 14. Similarly, the administrative law judge permissibly found Dr. Broudy's opinion outweighed by the opinions of Drs. Baker and Thompson because Dr. Broudy did not give an etiology for the obstruction that he found in the pulmonary function studies. Further, the

[4] The administrative law judge permissibly concluded that Dr. Fino's "silence" regarding the reports by Drs. Harrison and Myers, when Dr. Fino detailed all the other reports, indicated that those reports did not support Dr. Fino's conclusion that claimant did not suffer from pneumoconiosis. Decision and Order-Awarding Benefits at 14.

administrative law judge permissibly found that Dr. Fino's statement that industrial bronchitis "is not a condition that would be expected to still be present this long after leaving the mines" was vague. Decision and Order-Awarding Benefits at 15. The administrative law judge also found that Dr. Fino's statement was not adverse to the opinions of Drs. Baker and Thompson because Dr. Baker diagnosed industrial bronchitis in January 1994, months before claimant retired, and Dr. Thompson diagnosed industrial bronchitis in November 1995, one year after claimant's retirement. *Id.*

In light of the aforementioned, we conclude that employer has failed to identify reversible error with respect to the administrative law judge's finding of pneumoconiosis under Section 718.202(a)(4), and therefore, we affirm the finding.

Employer next argues that the administrative law judge erred in rejecting the opinion of Dr. Vuskovish because he did not consider a valid pulmonary function study or blood gas study, and erred in not weighing all the evidence, both like and unlike, under Section 718.204(c).[5] In weighing the medical opinions of record, the administrative law judge found that Dr. Lane was unsure of claimant's disability; that Dr. Baker only found a mild impairment; that Dr. Thompson did not render an opinion on disability; that Dr. Broudy found that claimant was "probably " disabled; and that Drs. Harrison and Myers determined that claimant was totally disabled. Decision and Order-Awarding Benefits at 19, 20.

Although the administrative law judge correctly found that Dr. Vuskovich did not consider any of the qualifying blood gas studies of record, the administrative law judge did not consider that Dr. Vuskovich opined that the pulmonary function studies were invalid for lack of effort, but nevertheless "above the Federal standards for total

[5]Additionally, employer argues that the administrative law judge erred in rejecting Dr. Fino's opinion under Section 718.204(c) by referring to his analysis under Section 718.202(a)(4). Employer specifically argues that because the issue at Section 718.202(a)(4) is the existence of pneumoconiosis, while the issue at Section 718.204(c)(4) is whether claimant suffers from a totally disabling respiratory or pulmonary disability, the administrative law judge rejected Dr. Fino's opinion without proper basis. We disagree. The administrative law judge's analysis under Section 718.202(a)(4) in this instance is equally relevant under Section 718.204(c)(4). As discussed, *supra* at 4, the administrative law judge found Dr. Fino's opinion as a consulting physician less probative, *inter alia*, because he did not address Dr. Myers's opinion that claimant was totally disabled due to pneumoconiosis. Decision and Order-Awarding Benefits at 14.

disability." Director's Exhibit 67. We, therefore, vacate the administrative law judge's finding that the weight of the medical opinion evidence establishes that claimant is totally disabled under Section 718.204(c)(4). On remand, the administrative law judge must reconsider the opinion of Dr. Vuscovich with the other medical opinions of record in determining whether claimant has established a totally disabling respiratory or pulmonary disability under Section 718.204(c)(4). In addition, on remand, the administrative law judge must weigh all the relevant evidence together, like and unlike, in determining whether claimant established total disability at Section 718.204(c). S*ee Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.* 9 BLR 1-195 (1986).

Employer finally argues that the administrative law judge improperly weighed the evidence of disability causation under Section 718.204(b). Employer argues that the opinions relied upon by the administrative law judge to find causation, namely the opinions of Drs. Harrison, Broudy and Thompson, concluded that claimant's disability was not due to coal mine work. The administrative law judge found:

> The evidence shows that [claimant] has chronic bronchitis and associated obstruction (pulmonary function study), a restrictive defect (pulmonary function study), and hypoventilation (arterial blood gas test). The evidence also shows that the hypoventilation is the most significant condition and that it is due to obesity. Nevertheless, the chronic bronchitis and associated obstruction, as well as the restriction, also play a part. Drs. Harrison and Broudy both rendered their opinions on total disability based on the results of the pulmonary function and arterial blood gas studies. Dr. Myers rendered an opinion of total disability based on a pulmonary function alone. Dr. Thompson found chronic mixed respiratory failure, both hypoxic and ventilatory, although he opined that the obstruction plays a secondary role. Therefore, I find that the Claimant's total disability is due at least in part to pneumoconiosis.

Decision and Order-Awarding Benefits at 20. Eight physicians rendered medical opinions. Only Dr. Myers categorically concluded that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 42. Dr. Baker diagnosed a mild impairment due to pneumoconiosis, Director's Exhibit 12, and Dr. Thompson only determined that claimant's bronchitis "probably" represents an industrial bronchitis due to his years of coal dust exposure. In contrast, the administrative law judge did not consider the opinions of Drs. Fino, Vuskovich, Lane and Broudy who concluded that claimant's total disability is unrelated to

pneumoconiosis. Director's Exhibits 42, 63, 64, 67, 78; Employer's Exhibits 1, 6. If on remand, the administrative law judge finds that claimant has established a totally disabling respiratory impairment, the administrative law judge must determine, based on all of the aforementioned relevant evidence, whether claimant's "pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment." *Peabody Coal Co. v. Smith,* 127 F.3d 504, 507, 21 BLR 2-180 (6th Cir. 1997); *see also Adams v. Director, OWCP,* 886 F.2d 818. 13 BLR 2-52 (6th Cir. 1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge