BRB No. 01-0300 BLA

JIMMY LUCAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WILLIAMS MOUNTAIN COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED:_____
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Legal Practice Clinic, Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0881) of Administrative Law Judge Robert J. Lesnick awarding benefits on a miner's 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 the miner with twenty-eight

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*,

years of coal mine employment. Decision and Order at 9. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge found that claimant[2] established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) (2000). Decision and Order at 10-12. The administrative law judge also found that claimant established total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Decision and Order at 13-14. Accordingly, benefits were awarded, commencing November 1, 1997. Decision and Order at 15.

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160 F. Supp.2d 47 (D.D.C. 2001). While claimant and employer submitted supplemental briefs in response to the Board's order, the court's decision renders moot those arguments made by claimant and employer in their supplemental briefs and in footnote one of employer's appeal brief regarding the impact of the challenged regulations.

[2]Claimant is Jimmy Lucas, the miner, who filed his claim for benefits on November 25, 1997. Director's Exhibit 1.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis. Employer's Brief at 7-10. Employer additionally asserts that the administrative law judge erred in weighing the medical opinion evidence regarding the cause of the miner's disability. Employer's Brief at 10-15. Claimant has responded, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response,[3] urging the Board to reject employer's assertions in footnote one of its appeal brief regarding the impact of the revised black lung regulations.[4]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding the existence of pneumoconiosis, employer asserts that the administrative law judge erred in weighing the medical opinion evidence by mechanically according greater weight to the opinions of Dr. Rasmussen, the miner's treating physician, and Dr. Cohen, a consulting physician, without assessing the credibility of the contrary evidence. Employer's Brief at 8-10. The administrative law judge noted that Drs. Rasmussen, Gobunsuy, and Cohen diagnosed the existence of pneumoconiosis whereas Drs. Zaldivar, Fino, Jarboe, Castle, Loudon, and Morgan did not. Decision and Order at 11-12. The administrative law judge found the opinions of Drs. Rasmussen and Cohen to be "the most persuasive" regarding the existence of pneumoconiosis. Decision and Order at 11. Specifically, the

[3]As discussed in n.1, *supra*, the *Chao* decision renders moot those arguments made by employer regarding the impact of the challenged regulations.

[4]We affirm the administrative law judge's findings regarding claimant's length of coal mine employment, the date of entitlement, and pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) (2000) and 20 C.F.R. §718.204(c) (2000) as they are unchallenged on appeal. *See* 20 C.F.R. §§718.202(a)(2), (a)(3), 718.204(b); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge found the opinions of Drs. Rasmussen and Cohen to be "thorough and well reasoned" and found that these physicians' "credentials in the area of black lung disease are impressive." *Id.* Additionally, the administrative law judge gave "great weight to the fact that Dr. Rasmussen is the claimant's treating physician and has had the opportunity to examine claimant on many occasions." *Id.*

Employer's contentions regarding the administrative law judge's weighing of the medical opinion evidence have merit. First, in finding the opinions of Drs. Rasmussen and Cohen to be "thorough and well reasoned," the administrative law judge noted that these physicians "show a great knowledge and understanding of the recent research regarding the relationship of coal dust exposure and the development of obstructive lung disease." Decision and Order at 11. However, Drs. Zaldivar, Fino, Jarboe, Castle, Loudon, and Morgan also reviewed the recent research that Drs. Rasmussen and Cohen considered, but disagreed with the latter physicians' interpretation of this research.[5] Other than referring to Dr. Rasmussen's and Dr. Cohen's knowledge of recent relevant research, the administrative law judge did not further explain why he found the opinion of Dr. Rasmussen, who treated claimant, and Dr. Cohen, who reviewed the medical evidence, to be more thorough and better reasoned than the opinions of Dr. Zaldivar, who examined claimant, and Drs. Fino, Jarboe, Castle, Loudon, and Morgan, who reviewed the medical evidence. Accordingly, we vacate the administrative law judge's Section 718.202(a)(4) (2000) finding and instruct the administrative law judge on remand to clarify his rationale for finding the opinions of Drs. Rasmussen and Cohen to be more reasoned and documented than the opinions of Drs. Zaldivar, Fino, Jarboe, Castle, Loudon, and Morgan. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

[5]Drs. Zaldivar, Fino, Jarboe, Castle, Loudon, and Morgan concluded that claimant's cigarette smoking is the sole cause of his lung impairment whereas Drs. Rasmussen and Cohen found that medical research supports their conclusion that coal dust exposure contributed to claimant's obstructive lung impairment.

Second, while the administrative law judge found the qualifications of Drs. Rasmussen and Cohen to be "impressive," he did not discuss why he found their qualifications to be more impressive than those of Drs. Zaldivar, Fino, Jarboe, Castle, Loudon, and Morgan. In this regard, the administrative law judge noted that "Dr. Rasmussen has authored many articles on the effects of coal dust exposure and cigarette smoking" and that "Dr. Cohen is the Director of the Black Lung Clinics program at Cook County Hospital in Chicago, Illinois." Decision and Order at 11. The record reflects that Drs. Zaldivar, Fino, Jarboe, and Castle are Board-certified in internal medicine and pulmonary disease and are B-readers[6], and that Dr. Morgan is a B-reader.[7] Employer's Exhibits 2, 4, 8, 7, 16. The administrative law judge, however, does not discuss the significance of these qualifications in relation to his determination that the credentials of Drs. Rasmussen and Cohen are "impressive." Moreover the administrative law judge did not provide any analysis comparing the qualifications of Drs. Rasmussen and Cohen with those of Drs. Zaldivar, Fino, Jarboe, Castle, Loudon, and Morgan. Because the administrative law judge did not specify

[6]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 of 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 Virginia 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).

[7]Dr. Rasmussen is Board-certified in internal medicine and forensic medicine, and Dr. Cohen is a B-reader. Claimant's Exhibits 2, 8.

why he found that the qualifications of Drs. Rasmussen and Cohen might be superior to the credentials of Drs. Zaldivar, Fino, Jarboe, Castle, Loudon, and Morgan, the Board is unable to determine whether the administrative law judge permissibly found the opinions of the former to be more persuasive, in part, on this basis. Therefore, we instruct the administrative law judge to reconsider, on remand, the qualifications of all the physicians in weighing the medical reports of record.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Additionally, regarding the existence of pneumoconiosis, employer asserts that the administrative law judge failed to weigh all types of relevant evidence together when considering whether claimant has established the existence of pneumoconiosis in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). Employer's Brief at 10. As employer contends, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held in *Compton* that:

> there is nothing in the language of §718.202(a) to support a conclusion that satisfaction of the requirements of one of the subsections conclusively proves the existence of pneumoconiosis even in the face of conflicting evidence. The regulation lists various bases which may be sufficient for a finding of pneumoconiosis. Thus, absent contrary evidence, evidence relevant to any one of the four subsections may establish pneumoconiosis.

Compton, 211F.2d at 209. The record in this case includes contrary evidence, *i.e.*, negative

[8]Employer contends that the administrative law judge failed to explain how Dr. Rasmussen's status as the miner's treating physician provides more credibility to this opinion, adding that a treating physician's opinion should not be mechanically credited. Employer's Brief at 9. The administrative law judge on remand may not accord greater weight to Dr. Rasmussen's opinion solely on the basis of his status as treating physician. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

x-ray readings and negative CT scan interpretations. Therefore, we instruct the administrative law judge on remand to weigh the x-ray, CT scan, and medical opinion evidence together to determine whether claimant has established the existence of pneumoconiosis by a preponderance of all of the evidence in the record. *See Compton*, *supra*.

Regarding the contrary evidence on the existence of pneumoconiosis, employer asserts that the administrative law judge erred in his consideration of the x-ray evidence by failing to consider Dr. Wiot's testimony[9] and by failing to note that some of the x-ray readings were rendered by physicians with dual radiological qualifications, both B-readers and Board-certified radiologists. Employer's Brief at 6-7. In considering the x-ray evidence, the administrative law judge stated that all six of the positive x-ray interpretations and twenty of the negative x-ray interpretations were rendered by physicians who are B-readers. Decision and Order at 10. Therefore, the administrative law judge found that "the totality of the x-ray evidence neither precludes nor establishes the presence of pneumoconiosis" because "there are multiple positive and negative interpretations by well-credentialed readers." *Id.* Consequently, the administrative law judge concluded that "Claimant has failed to meet his burden of establishing pneumoconiosis under §718.202(a)(1) [2000]." *Id.* However, as employer asserts, the administrative law judge failed to note that some of the positive and negative x-ray interpretations were rendered by physicians who are both B-readers and Board-certified radiologists. An administrative law judge may accord greater weight to an x-ray reading based on the reader's qualifications, but he is not required to do so. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Rather, it is the administrative law judge's function to consider the x-ray evidence and make credibility determinations based, in part, on a reader's radiological qualifications. *See Roberts*, *supra*; *see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Since the dual radiological qualifications of these physicians interpreting the x-rays may alter the administrative law judge's finding that the x-ray evidence is inconclusive, we instruct the administrative law judge to consider this information and Dr. Wiot's testimony when weighing all the medical evidence together on remand at 20 C.F.R. §718.202(a) pursuant to *Compton.*

Regarding the cause of the miner's disability, employer asserts that the administrative law judge failed to state his reasons for rejecting the opinions of Drs. Fino, Jarboe, Castle, Loudon, and Morgan. Employer's Brief at 13-14. As the administrative law judge noted,

[9]Dr. Wiot's testimony details his qualifications and discusses more specifically his findings that claimant does not suffer from pneumoconiosis based on his x-rays and CT scan. Employer's Exhibit 22.

Drs. Zaldivar, Fino, Jarboe, Castle, Loudon, and Morgan all found that claimant's respiratory impairment was due to his cigarette smoking and not his coal mine employment, whereas Drs. Rasmussen and Cohen found that claimant's disability was due to his cigarette smoking and coal mine dust exposure. Decision and Order at 13. The administrative law judge found the opinions of Drs. Rasmussen and Cohen to be the "most persuasive" in the record. Decision and Order at 14. Specifically, the administrative law judge gave "great weight" to Dr. Rasmussen's status as claimant's treating physician and to "the level of expertise" of Drs. Rasmussen and Cohen "in the area of black lung disease." *Id.* The administrative law judge also stated:

> [a]lthough the record contains the opinions of many highly qualified physicians, I find that the reports of Dr. Rasmussen and Dr. Cohen show an exceptional knowledge of the recent research relevant to the relationship of coal dust exposure and obstructive lung disease. I have also considered the claimant's significant history of 28 years of coal dust exposure and a smoking history of approximately 18-20 pack years.[10]

[10]Employer asserts that the administrative law judge minimized claimant's smoking history. Employer's Brief at 14-15. Employer specifically asserts that Dr. Zaldivar's carboxyhemoglobin test result indicated that claimant's smoking was equivalent to one and one-half packs per day and that Drs. Zaldivar, Castle, Morgan, Jarboe, and Loudon have all considered that claimant's smoking history totals almost forty years with claimant continuing to smoke. *Id.* In determining that claimant's smoking history was "approximately 18 pack years," the administrative law judge considered claimant's testimony and the smoking history noted in Dr. Rasmussen's report. Decision and Order at 13 n.2. As employer contends, the record contains other evidence regarding the extent of claimant's smoking history that the administrative law judge did not consider. Therefore, we instruct the administrative law judge to address all the relevant evidence concerning claimant's smoking history when

determining the extent of claimant's smoking history on remand. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Id. Therefore, the administrative law judge concluded that "claimant's coal dust exposure was a significant contributor to his totally disabling respiratory impairment" based on the opinions of Drs. Rasmussen and Cohen. *Id.*

The administrative law judge's bases for finding the opinions of Drs. Rasmussen and Cohen to be more persuasive regarding the cause of claimant's disability are similar to the reasons why he found these opinions more credible regarding the existence of pneumoconiosis. Because we have held that the administrative law judge's crediting of Drs. Rasmussen and Cohen on the existence of pneumoconiosis cannot be affirmed, as stated, we also hold that the administrative law judge similarly erred in crediting these opinions on the cause of claimant's disability. *See* discussion, *supra*. Additionally, as employer contends, the administrative law judge found the opinions of Drs. Rasmussen and Cohen to be "more persuasive" without discussing the credibility of the contrary opinions of Drs. Fino, Jarboe, Castle, Loudon, and Morgan. Therefore, we vacate the administrative law judge's finding regarding the cause of claimant's total respiratory disability and remand this case for him to reconsider the relevant medical opinion evidence pursuant to 20 C.F.R. §718.204(c), explaining his rationale for crediting or discrediting the conflicting evidence on remand. *See Wojtowicz*, *supra*; *Tenney*, *supra*.

Employer also asserts that the administrative law judge erred in rejecting the opinion of Dr. Zaldivar by impermissibly shifting the burden of proof to require employer to "rule out" the possibility of a combined effect of coal dust and cigarette smoking as a cause of claimant's disability. Employer's Brief at 11-13. The administrative law judge initially stated that he did not find Dr. Zaldivar's opinion to be "persuasive" because "it does not rule out the possibility of the claimant's severe impairment being caused by the combined effect of coal dust and cigarettes." Decision and Order at 14. The administrative law judge later stated he did not find Dr. Zaldivar's opinion to be "convincing" because this physician "seems to rule out the possibility of cigarettes and coal dust exposure having a combined contributory effect on the claimant's obstructive lung disease." *Id.* Thus, the administrative law judge has provided conflicting statements for why he rejected Dr. Zaldivar's opinion on the cause of claimant's disability. Accordingly, we instruct the administrative law judge to reconsider his discrediting of Dr. Zaldivar's opinion on remand and further instruct the administrative law judge that it is claimant's burden to prove that his pneumoconiosis is a "substantially contributing cause" of his disability in this 20 C.F.R. Part 718 case. 20 C.F.R. §718.204(c); *see* discussion, *infra*.

Finally, we instruct the administrative law judge on remand to consider all the relevant evidence of record under the revised disability causation regulation at 20 C.F.R. §718.204(c). The disability causation standard established by the revised regulation at 20 C.F.R. §718.204(c) is as follows:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge