

BRB No. 07-0119 BLA

C.S. )  
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 Claimant-Petitioner )  
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 v. )  
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 ENERGY RESOURCES, INCORPORATED ) DATE ISSUED: 10/31/2007  
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 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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-5407) of Administrative Law Judge Richard A. Morgan denying benefits 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). Claimant filed this application for benefits on April 24, 2003. Director's Exhibits 2, 37, 41. The administrative law judge accepted the parties' stipulation to thirty-five years of coal mine employment and to the fact that claimant is totally disabled from returning to his previous coal mine employment.<sup>1</sup> Decision and

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<sup>1</sup> We will apply the law of the United States Court of Appeals for the Third Circuit, as claimant was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 202 (1989)(*en banc*); Director's Exhibits 3, 5.

Order at 3. The administrative law judge determined, however, that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 15. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, arguing that because the administrative law judge found the evidence equally balanced, claimant failed to meet his burden of establishing the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so.<sup>2</sup>

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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, 363 (1965).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Fee, Solic, Fino, and Begley. The administrative law judge noted that Dr. Fee diagnosed chronic obstructive pulmonary disease (COPD), angina and pneumoconiosis, but the administrative law judge found that because Dr. Fee provided no discussion of claimant's smoking history in relation to his pulmonary condition, his opinion was not adequately reasoned and was, therefore, entitled to little weight. Decision and Order at 13. The administrative law judge found that Dr. Solic, who indicated that claimant suffered from COPD due to cigarette smoking and coronary artery disease, provided no explanation as to why coal dust exposure was not one of the causes of claimant's COPD. Decision and Order at 14. The administrative law judge nonetheless found Dr. Solic's opinion "more reasoned and supported than Dr. Fee's opinion." *Id.*

In evaluating Dr. Fino's opinion, the administrative law judge concluded that in light of claimant's thirty-five year history of coal mine employment, the physician's opinion, that claimant's pulmonary condition was not due to coal dust exposure and that he was not disabled from performing his job as a weigh master by a coal dust related disease, was inconsistent with the record. Decision and Order at 14. The administrative

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<sup>2</sup> The parties do not challenge the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §§718.202(a)(1)-(3) or that total disability was not established under 20 C.F.R. §718.204(b). These findings are therefore affirmed, as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

law judge also found that Dr. Fino did not adequately explain why claimant's pulmonary condition was caused solely by cigarette smoking. *Id.* The administrative law judge concluded, therefore, that Dr. Fino's opinion regarding the existence of pneumoconiosis was entitled to little weight. *Id.*

Regarding Dr. Begley's opinion, the administrative law judge found that his diagnosis of clinical pneumoconiosis, based on the December 2, 2005 x-ray, was not entitled to consideration.<sup>3</sup> Decision and Order at 14. The administrative law judge noted that Dr. Begley diagnosed chronic bronchitis and emphysema caused by both cigarette smoking and coal dust exposure. *Id.* The administrative law judge further acknowledged that Dr. Begley's statements regarding COPD, chronic bronchitis, and emphysema caused by coal dust exposure support a finding of legal pneumoconiosis. However, the administrative law judge also found that:

Dr. Begley did not provide an adequate discussion of why coal dust exposure caused the miner's chronic bronchitis or emphysema. It is not clear if Dr. Begley continues to rely on the December 2, 2005 chest X-ray in making such findings regarding the chronic bronchitis and emphysema, or if he would have made such conclusions absent the chest X-ray evidence.

Decision and Order at 14. The administrative law judge further determined that Dr. Begley's opinion, that claimant's cardiac examination was normal, was inconsistent with the findings of other physicians of record. *Id.*

The administrative law judge summarized his review of the medical opinion evidence at Section 718.202(a)(4) and determined that Drs. Solic and Fino were the most qualified physicians of record, but found that "all the physician opinions of record are lacking in reasoning and explanation, in some respect, regarding [claimant's] condition." Decision and Order at 14. The administrative law judge then weighed the x-ray evidence together with the medical opinions, and found that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order at 15.

Claimant argues that the administrative law judge erred in failing to adequately consider the testimony in which Dr. Begley stated that he would have drawn the same

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<sup>3</sup> When considering the x-ray evidence under Section 718.202(a)(1), the administrative law judge noted that the December 2, 2005 x-ray lacked an ILO classification, the interpreting physician's radiological qualifications were not in evidence, and the x-ray was not presented as evidence at the hearing. Decision and Order at 12. The administrative law judge, therefore, excluded the December 2, 2005 x-ray from consideration. *Id.* Because the parties have not challenged this finding on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711.

conclusions as to the presence of pneumoconiosis without the x-ray evidence. Claimant also argues that the administrative law judge erred in finding that Drs. Fino and Solic are the most qualified physicians of record. Employer responds, arguing that the administrative law judge provided a valid rationale for rejecting Dr. Begley's testimony, in that the physician did not clearly explain his opinion that claimant has legal pneumoconiosis. Employer also asserts that the only basis offered by Dr. Begley in support of his opinion that coal dust contributed to claimant's pulmonary condition is claimant's history of coal dust exposure. Thus, employer contends, any error by the administrative law judge regarding Dr. Begley's reliance on the December 2, 2005 chest x-ray is harmless.

Upon review of the administrative law judge's findings, the relevant evidence, and the arguments raised by the parties, we hold that claimant's contentions have merit. As indicated, the administrative law judge discredited Dr. Begley's diagnosis of legal pneumoconiosis because the physician "did not provide an adequate discussion of why coal dust exposure caused the miner's chronic bronchitis or emphysema" and it was "[n]ot clear if Dr. Begley continues to rely on the December 2, 2005 chest x-ray in making such findings...[.]" Decision and Order at 14. A review of Dr. Begley's opinion in its entirety indicates, however, that Dr. Begley set forth a detailed rationale for his diagnosis. Dr. Begley noted that claimant stopped smoking in 1991, but opined that both cigarette smoking and coal dust exposure contributed to claimant's chronic bronchitis and emphysema. Claimant's Exhibit 8 at 18-20, 22-23. Dr. Begley explained that although chronic bronchitis and emphysema can be diagnosed by x-ray, the conditions are best diagnosed by pulmonary function testing, and the physician opined that claimant's pulmonary function study values were severely abnormal. Claimant's Exhibit 8 at 12, 30. In addition, contrary to the administrative law judge's finding that Dr. Begley may have relied upon a rejected x-ray reading in diagnosing legal pneumoconiosis, Dr. Begley explicitly stated that if there was no x-ray evidence of pneumoconiosis, it would still be his opinion that claimant's pulmonary dysfunction was a consequence of coal dust exposure and cigarette smoking. Claimant's Exhibit 8 at 24. Thus, the administrative law judge's reasons for discrediting Dr. Begley's opinions are not supported by the record.

Furthermore, in summarizing his weighing of the medical opinion evidence at Section 718.202(a)(4), the administrative law judge concluded that "Drs. Fino and Solic are the most qualified" physicians, but did not identify any evidence in support of this finding. Decision and Order at 14. A review of the record reveals that Drs. Solic, Fino and Begley are all Board-certified in internal medicine. Drs. Solic and Fino noted additional relevant credentials such as "subspecialty pulmonary disease," and Dr. Begley stated that he is Board-certified in pulmonary medicine. Director's Exhibits 33; Employer's Exhibit 1, Claimant's Exhibits 7, 8 at 3. Although as B readers, Drs. Fino and Solic have superior radiological qualifications, this distinction is not relevant to the issue of the existence of legal pneumoconiosis at Section 718.202(a)(4), which requires

consideration of the physician's opinion based on supporting documentation in addition to x-ray evidence. 20 C.F.R. §718.202(a)(4).

Because the administrative law judge did not accurately characterize the evidence and did not provide a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." as required by the Administrative Procedure Act, 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 U.S.C. §932(a), we must vacate the administrative law judge's findings pursuant to Section 718.202(a)(4) and remand this case to the administrative law judge for reconsideration of whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

If, on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a), he must then address the remaining elements of entitlement pursuant to 20 C.F.R. Part 718.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge