

BRB No. 05-0860 BLA

LEROY C. SMEAL)
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 Claimant-Respondent)
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 v.)
)
 AL HAMILTON CONTRACTING) DATE ISSUED: 04/19/2006
)
 and)
)
 ROCKWOOD CASUALTY INSURANCE)
 COMPANY)
)
 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.

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

Gregory J. Fischer and Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (03-BLA-6663) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge found that the instant claim was a subsequent claim¹ and that the employer conceded that claimant had a coal mine employment history of forty-two years. Considering the newly submitted relevant evidence together, pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), as to the existence of pneumoconiosis, the administrative law judge found that it supported a finding of the existence of pneumoconiosis and that claimant had, therefore, established a change in an applicable condition of entitlement. Decision and Order at 7-10; 20 C.F.R. §§718.202(a)(1), (4); 725.309. Turning to the merits of entitlement, the administrative law judge concluded, on considering all the evidence of record, that the weight of the evidence established the existence of pneumoconiosis, that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment, and that claimant established the presence of a totally disabling respiratory impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a); 718.203(b); 718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the newly submitted evidence established the existence of pneumoconiosis and, therefore, a change in an applicable condition of entitlement. Employer also asserts that the administrative law judge erred in rejecting the opinion of Dr. Fino as not reasoned and in finding a totally disabling respiratory impairment established. Claimant responds and urges that the award of benefits be affirmed. In response, the Director, Office of Workers' Compensation Programs, (the Director) contends only that the administrative law judge properly found that the weight of the x-ray evidence was positive for the existence of pneumoconiosis.²

¹ Claimant filed a claim on October 12, 1995 which was denied by the district director on February 26, 1996 because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. No further action was taken until the filing of the instant claim on July 18, 2002. Director's Exhibit 3. After an April 20, 2005 hearing, the administrative law judge issued the Decision and Order awarding benefits on July 15, 2005, from which employer now appeals.

² We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the administrative law judge's finding that claimant established entitlement to the presumption that his pneumoconiosis arose out of coal mine employment at Section 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of 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).³

Employer first argues that, having found that Dr. Duncan, who was dually qualified, and Dr. Fino, who was a B-reader, read x-rays as negative, the administrative law judge erred in crediting positive x-ray interpretations of Dr. Harron, a dually qualified reader, and of Drs. Boron and Schaaf, who did not have any specialized radiological credentials.⁴

We reject employer's assertions and affirm the administrative law judge's determination that the x-ray evidence supports a finding of the existence of pneumoconiosis. Employer's assertions regarding this evidence are tantamount to requests that the Board reweigh the evidence, a role outside the Board's scope of review. *See Anderson*, 12 BLR 1-111.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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 Company, 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). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

In weighing the new x-ray evidence, the administrative law judge found that even though Dr. Schaaf, who was neither a B-reader nor a board-certified radiologist, rendered a positive interpretation, the record demonstrated that he had “thirty years of experience in utilizing x-rays on a daily basis to treat patients” which entitled his positive interpretation to at least some weight. Decision and Order at 8. Similarly, the administrative law judge found Dr. Boron’s positive interpretation entitled to some weight based on Dr. Boron’s experience in interpreting x-rays and his status as a board-eligible radiologist. Accordingly, the administrative law judge found that the three positive x-ray interpretations by Dr. Harron, a dually qualified physician, in conjunction with the positive readings by Drs. Schaaf and Boron, were entitled to greater weight than the two negative readings of Dr. Fino, a B-reader, and the one negative reading by Dr. Duncan, a dually qualified physician. This was rational.

The Director agrees that, on considering the credentials of the physicians who read each x-ray, the weight of the x-ray evidence is positive for the existence of pneumoconiosis, *i.e.*, the June 10, 2002 x-ray is positive since Dr. Harron, a dually qualified physician, read it positive (it was also read as positive by Dr. Schaaf, a physician who has no specialized radiological credentials), the August 27, 2002 x-ray is positive as it was also read positive by Dr. Harron (it was read negative by Dr. Fino, who is only a B-reader, and Dr. Boron, who is only board-eligible), while only the October 23, 2003 was negative as it was read as both positive and negative by dually qualified physicians (Drs. Harron and Duncan) and read negative by Dr. Fino, a B-reader. Alternatively, the Director also notes that the October 23, 2003 x-ray could be viewed as showing neither the existence or nonexistence of pneumoconiosis as it was read both positive and negative by dually qualified physicians.

Accordingly, since the administrative law judge considered the new x-ray evidence of record and properly gave due consideration to both the qualitative as well as quantitative aspects of the x-ray readings, *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *see generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), we affirm the administrative law judge’s finding that the newly submitted x-ray evidence supports a finding of the existence of pneumoconiosis.

In addition, employer argues that the “irrational nature” of the administrative law judge’s finding regarding the x-ray evidence is further highlighted by the administrative law judge’s finding that the CT scan evidence does not support a finding of the existence of pneumoconiosis; Dr. Harron interpreted the January 7, 2000 scan as inadequate for the evaluation of pneumoconiosis and opined that the October 10, 2002 scan revealed

pneumoconiosis, while Dr. Fino opined that neither scan revealed pneumoconiosis. Employer contends that the administrative law judge erred in proffering no explanation as to why, with the presence of this CT scan evidence, the administrative law judge did not find the x-ray evidence to be negative for the existence of pneumoconiosis. Regarding the negative CT-scan evidence, we reject employer's assertion as the administrative law judge considered the CT scan evidence and found it to be in equipoise. Decision and Order at 8. We cannot say, therefore, that the administrative law judge should have found that the CT scan evidence supported the negative x-ray evidence. *See Anderson*, 12 BLR 1-111.

Employer further asserts that the administrative law judge acted irrationally when he stated that he was according greater weight to the most recent x-rays of record, but the most recent x-ray of record, taken on October 23, 2003, was read negative by both Drs. Fino and Duncan, and was only read positive by Dr. Harron. Employer contends, therefore, that if the administrative law judge was, as he stated, according greater weight to the most recent x-rays, the administrative law judge should have found the x-ray evidence to be negative based on the negative readings of the October 23, 2003 x-ray.

In addressing the x-ray evidence of record, the administrative law judge found that, in light of the significant seven to eight year span of time between the x-ray evidence submitted in the prior claim (two negative readings of a November 7, 1995 x-ray, and that submitted in the present claim, mixed readings of x-rays taken June 2002, August 2002, and October 2003) and the fact that pneumoconiosis is a progressive disease, *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), the more recent x-ray evidence was more probative on the issue of pneumoconiosis than the earlier x-ray evidence, Decision and Order at 10-11, and should therefore be given greater weight. Accordingly, weighing the readings of the more recent x-rays, *i.e.*, those submitted with the subsequent claim, the administrative law judge found the existence of pneumoconiosis established based on the preponderance of the best x-ray evidence. This was reasonable. *See Staton*, 65 F.3d 55, 19 BLR 2-271; *Adkins*, 958 F.2d 49, 16 BLR 2-61.

Finally, employer contends that the administrative law judge erred in according less weight to the opinion of Dr. Fino on the issues of pneumoconiosis and total disability because the only x-ray reviewed by Dr. Fino which was part of the record, was his own and the other x-ray interpretations and pulmonary function test results he relied on were outside the record. Employer contends, however, that, in addition to his own x-ray, Dr. Fino also reviewed claimant's August 27, 2002 x-ray as well as both of claimant's CT scans, which were a part of the record. Employer further contends that the administrative law judge erred in relying on the opinions of Drs. Schaaf and Illuzzi, who did not review nearly the amount of chest x-ray evidence that Dr. Fino reviewed. Accordingly, employer contends that the administrative law judge erred in finding that the opinions of

Drs. Schaaf and Illuzzi established the existence of pneumoconiosis because they were better reasoned.

In considering the medical opinion evidence, the administrative law judge found that Drs. Schaaf and Ratner diagnosed the existence of coal workers' pneumoconiosis, that Dr. Illuzzi diagnosed a chronic obstructive airways disease of the lung due to pneumoconiosis, while Drs. Fino and Dr. Kaplan found no evidence of coal workers' pneumoconiosis, and attributed claimant's chronic obstructive impairment to asthma. The administrative law judge further found that Dr. Fino diagnosed chronic obstructive pulmonary disease, chronic bronchitis, reversible airways disease, and emphysema. Decision and Order at 9; Director's Exhibit 6; Claimant's Exhibit 4, 9; Employer's Exhibits 2, 3.⁵

In weighing the opinions of Drs. Schaaf, Illuzzi, and Fino, the administrative law judge found the opinions of Drs. Schaaf and Illuzzi to be based on claimant's work history, symptoms and pulmonary function studies, and found their opinions to be supported by the medical evidence of record, including the x-ray evidence which was found to be positive for the existence of coal workers' pneumoconiosis. *See Williams*, 114 F.3d 22, 21 BLR 2-104. The administrative law judge accorded little weight to Dr. Fino's opinion because it was not based on the x-ray evidence of record which was found to have established the existence of coal workers' pneumoconiosis. Weighing the x-ray and medical opinion evidence together, the administrative law judge found that it established the existence of pneumoconiosis. This was reasonable. *Williams*.

Regarding total disability, employer contends that it was irrational to reject Dr. Fino's opinion of a mild impairment based on pulmonary function study and accept the opinions of Drs. Schaaf and Illuzzi of a moderate impairment when all of the pulmonary function studies of record were non-qualifying.⁶ Although the administrative law judge noted that the pulmonary function and blood gas studies of record were non-qualifying, the administrative law judge credited the opinions of Drs. Schaaf and Illuzzi that claimant had a moderate ventilatory impairment and could not perform his former coal mine employment as he found these opinions reasoned. The administrative law judge accorded little weight to Dr. Fino's opinion of a mild ventilatory impairment because Dr. Fino had

⁵ The administrative law judge accorded little weight to the opinions of Drs. Ratner and Kaplan as he found them unreasoned. Decision and Order at 9.

⁶ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

characterized claimant's pulmonary function study as showing a moderate ventilatory impairment. Further, the administrative law judge noted that Dr. Fino based his opinion on pulmonary function studies which were not part of the record as opposed to the three pulmonary function studies, in addition to his own, which were part of the record. This was proper. *See Anderson*, 12 BLR 1-111. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence established a total respiratory disability.

Turning to disability causation, employer contends that the administrative law judge erred in crediting Dr. Schaaf's opinion over Dr. Fino's because he found Dr. Schaaf's understanding of asthma to be better than Dr. Fino's. In finding that the evidence established disability causation, the administrative law judge credited Dr. Schaaf's opinion, along with Dr. Illuzzi's, over Dr. Fino's as he found it to be better supported by the medical evidence of record and better reasoned, including the doctor's discussion of whether claimant had asthma. This was permissible. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). While employer contends that there is no indication that Dr. Schaaf's definition of asthma is medically accurate or generally accepted by the medical community, employer does not provide any support for this general allegation. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). We, therefore, affirm the administrative law judge's finding of disability causation.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge