

BRB No. 08-0458 BLA

J.K.)
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 Claimant-Respondent)
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 v.)
)
 MIDWEST COAL COMPANY (F/K/A) DATE ISSUED: 07/31/2009
 AMAX COAL COMPANY))
)
 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 – Awarding Benefits and the Attorney Fee Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2004-BLA-6286) and the Attorney Fee Order (2004-BLA-6286) of Administrative Law Judge Donald W. Mosser rendered 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). Upon stipulation of the parties, the administrative law judge credited claimant with at least sixteen and one-quarter years of qualifying coal mine employment, and adjudicated this claim, filed on May 13, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found 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 total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits, and subsequently awarded attorney fees.

On appeal, employer challenges the administrative law judge's findings that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1), (4), as well as total respiratory disability due to pneumoconiosis pursuant to Sections 718.204(b), (c). Employer also challenges the administrative law judge's award of attorney fees. Claimant responds, urging affirmance of the administrative law judge's award of benefits and attorney fees. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case. Employer has replied in support of its position.¹

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first 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 erred in failing to accord determinative weight to the negative x-ray interpretations of Dr. Wiot based on his superior qualifications. Employer also asserts that the administrative law judge violated 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), and 30 U.S.C. §932(a), by applying a "simple head count" to the evidence. Employer's Brief at 25-30. Employer's contentions lack merit.

At Section 718.202(a)(1), the x-ray evidence considered by the administrative law judge consisted of eight interpretations of three x-rays dated August 15, 2003, January 20, 2004, and August 26, 2004. The August 15, 2003 x-ray was interpreted as positive for pneumoconiosis by Drs. Whitehead, Capiello, and Ahmed, all of whom are Board-

¹ We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

² The law of the United States Court of Appeals for the Seventh Circuit is applicable, as the miner was employed in the coal mining industry in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

certified radiologists and B readers.³ Dr. Wiot, also a dually qualified physician, read the x-ray as negative. Director's Exhibits 15, 29; Claimant's Exhibits 1, 2. The January 20, 2004 x-ray was interpreted as positive by Dr. Alexander, a dually qualified physician, and as negative by Dr. Wiot. Employer's Exhibit 13; Claimant's Exhibit 3. The August 26, 2004 x-ray was interpreted as positive by Dr. Capiello and as negative by Dr. Wiot. Employer's Exhibit 3; Claimant's Exhibit 7.

The administrative law judge accurately reviewed the x-ray evidence of record, and determined that five of the eight interpretations were positive for pneumoconiosis and were rendered by four different dually qualified physicians, while the three negative interpretations were rendered by a single dually qualified physician. Noting that all of the x-rays were taken "relatively contemporaneously (within one year)," and declining to perform a simple "head count," the administrative law judge permissibly concluded, based on a preponderance of positive interpretations by a majority of highly qualified physicians, that the evidence was sufficient to establish the existence of clinical pneumoconiosis. *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); Decision and Order at 11. Contrary to employer's contention, for which it cites no authority, serial readings by one physician over the course of one year do not alone require remand of this case, and furthermore, the administrative law judge was not required to accord greater weight to Dr. Wiot's opinion based on his additional qualification as a Professor Emeritus.⁴ *See J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-90 n.13 (2008); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *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). Accordingly, we affirm the administrative law judge's findings pursuant to Section 718.202(a)(1), as supported by substantial evidence.⁵

³ 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.

⁴ Dr. Wiot is Professor Emeritus of radiology at the University of Cincinnati College of Medicine. Employer's Exhibit 19.

⁵ Employer points to no evidence sufficient to rebut the presumption that claimant's clinical pneumoconiosis, affirmed herein, arose out of coal mine employment,

Employer next challenges the administrative law judge's finding that the weight of the medical opinion evidence of record was sufficient to establish legal pneumoconiosis at Section 718.202(a)(4). Employer asserts that the administrative law judge improperly shifted the burden of proof to employer in violation of the regulations and the APA, and failed to provide valid reasons for crediting the diagnoses of legal pneumoconiosis by Drs. Houser, Harris and Cohen over the contrary opinions of Drs. Repsher and Rosenberg, that claimant did not have any respiratory or pulmonary impairment related to coal dust exposure, but rather suffered a restrictive impairment in lung function due to a paralyzed right hemidiaphragm. Employer's Brief at 24-25, 33-40. Some of employer's arguments have merit.

In evaluating the conflicting medical opinions of record, the administrative law judge initially stated that "[i]n ruling out a diagnosis of legal pneumoconiosis, the physician must adequately explain how the miner's coal dust exposure can be eliminated as a possible cause of his respiratory illness." Decision and Order at 12. The administrative law judge concluded that Dr. Repsher⁶ failed to adequately rule out the existence of legal pneumoconiosis because he "fails to address considerable evidence in the miner's medical records that he may have suffered from severe COPD." Decision and Order at 13. The administrative law judge similarly accorded Dr. Rosenberg's opinion⁷ little weight because the doctor appeared to focus on a lack of radiographic

and thus, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.203(b).

⁶ Dr. Repsher examined claimant on January 20, 2004, and found no evidence of coal workers' pneumoconiosis or evidence of any other pulmonary or respiratory disease caused or aggravated by coal dust exposure, but diagnosed coronary artery disease, paralyzed right diaphragm, and various other non-respiratory diseases. Dr. Repsher noted that the miner's pulmonary function study results show severe restriction, which is anticipated in view of claimant's paralyzed right hemidiaphragm. He opined that claimant's paralyzed right hemidiaphragm accounts for all of claimant's abnormalities on his test results, and that his restrictive impairment prevents him from performing his last coal mine employment. Employer's Exhibits 5, 16.

⁷ Dr. Rosenberg examined claimant on September 21, 2004, and noted severe restriction and significant hypoxia, but determined that claimant does not have coal workers' pneumoconiosis. He also testified that he did not believe claimant suffered from COPD, but that he found "a little bit of emphysematous changes on CT scan." Employer's Exhibit 6 at 29. Dr. Rosenberg testified that claimant's restrictive dysfunction is the extrinsic type, due to claimant's paralyzed right hemidiaphragm, a force external to the lungs, and that the elevated hemidiaphragm is probably the major

evidence of pneumoconiosis, and failed to “adequately explain how claimant’s extensive coal mine employment failed to contribute to the [little bit of] emphysematous changes” that Dr. Rosenberg noted on x-ray. Decision and Order at 13. The administrative law judge found that the opinion of Dr. Harris⁸ was entitled to “heightened weight” pursuant to 20 C.F.R. §718.104(d) based on his status as a treating physician, and that the opinion of Dr. Cohen,⁹ as supported by the opinions of Drs. Houser¹⁰ and Harris, was the “most

contributing factor causing claimant’s restriction. Dr. Rosenberg stated that while claimant has severe impairments which are disabling, they have not been caused or aggravated to any significant extent by his [sic] coal workers’ pneumoconiosis, and even if claimant had a minimal degree of coal workers’ pneumoconiosis, it would not be responsible [for], or [have] significantly contributed to his severe impairment. Employer’s Exhibits 1, 2, 6.

⁸ Dr. Harris, one of the miner’s treating physicians, initially examined claimant on April 15, 2003, and diagnosed hypoxemia, COPD related to smoking and coal dust exposure, obesity, and elevation of the right hemidiaphragm, with no evidence of heart failure. Dr. Harris examined claimant again on April 30, 2003, diagnosing an obstructive and restrictive pulmonary disease, and was concerned that claimant may have coal workers’ pneumoconiosis based on inspiratory rates, restrictive and obstructive pulmonary disease, and significant hypoxemia with desaturation. After an examination on June 25, 2003, Dr. Harris continued to suspect coal workers’ pneumoconiosis and possibly silicosis, and indicated that the x-ray abnormalities, hypoxemia, and restrictive and obstructive ventilatory defects suggested significant pulmonary disease. In a report dated December 17, 2003, Dr. Harris stated that he believed that claimant is suffering from coal workers’ pneumoconiosis. Employer’s Exhibits 8, 9; Director’s Exhibit 28; Claimant’s Exhibit 5.

⁹ Dr. Cohen prepared a consultative report on August 8, 2005, and concluded that claimant’s coal mine employment and paralyzed hemidiaphragm were significantly contributory to his pulmonary dysfunction, which included a severe restrictive defect. Dr. Cohen opined that claimant has coal workers’ pneumoconiosis and that the resulting respiratory impairment is disabling. Dr. Cohen indicated that it was unlikely that claimant’s heart failure contributed to his pulmonary impairment, and that smoking also did not contribute to the impairment, as smoking does not cause a restrictive impairment. Claimant’s Exhibit 6.

¹⁰ Dr. Houser performed the Department of Labor examination on August 15, 2003, and diagnosed coal workers’ pneumoconiosis; chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to cigarette smoking and exposure to coal and rock dust from coal mining; a paralyzed right hemidiaphragm; and heart disease. Dr.

well-reasoned” in light of the objective evidence, and was entitled to controlling weight. *Id.*

We agree with employer’s argument that the administrative law judge improperly shifted the burden of proof to employer by requiring Drs. Repsher and Rosenberg to rule out the existence of legal pneumoconiosis and to explain how coal dust exposure can be eliminated as a possible cause of COPD and emphysema, when it is claimant’s burden to establish that any chronic lung disease or respiratory or pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). In the present case, no physician attributed claimant’s emphysematous changes to coal dust exposure, and only Drs. Houser and Harris diagnosed COPD, while Drs. Cohen, Repsher and Rosenberg found a purely restrictive defect. The administrative law judge has also failed to explain how Dr. Cohen’s opinion is better supported by the objective medical evidence, or why it is the “most well-reasoned” and entitled to controlling weight. Further, in evaluating Dr. Harris’s opinion, the administrative law judge improperly substituted his own opinion for that of a physician by stating that “even if the x-ray evidence were interpreted as negative for [clinical pneumoconiosis], claimant’s symptoms, physical examination, coal mine employment, and other medical records indicate that coal dust inhalation contributed to or aggravated his COPD and I therefore find he also suffers from legal pneumoconiosis.” Decision and Order at 14. Consequently, we vacate the administrative law judge’s findings at Section 718.202(a)(4), and remand this case for a reassessment of the conflicting medical opinions of record in light of their reasoning and documentation, with the burden on claimant to establish legal pneumoconiosis by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Additionally, upon reconsideration of the factors listed at Section 718.104(d), the administrative law judge should reassess whether Dr. Harris’s opinion is entitled to enhanced weight based on his status as a treating physician, in light of the equivocal nature of his reports and the fact that Dr. Harris’s treatment spanned a period of only two months, and not one year and two months, as listed by the administrative law judge.¹¹

Houser attributed claimant’s moderately severe impairment mainly to his COPD, with chronic bronchitis as a mild contributing factor, noting that the paralyzed hemidiaphragm would not directly affect claimant’s FEV₁ results. Director’s Exhibit 10; Claimant’s Exhibit 4.

¹¹ Dr. Harris first saw the miner on April 15, 2003, and treated him again on April 30, 2003 and June 25, 2003. Employer’s Exhibit 9. The administrative law judge

Employer next asserts that the administrative law judge erred in his consideration of the CT scan evidence pursuant to 20 C.F.R. §718.107, and failed to acknowledge that none of the CT scan interpretations of record was positive for pneumoconiosis. Employer also maintains that the interpretation of Dr. Wiot is entitled to determinative weight based on his superior qualifications. Employer's Brief at 30-32. Some of employer's arguments have merit.

Dr. Potts performed a CT scan on May 7, 2003 at the request of Dr. Harris, for treatment purposes. Dr. Potts issued findings of an elevated right hemidiaphragm, some tiny nodules too small to be characterized, and fibrotic changes with no pleural effusions. Employer's Exhibit 8. Dr. Harris reviewed the findings by Dr. Potts and incorporated them into his medical report of June 25, 2003. Employer's Exhibit 9. Dr. Cohen reviewed the scan, finding scattered round opacities between 1-3 mm in diameter in the upper lobes, several larger lesions measuring 0.5 and 0.8 cm, and some emphysematous changes along with the elevation of the right hemidiaphragm. Claimant's Exhibit 6. Dr. Wiot interpreted the CT scan of record as showing three small nodules representing granulomas, mild emphysematous change, an enlarged heart, and no evidence of pneumoconiosis. Director's Exhibit 29. The administrative law judge reviewed the findings of Drs. Cohen and Wiot, and summarily concluded that "when the CT scan is weighed with the other medical opinion evidence and x-rays of record, I continue to find that the substantial majority of the evidence presented supports the conclusion that claimant has established the existence of pneumoconiosis." Decision and Order at 14. We reject employer's argument that the administrative law judge was required to accord greater weight to the opinion of Dr. Wiot based on his qualifications as a Board-certified radiologist and B reader, as the administrative law judge must simply be persuaded that a physician has the necessary knowledge, training, or experience to analyze a CT scan for a diagnosis of pneumoconiosis. *Consolidation Coal Co. v. Director, OWCP* [Stein], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). However, because the administrative law judge did not indicate whether the CT scan interpretations supported or negated a finding of pneumoconiosis, and did not consider the CT scan evidence in relation to the medical opinions of record, he is instructed on remand to discuss how the CT scan interpretations affect the credibility of the opinions of the physicians who reviewed them.

Lastly, employer challenges the administrative law judge's finding of total disability due to pneumoconiosis at Section 718.204(b), (c). Because the administrative law judge's findings on remand at Section 718.202(a)(4) may affect his analysis on the

mistakenly determined that the miner's initial visit was on April 15, 2002. Decision and Order at 9.

issues of total respiratory disability and disability causation, we must vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(b), (c). We also find merit in employer's specific arguments that the administrative law judge failed to weigh all relevant evidence together, like and unlike, and failed to acknowledge that Drs. Repsher and Rosenberg found a disabling extrinsic impairment of claimant's lung function rather than a totally disabling respiratory impairment. Employer's Brief at 41-43.

The administrative law judge found that claimant failed to establish total disability at 20 C.F.R. §§718.304, 718.204(b)(2)(ii), (iii), as there was no evidence of complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure in the record, and the weight of the blood gas studies of record produced non-qualifying values. However, the administrative law judge found total disability established based on the pulmonary function studies of record at subsection (b)(2)(i), and the medical opinions of Drs. Rosenberg and Cohen at subsection (b)(2)(iv). Decision and Order at 15. In reviewing the medical opinions, the administrative law judge stated that Dr. Houser diagnosed a "moderate severe impairment;" Drs. Harris and Repsher provided no opinion as to claimant's level of disability; and Drs. Rosenberg and Cohen agreed that claimant was totally disabled from a pulmonary perspective. Decision and Order at 15. Contrary to the administrative law judge's findings, however, Dr. Repsher concluded that, while claimant's testing revealed apparent severe restrictive disease, claimant's impairment was external to the lungs, and claimant was disabled from his last coal mine employment due to congestive heart failure and paralysis of his hemidiaphragm, not coal dust exposure. Employer's Exhibit 5 at 17, 28-29, 35, 38, 55. Furthermore, Dr. Rosenberg similarly opined that claimant's significant restriction does not result from an intrinsic form of lung disease, but rather is extrinsic, *i.e.*, the restriction results from external forces outside the lungs. Employer's Exhibit 6 at 20-22. Consequently, on remand, the administrative law must reassess the medical opinions of record at Section 718.204(b)(2)(iv), and then determine whether the weight of all relevant evidence establishes the presence of a chronic pulmonary or respiratory impairment, which, standing alone, prevents claimant from performing his usual coal mine work or similar employment. 20 C.F.R. §718.204(a), (b)(1), (2); *see Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). If so, the administrative law judge must determine whether pneumoconiosis is a substantially contributing cause thereof. 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. At this time, we decline to address employer's challenges to the administrative law judge's Attorney Fee Order granting attorney fees.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge