

BRB No. 09-0476 BLA

FRANK LESTER)
)
 Claimant-Respondent)
)
 v.)
)
 MACK COAL COMPANY,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 03/18/2010
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 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 Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2008-BLA-5344)
of Administrative Law Judge Daniel L. Leland, rendered on a subsequent 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 In a Decision and Order dated February 24, 2009, the administrative law judge credited claimant with seventeen years and ten months of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge initially determined that claimant was not entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. He found, however, that the evidence was sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202 and 718.203, and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in weighing the x-ray evidence at 20 C.F.R. §718.202(a), and in finding the evidence overall to be sufficient to establish the existence of pneumoconiosis. Employer also argues that the administrative law judge erred in rejecting the disability causation opinions of Drs. Zaldivar and Repsher, and in crediting the opinions of Drs. Rasmussen and Forehand, that claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.²

¹ Claimant first filed a claim on May 22, 1986, which was dismissed by Administrative Law Judge Lawrence E. Gray because claimant failed to show good cause for his failure to attend a scheduled hearing. Director's Exhibit 1. Claimant filed a second claim on January 14, 2002. Director's Exhibit 2. In a Proposed Decision and Order dated October 29, 2003, the district director found that claimant failed to establish total disability and denied benefits. *Id.* Claimant took no action with regard to the denial of his claim until he filed the current subsequent claim on April 30, 2007. Director's Exhibit 4.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that claimant had seventeen years and ten months of coal mine employment and his findings that claimant established total disability under 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, but did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Existence of Pneumoconiosis

Employer contends that the administrative law judge erred in finding that claimant established the existence of clinical pneumoconiosis.⁴ Employer specifically contends that the administrative law judge erred in failing to weigh all of the relevant x-rays and explain the basis for his findings of fact, as required by the Administrative Procedure Act (APA), 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).⁵

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

⁴ Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. 718.201(a)(1).

⁵ The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered twelve readings of six films dated July 11, 2007, July 27, 2007, September 19, 2007, January 29, 2008, April 22, 2008 and August 21, 2008.⁶ Decision and Order at 7-9. The administrative law judge found:

The July 11, 2007 x-ray is negative for pneumoconiosis, the July 27, 2007 x-ray has no probative value, and the evidence regarding the September 19, 2007 x-ray is in equipoise. However, the January 29, 2008 x-ray was interpreted as showing at least simple pneumoconiosis by Dr. Rasmussen and Dr. Wiot, and the August 21, 2008 x-ray was read as demonstrating at least simple pneumoconiosis by Dr. DePonte and Dr. Wiot. The April 22, 2008 x-ray demonstrates both simple and complicated pneumoconiosis. Thus, three of the five properly classified x-rays demonstrate pneumoconiosis. As there is no biopsy or autopsy evidence[,] and the enumerated presumptions are not applicable to this claim, the x-ray evidence establishes that [claimant] has clinical pneumoconiosis.

Decision and Order at 8-9.

Employer asserts that the administrative law judge “appeared to resolve the conflicting evidence with the ‘counting of heads’” and that he failed to consider non-occupational factors which could account for the changes seen on the x-rays, other than

⁶ The July 11, 2007 x-ray was read by Dr. Forehand, a B reader, as positive for simple and complicated pneumoconiosis, 1/1, q, p, Category A, by Dr. Wiot, a Board-certified radiologist and B reader, as negative, and by Dr. Gaziano for quality only. Director’s Exhibits 12, 13. The July 27, 2007 x-ray was read by Dr. Zekan as showing hyperexpanded lungs with reticular nodular interstitial disease. Claimant’s Exhibit 4. The September 19, 2007 x-ray was read by Dr. DePonte, a Board-certified radiologist and B reader, as positive for simple and complicated pneumoconiosis, 1/1, p, q, Category A, and by Dr. Wiot as negative. Claimant’s Exhibit 5; Employer’s Exhibit 1. The January 29, 2008 x-ray was read by Dr. Rasmussen, a B reader, as positive for simple and complicated pneumoconiosis, 1/1, p, q, Category A, and by Dr. Wiot, as positive for simple pneumoconiosis, 1/1, p, q, but negative for complicated pneumoconiosis. Claimant’s Exhibit 1; Employer’s Exhibit 6. The April 22, 2008 x-ray was read by Dr. Repsher, a B reader, as negative, and by Dr. DePonte as positive for simple and complicated pneumoconiosis, 1/1, q, q, and Category B opacities. Claimant’s Exhibit 6; Employer’s Exhibit 2. The August 21, 2008 x-ray was read by Dr. DePonte as positive for simple and complicated pneumoconiosis, 1/1, p, q, Category B, and by Dr. Wiot as positive for simple pneumoconiosis, 1/1, q, p and negative for complicated pneumoconiosis. Claimant’s Exhibit 3; Employer’s Exhibit 5.

coal workers' pneumoconiosis. Employer's Brief in Support of Petition for Review at 9. Employer also asserts that the administrative law judge erred in finding that Dr. Zekan's interpretation of the July 27, 2007 x-ray has "no probative value." Decision and Order at 8.

Employer correctly points out that the administrative law judge did not offer any explanation, in his discussion of the evidence at 20 C.F.R. §718.202(a)(1), for finding that the July 27, 2007 x-ray had no probative value. The administrative law judge did address Dr. Zekan's reading of the July 27, 2007 x-ray in his discussion of the x-ray evidence at 20 C.F.R. §718.304(a), and observed that "Dr. Zekan did not classify the July 27, 2007 x-ray[,] and his interpretation is not relevant to the issue before me." Decision and Order at 7. Employer asserts that, while Dr. Zekan did not classify the x-ray for complicated pneumoconiosis, the administrative law judge erred in finding that his reading was not probative to the issue of the existence of simple pneumoconiosis under 20 C.F.R. §718.202(a)(1). Employer notes that x-rays that are not classified under the ILO system may still be weighed by the administrative law judge in determining whether claimant established the existence of simple pneumoconiosis. Employer contends that, because Dr. Zekan "failed to mention evidence of pneumoconiosis on the July 2007 x-ray, his reading is negative for the existence of pneumoconiosis and should have been considered." Employer's Brief in Support of Petition for Review at 10 n.1. Employer's assertion of error has merit, in part.

Contrary to employer's contention, the administrative law judge is not required to weigh Dr. Zekan's x-ray interpretation as a negative reading for pneumoconiosis. The Board has held that, in the absence of applicable quality standards, the significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge in his role as fact-finder. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984).

Notwithstanding, in support of his finding that claimant has clinical pneumoconiosis, the administrative law judge observed that three of the five *properly classified* x-rays, demonstrate clinical pneumoconiosis. Decision and Order at 9 (emphasis added). However, pursuant to 20 C.F.R. §718.101(b), the quality standards contained in 20 C.F.R. Part 718 apply only to "evidence developed by any party . . . in connection with a claim" and, therefore, x-ray readings contained in treatment records do not have to be classified under the ILO system, as they were obtained in connection with the miner's treatment, rather than in connection with his claim. 20 C.F.R. §718.101(b); *see also* 64 Fed. Reg. 54966, 54975 (Oct. 8, 1999); 65 Fed. Reg. 79,929 (Dec. 20, 2000). In this case, the x-ray report of Dr. Zekan indicates that the July 27, 2007 x-ray was obtained at the request of Dr. Bellam, who has been identified in the record as claimant's treating physician. Claimant's Exhibit 4. Because the administrative law judge did not

address whether Dr. Zekan's reading was made in connection with claimant's treatment, and he did not specifically explain the basis for his relevancy determination with regard to Dr. Zekan's reading in his discussion of the x-ray evidence at 20 C.F.R. §718.202(a)(1), we are compelled to vacate his finding that claimant established the existence of clinical pneumoconiosis under that subsection.

Employer also argues that the administrative law judge erred in failing to properly consider the opinions of Drs. Zaldivar and Repsher, regarding the etiology of claimant's opacities seen on x-ray and whether or not claimant has clinical pneumoconiosis. We agree.

Dr. Zaldivar examined claimant on September 19, 2007, and concluded that there was "no radiographic evidence of pneumoconiosis," but that there is "a suggestion of earlier pulmonary fibrosis with increased markings in the lower zones[,] particularly in the right lower zone." Director's Exhibit 13. He further opined that there is "evidence of previous inflammation which left pleural scars in the right upper lobe." *Id.* In a deposition conducted on September 2, 2008, Dr. Zaldivar testified that claimant's physical symptoms included wheezing, which is not a manifestation of coal workers' pneumoconiosis. Employer's Exhibit 4 at 10. He stated that claimant's x-ray showed inflammation of the right upper zone with pleural thickening and an increase in fibrotic changes which were linear in both lower zones. *Id.* at 15-17. However, he testified that these were not related to coal dust exposure, and explained as follows:

[L]inear changes are not typical of coal mining at all. Coal mining causes nodular changes most typically in the upper zones at first. And then as more dust is retained, then the mid and lower zones become involved radiographically. They are nodular in coal workers' pneumoconiosis or even silicosis. But the linear markings in the lower zones are those of a pulmonary fibrotic process. They can happen in smokers.

Id. at 16.

Dr. Repsher examined claimant on April 22, 2008, and concluded that claimant does not suffer from clinical pneumoconiosis. Employer's Exhibit 2. In a deposition conducted on August 21, 2008, Dr. Repsher testified that, upon examination, claimant demonstrated markedly decreased breath sounds, which is not characteristic of coal workers' pneumoconiosis, but is characteristic of centrilobular emphysema. Employer's Exhibit 3. Dr. Repsher further opined that an x-ray obtained in conjunction with his examination did not evidence any changes consistent with pneumoconiosis, but did evidence calcified granulomatous disease and centrilobular emphysema. *Id.*

Contrary to employer's assertion of error, the Board has held that a physician's comments that address the source of pneumoconiosis diagnosed by x-ray are not relevant

to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). However, those comments are to be considered at 20 C.F.R. §718.203. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999) (*en banc*); *see also Kiser v. L&J Equipment Co.*, 23 BLR 1-246 (2006). In this case, once the administrative law judge determined that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), he summarily concluded that claimant was entitled to the presumption at 20 C.F.R. §718.203, that his pneumoconiosis arose out of coal mine employment, based on the fact that he had over ten years of coal mine employment, without addressing whether employer had presented evidence sufficient to rebut that presumption. Because the administrative law judge did not address the opinions of Drs. Zaldivar and Repsher as to the etiology of claimant's radiological findings, we vacate the administrative law judge's finding at 20 C.F.R. §718.203 and remand this case for further consideration as to whether claimant has established that his pneumoconiosis, if present, arose out of coal mine employment.

Furthermore, although the administrative law judge determined that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis,⁷ he erred in failing to resolve the conflict in the medical opinions as to the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must make a specific finding as to whether the evidence is sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4).⁸ As necessary, the administrative law judge must also weigh the x-ray evidence and medical opinions together and reach a determination as to whether claimant has satisfied his burden to establish the existence of clinical pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

⁷ Legal pneumoconiosis “includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

⁸ In summarizing Dr. Zaldivar's medical opinion, the administrative law judge noted that he based his diagnosis of clinical pneumoconiosis on his own x-ray interpretation, which was not part of the evidentiary record. Decision and Order at 4 n.2. We instruct the administrative law judge, on remand, to consider the extent to which Dr. Zaldivar's opinion that claimant does not have clinical pneumoconiosis is based on his review of inadmissible evidence. *See* 20 C.F.R. §725.414(a)(3)(i); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting).

Disability Causation

In the interest of judicial economy we will also address employer's arguments with regard to the issue of disability causation. Employer contends that the administrative law judge erred in finding the opinions of Drs. Forehand and Rasmussen to be sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R §718.204(c). Employer asserts that the administrative law judge erred in giving little weight to the disability causation opinions of Dr. Zaldivar, because he did not diagnose pneumoconiosis, and Dr. Repsher, because he failed to diagnose pneumoconiosis and total disability. Employer also maintains that it was improper for the administrative law judge to find that Dr. Rasmussen's opinion was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), in light of the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), that Dr. Rasmussen's opinion was too equivocal to establish the existence of legal pneumoconiosis.

Contrary to employer's assertion, the administrative law judge properly assigned little weight to Dr. Repsher's disability causation opinion at 20 C.F.R. §718.204(c), because Dr. Repsher opined that claimant is not totally disabled, contrary to the administrative law judge's finding that the evidence is sufficient to establish total disability. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). However, in light of our decision to vacate the administrative law judge's findings at 20 C.F.R. §718.202(a), that claimant established the existence of pneumoconiosis, we also vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c), and his credibility determination with regard to Dr. Zaldivar, as it was based on his finding that claimant established the existence of pneumoconiosis.

We agree with employer that the administrative law judge erred in failing to render a specific finding as to whether Drs. Rasmussen and Forehand provided reasoned and documented opinions to establish that claimant's has a totally disabling respiratory impairment due to clinical pneumoconiosis. *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, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). There is also merit to employer's assertion that the administrative law judge erred in failing to address whether Drs. Rasmussen and Forehand based their disability causation opinions on their belief that claimant has complicated pneumoconiosis. Because the administrative law judge found that the evidence did not establish that claimant has complicated pneumoconiosis, he must address the extent, if

any, to which that determination may affect the weight accorded the medical opinion evidence at 20 C.F.R. §718.204(c).

Thus, we vacate the administrative law judge's award of benefits and remand this case for further consideration pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and 718.204(c). In rendering his findings on remand, the administrative law judge must explain the bases for his credibility determinations and the weight accorded the conflicting evidence in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge