

BRB No. 96-0652 BLA

BERT BAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
WHITAKER COAL CORPORATION	)	
	)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-0649) of Administrative Law Judge Daniel L. Leland awarding benefits on a claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

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<sup>1</sup> Claimant is Bert Baker, the miner, whose application for benefits filed on February 27, 1992 was administratively denied on November 10, 1994. Director's Exhibits 1, 26.

amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with eight and one-half years of coal mine employment and found that he has three dependents for purposes of benefits augmentation. The administrative law judge found the existence of totally disabling pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(c), and 718.204 and, accordingly, awarded benefits.

On appeal, employer challenges the administrative law judge's

weighing of the evidence pursuant to Sections 718.202(a)(1) and 718.204. Employer further contends that the administrative law judge erred in his analysis of the evidence pursuant to Section 718.203(c), as it is legally insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Pursuant to Section 718.202(a)(1), employer contends that the administrative law judge failed to provide a rationale for his weighing of the x-ray evidence. Employer's Brief at 14. The record contains twenty readings of six x-rays. Five of the six x-rays received conflicting interpretations.<sup>3</sup> The readings consist of nine

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<sup>2</sup> We affirm as unchallenged on appeal the administrative law judge's findings regarding the length and nature of claimant's coal mine employment, dependency, and pursuant to 20 C.F.R. §§718.204(c)(1)-(3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> The April 22, 1991 x-ray was read positive by Drs. Vaezy and Anderson, who

positive and eleven negative readings. Director's Exhibits 12-14, 16, 23, 26. Of the ten physicians who read the x-rays, four are board-certified radiologists and B-readers, four are B-readers, and two possess no radiological credentials. See n.3, *supra*.

The administrative law judge did not reconcile the conflicting readings of any film or weigh the total number of readings. Instead, he placed the readers into opposing camps, noting that six physicians diagnosed pneumoconiosis by x-ray, while four detected no pneumoconiosis. The administrative law judge found that:

Drs. Sargent, Barrett, Bassali, and Mathur are the most qualified . . . as they are both [b]oard-certified radiologists and B readers. Drs. Dahhan, Broudy, Baker, and Lane are highly qualified B readers. While Dr. Anderson and Dr. Vaezy are neither [b]oard-certified radiologists nor B readers, they are pulmonary specialists whose opinions should be given some weight.

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lack radiological credentials, and by Dr. Lane, a B-reader. Director's Exhibits 16, 26. Drs. Sargent and Barrett, board-certified radiologists and B-readers, read this x-ray negative. Director's Exhibit 26. The February 27, 1992 x-ray was read positive by Dr. Baker, a B-reader, and negative by Drs. Sargent and Barrett. Director's Exhibit 26. The April 27, 1992 x-ray was read positive by Drs. Baker and Lane, and negative by Drs. Sargent and Barrett. Director's Exhibits 12-14, 26. The July 3, 1992 x-ray was read negative by Dr. Dahhan, a B-reader. Director's Exhibit 23. The July 29, 1992 x-ray was read positive by Drs. Bassali and Mathur, board-certified radiologists and B-readers, negative by Dr. Sargent, who possesses the same qualifications, and negative by Dr. Broudy, a B-reader. Director's Exhibits 23, 26. The January 12, 1993 x-ray was read positive by Dr. Lane and negative by Drs. Sargent and Barrett. Director's Exhibit 26.

Therefore, considering both the quantity and the qualifications of the doctors interpreting the chest x-rays, I conclude that the chest x-ray evidence establishes the existence of pneumoconiosis at (a)(1).

Decision and Order at 5-6.

An administrative law judge has broad discretion in weighing the medical evidence, but must provide a sufficient rationale for his weighing of the evidence 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); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); see also *Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984). In addition, the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, has held that pursuant to Section 718.202(a)(1) the administrative law judge must perform a quantitative and qualitative analysis of the x-ray readings. See *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge attempted to do so here, but failed to explain his rationale as required by the APA. See *Wojtowicz, supra; Congleton, supra*.

For example, although the administrative law judge cited the radiological qualifications of the readers, he failed to indicate how this factor supported his conclusion that the x-rays were positive for the existence of pneumoconiosis. Specifically, the four board-certified radiologists and B-readers that the administrative law judge found most qualified, as well as the four B-readers, disagreed among themselves as to whether the x-rays were positive or negative. Further, the administrative law judge mentioned "quantity" but failed to explain how it supported his finding in view of either the multiple conflicting readings of each film or of the total number of positive and negative readings. Moreover, employer is correct in its assertion that the administrative law judge erroneously relied on the non-radiological credentials of Drs. Anderson and Vaezy. Employer's Brief at 12. "[T]he fact that a physician may be board-certified in internal or pulmonary medicine is not relevant to the weighing of the evidence pursuant to Section 718.202(a)(1), as these are not *radiological* qualifications as described in the regulations and therefore cannot be equated with such." *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*); see 20 C.F.R. §718.202(a)(1)(ii)(C) - (E). Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand this case for further consideration.

Pursuant to Section 718.203(c),<sup>4</sup> the administrative law judge found that the opinions of Drs. Dahhan and Broudy attributing claimant's respiratory impairment to smoking carried "little weight," since the physicians failed to diagnose pneumoconiosis. Decision and Order at 6. Accordingly, the administrative law judge credited the opinions of Drs. Baker and Vaezy linking claimant's pneumoconiosis to coal mine dust exposure. Because the administrative law judge's analysis at this section is tainted by his failure to properly weigh the x-ray evidence pursuant to Section 718.202(a)(1), we must also vacate his finding pursuant to Section 718.203(c). However, we reject the specific allegations of error raised by employer on this issue.

Employer contends that the administrative law judge mischaracterized the evidence regarding claimant's exposure to other respiratory irritants. Employer's Brief at 15-16. In weighing the evidence, the administrative law judge stated that "although claimant had other employment besides his coal mine work, there is no evidence in the record that he was exposed to any [other] irritants which would have cause[d] his pneumoconiosis." Decision and Order at 6. Employer points to periods of drywall work reflected in claimant's Social Security earnings records and recorded in the history sections of the medical opinions. Director's Exhibits 4, 23, 26. Although each physician noted drywall work along with claimant's coal mine employment, no physician attributed claimant's respiratory impairment to drywall dust exposure.<sup>5</sup> Thus, any error by the administrative law judge in describing the

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<sup>4</sup> Because claimant established fewer than ten years of coal mine employment, he must produce competent evidence to show that his pneumoconiosis arose at least in part out of coal mine employment. 20 C.F.R. §718.203(a), (c). *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984).

<sup>5</sup> Only Dr. Baker discussed this issue, stating that claimant's drywall dust exposure "may have contributed to [the x-ray readings] in some way, but I think it's mostly due to his exposure to coal dust." Director's Exhibit 26, March 3, 1994, Baker deposition transcript at 14.

record is harmless, see *Larioni v. Director*, OWCP, 6 BLR 1-1276 (1984), in view of the lack of medical evidence attributing claimant's respiratory impairment to drywall dust exposure.

Employer further contends that the opinions of Drs. Baker and Vaezy attributing claimant's respiratory impairment to coal dust exposure are legally insufficient to establish the required causal connection under Section 718.203(c) because they fail to distinguish between the respiratory effects caused by coal mine dust and those caused by drywall dust. Employer's Brief at 16. The Sixth Circuit court has held that claimant need not "establish what portion of his disease is due to non-mine exposure, and what portion is due to mine exposure. It is enough that the mine exposure is an exposure that contributed to the disease at least in part." *Southard v. Director*, OWCP, 732 F.2d 66, 72, 6 BLR 2-26, 2-35 (6th Cir. 1984). Because Drs. Baker and Vaezy attributed claimant's pneumoconiosis at least in part to coal dust exposure, their opinions are legally sufficient, if properly credited, to establish the required causal relation under Section 718.203(c). Director's Exhibits 10, 26; see *Southard*, *supra*. Therefore, we reject employer's contention.

Pursuant to Section 718.204(c)(4), employer argues that the medical opinions of Drs. Baker and Vaezy are legally insufficient to establish total respiratory disability. Employer's Brief at 17. Drs. Baker and Vaezy checked "No" in response to whether claimant was able to perform his usual coal mine employment. Director's Exhibit 26. Both physicians explained that claimant "should have no further exposure to coal dust . . . or similar noxious agents." *Id.* In addition, both physicians opined that claimant "would have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment," due to his pulmonary condition. Director's Exhibit 26. Dr. Baker added that claimant "would have difficulty doing any type of hard manual labor with the degree of impairment that he has." Director's Exhibit 26, March 3, 1994, Baker deposition transcript at 8. Viewed in their entirety, these opinions address claimant's physical capacity to work and do not merely advise against a return to dusty conditions, as employer argues. See *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 88 (1988). Therefore, they are legally sufficient, if properly credited, to establish the existence of a totally disabling respiratory impairment.

However, as employer contends, the administrative law judge failed to provide a valid rationale for crediting the opinions of Drs. Baker and Vaezy over the contrary opinions of Drs. Dahhan and Broudy. Employer's Brief at 21. After noting correctly that all of the objective studies were non-qualifying,<sup>6</sup> the administrative law judge

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<sup>6</sup> A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-

stated that the opinions of Drs. Baker and Vaezy that claimant was unable to perform sustained manual labor were supported by the pulmonary function study results. Decision and Order at 6. Specifically, the administrative law judge found that although the pulmonary function studies were non-qualifying, "the FEV1's . . . are below 70% of the predicted levels and the FVC's are no higher than 76% of the predicted levels. Because they are consistent with the objective test results, I credit the opinions of Drs. Baker and Vaezy . . . ." Decision and Order at 6.

An administrative law judge exercises broad discretion in weighing the medical evidence, but may not substitute his own medical judgment for that of a physician. See *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Here, the administrative law judge's decision to credit the opinions of Drs. Baker and Vaezy rests upon his own interpretation of the medical data. All four physicians discussed the pulmonary function values as a percentage of the predicted levels; two diagnosed total respiratory disability based in part on these values and two did not. Director's Exhibits 10, 23, 26. The administrative law judge provided no explanation, other than his own inferences regarding the significance of the pulmonary function data, for his finding that the conclusions of Drs. Baker and Vaezy are more consistent with the objective study results than those of Drs. Dahhan and Broudy. See *Marcum, supra*. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.204(c)(4).

Pursuant to Section 718.204(b), employer asserts that the administrative law judge erred by discrediting the opinions of Drs. Dahhan and Broudy because they failed to diagnose pneumoconiosis. Employer's Brief at 17. Because the administrative law judge's analysis was tainted by his earlier failure to properly weigh the x-ray evidence pursuant to Section 718.202(a)(1), we must also vacate his finding pursuant to Section 718.204(b).

On remand, the administrative law judge must reconsider the x-ray evidence in light of the readers' radiological qualifications pursuant to Section 718.202(a)(1). See *Woodward, supra*; *Melnick, supra*. If he finds it to be negative for the existence of pneumoconiosis, he must then determine whether the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(4). If so, the administrative law judge must determine whether claimant's pneumoconiosis arose at least in part out of coal mine employment pursuant to Section 718.203(c). See *Southard, supra*. The administrative law judge must also determine whether the medical opinion evidence establishes total respiratory disability pursuant to Section 718.204(c)(4). See *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). If

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qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

the administrative law judge finds that it does, and concludes that all the relevant evidence weighed together establishes total respiratory disability, see *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), he must then evaluate all the relevant evidence to determine whether claimant's total disability is due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). See *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52, 2-63 (6th Cir. 1989).

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

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NANCY S.  
DOLDER  
Administrative Appeals Judge

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REGINA C.  
McGRANERY  
Administrative Appeals Judge