BRB No. 06-0596 BLA

WILLIAM E. DALTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRONTIER-KEMPER CONSTRUCTORS, INCORPORATED	)	DATE ISSUED: 04/27/2007
	)	
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 on Remand of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C. for employer.

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

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (01-BLA-0315) of Administrative Law Judge Rudolf L. Jansen awarding 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). This case involves a claim filed on June 1, 1999 and is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with twenty-two years and three months of coal mine employment and found that employer was the

responsible operator liable for the payment of any benefits. In regard to the merits of the claim, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge further found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). After finding that the issue of total disability was not contested, the administrative law judge found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated November 26, 2004, the Board affirmed the administrative law judge's designation of employer as the responsible operator and his finding that claimant established at least ten years of coal mine employment. *Dalton v. Frontier-Kemper Constructors, Inc.*, BRB No. 04-0206 BLA (Nov. 26, 2004) (unpub.). However, the Board vacated the administrative law judge's findings that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and remanded the case for further consideration. *Id.* In light of its decision to vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (4), the Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(c).[1] *Id.*

On remand, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Having found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that it was not necessary to address whether the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). The administrative law judge also found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established that claimant's chronic obstructive pulmonary disease arose out of his coal mine employment. Claimant responds in support

[1] The Board subsequently denied a motion for reconsideration filed by employer. *Dalton v. Frontier-Kemper Constructors, Inc.*, BRB No. 04-0206 BLA (May 4, 2005) (Order) (unpub.).

of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions of error. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes 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).

Employer initially argues that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. In considering the x-ray evidence, the administrative law judge acted within his discretion by according greater weight to the interpretations of claimant's most recent x-rays, *i.e.*, the interpretations of x-rays taken in 2002. *See Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); Decision and Order on Remand at 6. The administrative law judge also properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order on Remand at 5-6.

Three dually qualified physicians, Drs. Cappiello, Miller, and Ahmed, interpreted claimant's November 11, 2002 and December 30, 2002 x-rays as positive for pneumoconiosis, Claimant's Exhibits 1-3, while two equally qualified physicians, Drs. Wheeler and Scott, interpreted these x-rays as negative for the disease. Employer's Exhibits 1-4. Because six of the ten x-ray interpretations of claimant's two most recent x-rays rendered by the best qualified physicians are positive for pneumoconiosis, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order on Remand at 6.

Employer argues that the administrative law judge erred in relying upon a "number tally" to find that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Contrary to employer's characterization, the administrative law judge did not rely merely upon a "number tally"

of the x-ray interpretations. In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, the quality of the x-ray films, and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Ordinarily, an administrative law judge's finding that the existence of pneumoconiosis was established by x-ray evidence at Section 718.202(a)(1) would obviate the need for him to render a separate finding regarding whether the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4).[2] *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, the administrative law judge credited medical opinion evidence attributing claimant's total disability to "legal" pneumoconiosis, in the form of chronic obstructive pulmonary disease due partly to coal mine dust exposure, pursuant to 20 C.F.R. §718.204(c). Decision and Order on Remand at 9-10. Before addressing whether the evidence established that claimant's total disability was due to "legal" pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge should have determined first whether the medical opinion evidence established the existence of "legal" pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §§718.201(a)(2), 718.204(c)(1). Consequently, we remand the case to the administrative law judge for his consideration of whether the medical opinion evidence is sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[3]

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because claimant's most recent coal mine employment occurred in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2. Consequently, the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that an administrative law judge must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), is not applicable.

[3] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "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).

Employer argues that the evidence does not establish that claimant's chronic obstructive pulmonary disease arose out of his coal mine employment. In this case, Drs. Carandang, Selby, Diaz, and Cohen diagnosed chronic obstructive pulmonary disease. While Drs. Carandang and Selby attributed claimant's chronic obstructive pulmonary disease to his cigarette smoking, Director's Exhibits 9, 20, Drs. Diaz and Cohen opined that the miner's chronic obstructive pulmonary disease was due to both cigarette smoking and coal dust exposure.[4] Claimant's Exhibits 5, 6.

In his 2003 decision, the administrative law judge found that the medical opinion evidence established the existence of "pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 20-21. However, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) because the administrative law judge had failed to weigh the interpretations of a CT scan taken on January 5, 1999. *Dalton*, slip op. at 8.

Employer currently requests that the Board instruct the administrative law judge, on remand, to address whether the physicians who diagnosed the etiology of claimant's chronic obstructive pulmonary disease relied upon accurate coal mine employment and smoking histories. Employer argues that the administrative law judge erred in crediting claimant with twenty-two years and three months of coal mine employment. In his initial decision, the administrative law judge rendered specific findings regarding the length of claimant's coal mine employment, ultimately crediting claimant with a total of twenty-two years and three months of coal mine employment. *See* Decision and Order at 10-12. In its 2004 Decision and Order, the Board affirmed the administrative law judge's finding that "claimant established at least ten years of coal mine employment." *Dalton*, slip op. at 5.

Employer argues that claimant's description of his coal mine employment by companies other than employer supports a finding of approximately six years of coal mine employment. Employer contends that when the six years are added to the "at least ten years of coal mine employment" with employer, claimant should be credited with "far less" than twenty-two years of coal mine employment. Employer's Reply Brief at 4. Employer's contention lacks merit. In crediting claimant with a total of sixteen years of coal mine employment with employer, the administrative law judge provided a specific

[4] In his initial decision, the administrative law judge found that while Dr. Jani's treatment notes indicate that he treated claimant for chronic obstructive pulmonary disease, the doctor did not address the etiology of the disease. Decision and Order at 21; Director's Exhibit 20. The Board held that the administrative law judge properly found that Dr. Jani's treatment notes were not probative of whether claimant has pneumoconiosis. *Dalton v. Frontier-Kemper Constructors, Inc.*, BRB No. 04-0206 BLA (Nov. 26, 2004) (unpub.), slip op. at 7.

explanation for his determination.[5] *See* Decision and Order at 11-12. Because it is supported by substantial evidence, we affirm the administrative law judge's finding of sixteen years of coal mine employment with employer. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988)(*en banc*) (holding that, in calculating years of coal mine employment, an administrative law judge may use any reasonable method of calculation).

The administrative law judge also credited claimant with an additional six years and three months of coal mine employment with other companies. *See* Decision and Order at 11. Employer does not challenge this determination. Consequently, we affirm the administrative law judge's finding that claimant established twenty-two years and three months of coal mine employment.

Employer also argues that the administrative law judge erred in failing to consider all relevant evidence in calculating the length of claimant's smoking history. In his initial decision, the administrative law judge stated:

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[5] The administrative law judge stated:

> Claimant's affidavit, the Social Security records, and [e]mployer's accounting of [c]laimant's work history establish that [c]laimant worked for [employer] for sixteen years from 1974 to 1991. Generally, [c]laimant's work was constant with [employer] throughout his employment, but there were periods where he was not assigned to a project. Claimant began working for [e]mployer on August 19, 1974; therefore he had four months of employment for that year. He worked for the entire year for the periods from 1977 until 1982. In 1983, [c]laimant worked in January but did not return to work until May. For 1983, [c]laimant had nine months of coal mine employment. Claimant worked the entire years of 1984 and 1985. In 1986, [c]laimant worked only from January until the end of June; thus, [c]laimant had six months of employment with [employer] that year. Claimant worked all of 1987 and all but December of 1988. In 1989, [c]laimant did not work January or February, thus working ten months in that year. Claimant worked the entire year for 1990 and left coal mine employment on August 30, 1991. In total, [c]laimant worked sixteen years for [employer]. Both [e]mployer and [c]laimant's statement are consistent in this regard. I conclude that [c]laimant worked sixteen years for [employer].

Decision and Order at 11-12. The administrative law judge also found that claimant was exposed to coal dust throughout his work in coal mine construction while employed by employer and other employers. *See* Decision and Order at 8.

> Regarding [claimant's] smoking history, the record is consistent in showing that he smoked three-quarters of one package of cigarettes per day for twenty years from 1964 to 1984.

Decision and Order at 4.[6]

In his Decision and Order on Remand, the administrative law judge stated:

> [T]he Board did not disturb my finding that the record showed a smoking history of ¾ pack of cigarettes a day for 20 years. The reports by Drs. Diaz and Cohen, as well as Dr. Selby, all relied on a smoking history very close to that finding, at least within a range of 5 years. Therefore, contrary to the [e]mployer's argument, this factor does not detract from the medical opinions relating to the cause of [claimant's] pneumoconiosis.

Decision and Order on Remand at 9.

Employer argues that the administrative law judge failed to address the smoking history recorded by claimant's treating physician, Dr. Jani, and this history is more reliable than the other histories reported because it was taken prior to claimant's filing of his claim for black lung benefits. During claimant's hospitalization on September 19, 1996, Dr. Jani noted that claimant had been "a heavy smoker of one and a half packs for the last many years." *See* Director's Exhibit 20. Thus, Dr. Jani's recorded smoking history indicates that claimant smoked up to one and a half packs per day, twice the rate of three-fourths of a pack a day credited by the administrative law judge.

An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate smoking history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). In this case, the administrative law judge erred in failing to address all relevant evidence regarding the length of claimant's smoking history. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, on remand, the administrative law judge must reconsider his finding as to the length of claimant's smoking history and reconsider the credibility of the relevant medical opinion evidence in light of that finding.

[6] In its initial appeal to the Board, employer argued that the administrative law judge failed to reconcile inconsistencies in the reported lengths of claimant's smoking history. Employer specifically noted that the administrative law judge had failed to address Dr. Jani's description of claimant's smoking history. The Board did not address the argument in its previous consideration of this case.

On remand, should the administrative law judge find that the medical opinion evidence establishes the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge will have already found that claimant's chronic lung disease or impairment arose out of claimant's coal mine employment. 20 C.F.R. §718.201(a)(2). Consequently, if, on remand, the administrative law judge finds the evidence sufficient to establish the existence of "legal" pneumoconiosis, he need not separately determine the etiology thereof at 20 C.F.R. §718.203(b), as his findings at 20 C.F.R. §718.202(a)(2) will necessarily subsume that inquiry.[7] *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); *see also Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006). However, on remand, the administrative law judge must address whether the evidence establishes that claimant's "clinical" pneumoconiosis, established by the x-ray evidence at 20 C.F.R. §718.202(a)(1), arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).

In light of our decision to remand the case to the administrative law judge for his consideration of whether the medical opinion evidence establishes the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we vacate the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). On remand, should the administrative law judge find that the evidence establishes the existence of "legal" pneumoconiosis, the administrative law judge must address whether the evidence is sufficient to establish that claimant's total disability is due to either clinical or legal pneumoconiosis.

[7] In his consideration of the evidence pursuant to 20 C.F.R. §718.203, the administrative law judge appears to have improperly granted claimant the benefit of a rebuttable presumption that his chronic obstructive pulmonary disease arose out of his coal mine employment. *See* Decision and Order on Remand at 7-9. In order to establish the existence of "legal" pneumoconiosis, claimant bears the burden of establishing that his chronic lung disease arose out of his coal mine employment. *See* 20 C.F.R. §718.201(a)(2).

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully differ with my colleagues as to the consideration of the duration of claimant's coal mine employment. Rather than affirming the administrative law judge's finding of twenty-two years and three months of coal mine employment, I would further instruct the administrative law judge, on remand, to give careful consideration to the miner's coal dust exposure as it pertains to the relevant causation issues. More specifically, I would instruct the administrative law judge to consider and address the significance of the duration and nature of claimant's coal dust exposure in evaluating the medical evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-61 (1988) (*en banc*) (holding that an administrative law judge's calculation of years of coal mine employment impacts the reliability of the medical evidence); *Crosson v. Director, OWCP*, 6 BLR 1-809, 1-812 (1984) (recognizing that an administrative law judge may properly discount a physician's opinion that is based on an erroneous assumption regarding the miner's years of coal mine employment).

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JUDITH S. BOGGS
Administrative Appeals Judge