BRB No. 09-0521 BLA

DANNY RAY HUDSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY	)	DATE ISSUED: 04/14/2010
	)	
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 Living Miner's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits (2008-BLA-5252) of Administrative Law Judge Kenneth A. Krantz rendered on a claim filed on March 26, 2007 pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with at least sixteen years of qualifying coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). The administrative law judge also found that the evidence was sufficient to establish a totally disabling

respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's evidentiary ruling pursuant to 20 C.F.R. §725.414(a)(3)(ii), which excluded Dr. West's reading of the May 24, 2007 x-ray from the record. Employer also challenges the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Further, employer challenges the administrative law judge's finding that the evidence was sufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i), (iv). Lastly, employer challenges the administrative law judge's finding that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this appeal.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address employer's contention that the administrative law judge erred in excluding Dr. West's negative reading of the May 24, 2007 x-ray from the record. The Director submitted Dr. Patel's negative reading of the May 24, 2007 x-ray into the record, as it was part of the complete pulmonary evaluation of claimant that was provided by the Department of Labor (DOL) pursuant to 20 C.F.R. §725.406. Director's Exhibit 10. Claimant designated Dr. Miller's positive reading of the May 24, 2007 x-ray as his rebuttal evidence to Dr. Patel's reading of this x-ray. Director's Exhibit 33. Employer designated Dr. Halbert's negative reading of the May 24, 2007 x-ray as its rebuttal evidence to Dr. Patel's reading of this x-ray. Employer's Exhibit 1. Employer

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and that the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

also designated Dr. West's negative reading of the May 24, 2007 x-ray as its rebuttal evidence to claimant's rebuttal evidence, namely Dr. Miller's reading of this x-ray. *Id*.

The pertinent regulation at Section 725.414(a)(3)(ii), provides that an employer shall be entitled to submit, in rebuttal of the case presented by the claimant, one physician's interpretation of each x-ray submitted by the claimant in support of his affirmative case and the x-ray submitted by the Director under Section 725.406. 20 C.F.R. §725.414(a)(3)(ii). In this case, claimant did not designate Dr. Miller's positive reading of the May 24, 2007 x-ray in support of his affirmative case pursuant to 20 C.F.R. §725.414(a)(2)(i). Rather, as previously noted, claimant designated Dr. Miller's positive reading of the May 24, 2007 x-ray as his physician's interpretation in rebuttal to Dr. Patel's negative reading of this x-ray that was submitted into the record by the Director, pursuant to 20 C.F.R. §725.406. 20 C.F.R. §725.414(a)(2)(ii). Thus, because the administrative law judge properly determined that the pertinent regulation at 20 C.F.R. §725.414(a)(3)(ii) did not provide employer with an opportunity to rebut Dr. Miller's reading of the May 24, 2007 x-ray, *see Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430, 2-463 (4th Cir. 2007); *Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155 (2006),[3] we reject employer's assertion that the administrative law judge erred in excluding Dr. West's negative reading of the May 24, 2007 x-ray from the record.[4] We, therefore, affirm the administrative law judge's decision to exclude Dr. West's negative reading of the May 27, 2007 x-ray.[5]

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[3] Employer cites to the Board's decision in *Ward v. Consolidation Coal Co*., 23 BLR 1-151 (2006), in support of the proposition that each party is entitled to "submit a piece for piece response to evidence." Employer's Brief at 11-12. The Board's holding in *Ward* applied to x-ray interpretations offered in support of each party's affirmative case, and not to x-ray readings offered in rebuttal. *Ward*, 23 BLR at 1-155.

[4] The administrative law judge properly determined that the submission of Dr. Patel's negative reading of the May 24, 2007 x-ray into the record by the Director, Office of Workers' Compensation Programs, pursuant to Section 725.406, did not preclude employer from designating Dr. Halbert's negative reading of this x-ray as its physician's interpretation in rebuttal to the reading of Dr. Patel. *J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-83 n.5 (2008); Decision and Order at 6 n.4; Director's Exhibit 27.

[5] Employer also argues that the administrative law judge erred in announcing his evidentiary ruling in his Decision and Order. At the hearing, employer stated that "it would not have mattered if [it] had designated Dr. West as rebuttal of the [Department of Labor] x-ray or rebuttal of Dr. Miller's x-ray and vice versa with respect to Dr. Halbert's. They're both negative x-ray readings of the May 24, 2007 x-ray that's being submitted as rebuttal of two different readings." Hearing Tr. at 15; Director's Exhibit 27; Employer's

Next, we address employer's contention that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R §718.202(a)(1). Employer argues that the administrative law judge impermissibly relied upon numerical superiority alone to resolve conflicts in the x-ray evidence of record, and that he ignored the contemporaneous timing of the x-rays. We disagree.

The administrative law judge summarized the nine interpretations of three x-rays taken on February 9, 2007, April 20, 2007, and May 24, 2007. Decision and Order at 5-6. In considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge accorded greater weight to the physicians who are dually-qualified as B readers and Board-certified radiologists.[6] The administrative law judge determined that the February 9, 2007 x-ray was positive for pneumoconiosis, as it was read as positive by Dr. Alexander, a dually-qualified radiologist, Director's Exhibit 29, and as negative by Dr. Westerfield, a B reader. Employer's Exhibit 2; Decision and Order at 6. The administrative law judge also determined that the April 20, 2007 x-ray was positive for pneumoconiosis, as it was read as positive by Drs. Alexander and Ahmed, dually-qualified radiologists, Director's Exhibit 29; Claimant's Exhibit 1, and as negative by Drs. Dahhan and Westerfield, B readers. Director's Exhibit 12, Employer's Exhibit 2; Decision and Order at 6. By contrast, the administrative law judge determined that the May 24, 2007 x-ray supported a finding of no pneumoconiosis, because it was read as positive by Dr. Miller, a dually-qualified radiologist, Director's Exhibit 33, and as negative by Dr. Patel, a Board-certified radiologist, and by Dr. Halbert, a dually-qualified radiologist. Director's Exhibit 10; Director's Exhibit 27; Decision and Order at 6. Thus, the administrative law judge found that the preponderance of the x-ray readings was positive for pneumoconiosis. Decision and Order at 6.

The administrative law judge acted within his discretion in giving greater weight to the preponderance of the positive x-ray readings by physicians who are dually-qualified as B readers and Board-certified radiologists. *See Woodward v. Director*,

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Exhibit 1. While we agree with employer that the administrative law judge should have rendered his evidentiary determination prior to issuing his Decision and Order, as consistent with the principles of fairness and administrative efficiency, we find no error in this case, as employer did not argue that good cause existed for the submission of Dr. West's negative reading of the May 24, 2007 x-ray. *See L.P. v. Amherst Coal Co.*, 24 BLR 1-55, 1-63 (2008).

[6] Section 718.202(a)(1) provides that where two or more x-ray reports are in conflict, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

OWCP, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004)(*en banc*). Consequently, we reject employer's assertions that the administrative law judge impermissibly relied upon numerical superiority alone to resolve conflicts in the x-ray evidence of record, and that he ignored the contemporaneous timing of the x-rays. Further, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Employer also contends that the administrative law judge erred in finding that the pulmonary function study evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). The administrative law judge considered the results of the four qualifying[7] pulmonary function studies that were conducted on February 9, 2007, April 20, 2007, May 25, 2007, and March 10, 2008. Decision and Order at 11-12; Director's Exhibits 10, 12, 29; Claimant's Exhibit 2. In evaluating the February 9, 2007 pulmonary function study, the administrative law judge considered the results of the study that were questioned by Dr. Westerfield.[8] The administrative law judge determined that Dr. Westerfield's explanation for invalidating the February 9, 2007 study was not adequately explained or reasoned, in light of the administering physician's notation that claimant showed good effort and cooperation. Hence, the administrative law judge found that the February 9, 2007 study was valid. Director's Exhibit 29; Decision and Order at 12. The administrative law judge then excluded the results of the April 20, 2007 pulmonary function study, because it was invalidated by Dr. Dahhan, the administering physician, and Dr. Westerfield. Director's Exhibit 12; Employer's Exhibit 2; Decision and Order at 12. In evaluating the May 25, 2007 pulmonary function study, the administrative law judge considered the statement of Dr. Alam, the administering physician, along with Dr. Westerfield's opinion.[9] In so doing, the administrative law judge determined that the

[7] A "qualifying" pulmonary function study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[8] In his report, Dr. Westerfield reviewed the curves and raw data of the February 8, 2007 pulmonary function study and stated that "[t]hese are not valid studies by anybody's criteria, particularly the American Thoracic Society, and in my mind, it's worthless information." Employer's Exhibit 2 at 19-20.

[9] Dr. Alam stated that the data was acceptable and reproducible, and that the patient gave good effort and cooperation. Director's Exhibit 10. Dr. Westerfield opined that while the results were officially valid, they were not indicative of claimant's

May 25, 2007 study was valid, as Dr. Westerfield did not indicate that the study was invalid, but merely recommended that the study should be repeated. Decision and Order at 12. Further, in evaluating the March 10, 2008 pulmonary function study, the administrative law judge determined that this 2008 study by Dr. Alam contained a notation of a severe restriction, while Dr. Alam's May 25, 2007 study showed only a moderate restriction. The administrative law judge concluded that both the May 25, 2007 and the March 10, 2008 studies were valid, because pneumoconiosis is an irreversible and progressive disease, and the worsening of the values between the 2007 test and the 2008 test were consistent with the disease's progression. *Id*.

We find no error with the administrative law judge's consideration of the February 9, 2007, April 20, 2007, and May 25, 2007 pulmonary function studies. However, as employer argues, the April 10, 2008 pulmonary function study did not contain a statement of the patient's cooperation and understanding. Consequently, the administrative law judge erred in failing to consider whether the April 10, 2008 study was in substantial compliance with the quality standards set forth at 20 C.F.R. §718.103. Additionally, while we find no merit in employer's contention that the administrative law judge substituted his opinion for that of the physicians when discussing the validity of the April 10, 2008 study, we note that the progressive nature of pneumoconiosis is not a proper basis on which to determine the validity of a pulmonary function study. 20 C.F.R. §718.103. Thus, we vacate the administrative law judge's finding that the pulmonary function study evidence was sufficient to establish total disability at Section 718.204(b)(2)(i). On remand, the administrative law judge should reweigh the pulmonary function study evidence after considering whether the April 10, 2008 pulmonary function study substantially complies with the quality standards set forth at Section 718.103.

Employer further contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer argues that the administrative law judge erred in failing to comply with 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), when weighing the medical opinion evidence at Section 718.204(b)(2)(iv). Employer maintains that the administrative law judge did not provide a reason for discounting the opinions of Drs. Dahhan and Westerfield. Employer additionally argues that the administrative law judge erred in failing to consider relevant evidence and in merging his analysis of the issue of disability with his analysis of the issue of disability causation. Employer also argues that the administrative law judge

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respiratory function due to the large number of efforts required by claimant to perform the test. Employer's Exhibit 2 at 14, 17.

erred in failing to weigh all of the evidence together, both like and unlike, as required by Section 718.204(b).

At Section 718.204(b)(2)(iv), the administrative law judge noted that "[t]wo of the three physicians who evaluated claimant found that he was not totally disabled from a pulmonary standpoint." Decision and Order at 13. The administrative law judge gave greater weight to the opinion of Dr. Alam[10] than to the opinions of Drs. Westerfield[11] and Dahhan,[12] because he found that Dr. Alam's opinion was "better supported by the objective medical evidence." *Id*. at 14. In addition, the administrative law judge found that "Dr. Alam's finding of pneumoconiosis [was] supported by x-ray evidence in the record and claimant's symptoms." *Id*. Further, the administrative law judge found that "[Dr. Alam's] finding of total disability due to pneumoconiosis is supported by the pulmonary function test results that show a progressive worsening of claimant's respiratory capacity and the length of his coal mine employment." *Id*. The administrative law judge therefore found that claimant established total disability under

[10] Dr. Alam diagnosed a severe airflow obstruction with severe restriction, and opined that claimant has clinical and legal pneumoconiosis, emphysema, chronic bronchitis, dyspnea due to deconditioning, and coronary artery disease (CAD). Dr. Alam opined that, from a pulmonary point of view, claimant was permanently disabled due to coal workers' pneumoconiosis, cardiac disease, and tobacco abuse, and that forty percent of claimant's impairment is related to his lungs. Director's Exhibit 10, Claimant's Exhibit 2.

[11] In his consulting report, Dr. Westerfield found that claimant has no clinical or legal pneumoconiosis, as the doctor attributed all of claimant's symptoms to CAD, smoking, and obesity. Dr. Westerfield noted that he "could not say" whether claimant had a restrictive or obstructive pulmonary disease, but determined that "with claimant's obesity, it is likely that he has some decrease in his oxygenation, (sic) however, it is unlikely that he has reached disability standards." Director's Exhibit 26. Dr. Westerfield opined that claimant is not suffering from a chronic dust disease of the lung due to his coal mine employment. *Id*.

[12] Dr. Dahhan found that claimant has no x-ray evidence of clinical pneumoconiosis. Based on claimant's poor performance on the vent study, Dr. Dahhan determined that claimant has "no significant respiratory impairment and/or disability" and "retains the respiratory capacity to return to his [usual] coal mine employment." Director's Exhibit 12. Dr. Dahhan diagnosed rheumatoid arthritis, CAD, and hypertension, but found no evidence of pulmonary impairment and/or disability caused by, or related to, the inhalation of coal dust. *Id*.

Section 718.204(b)(2)(iv) and that claimant was entitled to benefits. Decision and Order at 14.

Because the administrative law judge conflated the issues of disability and disability causation, we vacate the administrative law judge's finding at Section 718.204(b)(2)(iv) and remand the case for further consideration of the medical opinion evidence on the issue of total respiratory disability. On remand, the administrative law judge must consider the medical opinion evidence in compliance with the APA, addressing the accuracy of the medical opinion evidence with regard to the length of claimant's coal mine employment and his smoking history, and then determining if they affect the credibility of the medical opinion evidence.

If, on remand, the administrative law judge finds that the medical evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), then he should weigh all the relevant evidence together, both like and unlike, to determine whether the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*). In addition, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), then he should perform a separate analysis and determine whether the evidence establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

Furthermore, because we are remanding the case to the administrative law judge for a reweighing of the medical opinion evidence, we also vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[13] On remand, the administrative law judge

[13] The Board has long held that Section 718.202 provides four alternative methods for establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and has declined to extend the holding in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), outside of the United States Courts of Appeals for the Third and Fourth Circuits, respectively. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*). Thus, our affirmance of the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) would ordinarily obviate the need for the administrative law judge to consider whether the medical opinion evidence is sufficient to establish the existence of clinical and/or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Dixon*, 8 BLR at 1-345. However, in this case, the administrative law judge's finding that the evidence was sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) rests on Dr. Alam's opinion that claimant has clinical and legal coal workers' pneumoconiosis, and that he is permanently disabled

must consider the medical opinion evidence at 20 C.F.R. §718.202(a)(4) in accordance with the APA. Specifically, the administrative law judge must consider whether the medical opinion evidence establishes the existence of clinical pneumoconiosis and/or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge should also consider the opinion of Dr. Alam, claimant's treating physician, pursuant to the criteria set forth at 20 C.F.R. §718.104(d).

Finally, we note that because this case was filed after January 1, 2005 and the parties stipulated to sixteen years of qualifying coal mine employment, the administrative law judge must initially consider the impact of the recent amendments to the Act, which became effective on March 23, 2010, on this case, including whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

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from a pulmonary point of view because of his chronic pulmonary problems that are substantially aggravated by coal dust exposure. Claimant's Exhibit 2. Dr. Alam also opined that claimant is permanently disabled from a pulmonary point of view due to his coal workers' pneumoconiosis. Director's Exhibit 10. Thus, the administrative law judge's disability causation finding is affected by the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge must consider whether the medical opinion evidence is sufficient to establish the existence of clinical and/or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's 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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge