BRB No. 02-0154 BLA

MARVIN PROFFITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FALCON COAL COMPANY	)	DATE ISSUED:
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

W. Barry Lewis (Lewis & Lewis), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (01-BLA-0170) of Administrative Law Judge Thomas M. Burke 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).[1] Based on the filing date of January 14, 2000, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with eighteen years of coal mine employment and found employer to be the responsible operator. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b) and sufficient to demonstrate the presence of 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 findings of the administrative law judge at Section 718.202 (a)(1) and at Section 718.204(c). Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds only to the issue of the application of the new regulation at Section 718.204(c).[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first asserts that the administrative law judge erred in finding that the x-ray evidence established the existence of pneumoconiosis. Specifically, employer contends that the administrative law judge erred in rejecting Dr. Branscomb's finding that he did not believe the x-ray showed the existence of pneumoconiosis despite his positive reading, not because of technical flaws in the x-ray, but because the doctor fully explained why the abnormalities seen on x-ray were more reflective of claimant's morbid obesity, not pneumoconiosis. Employer also contends that the administrative law judge erred in crediting the most recent positive x-ray solely due to its recency as it was taken only four months after the second most recent x-ray which was interpreted as negative. We agree.

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, at 20 C.F.R. §§718.203(b), and 718.204(c)(4)(2000), now cited as 718.204(b)(2)(iv), and on onset date, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge noted that there were nineteen readings of seven different x-rays to consider and that seven of these readings were interpreted as positive while twelve were interpreted negative. The administrative law judge accorded less weight to Dr. Branscomb's positive x-ray interpretation because Dr. Branscomb later indicated on deposition that this interpretation was not consistent with pneumoconiosis and the changes were due to technical factors and because Dr. Branscomb was not a B-reader at the time he interpreted the x-ray.

In his report, Dr. Branscomb refers to the charges seen on x-ray as due to "technical factors." As employer contends, however, in his deposition Dr. Branscomb states that while he originally interpreted the February 2, 2000 x-ray as positive for pneumoconiosis, he later determined, after reviewing the evidence of claimant's morbid obesity, that the results on x-ray reflected claimant's morbid obesity, not pneumoconiosis, *i.e.*, "[t]his usual finding in a person of that level of obesity is to make the film look more like a positive film," Employer's Exhibit 1, Deposition at 26, and that the x-ray did not support a finding of pneumoconiosis, "[t]he distribution of the changes which I described was not consistent with pneumoconiosis in its usual presentation and the distribution and character of the changes didn't fit." Employer's Exhibit 1, Branscomb Deposition at 26.[3] Thus, the administrative law judge's rejection of Dr. Branscomb's finding of no pneumoconiosis on x-ray merely because of "technical problems" with the x-ray does not fully explain Dr. Branscomb's finding on x-ray. We must, therefore, vacate the administrative law judge's finding regarding Dr. Branscomb's x-ray and remand the case for him to reconsider Dr. Branscomb's testimony regarding the x-ray in question. *See Cranor v. Peabody Coal Co.*, 21 BLR 1-1, 1-5 (1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*); *Valazak v. Bethlehem Mines Corp.*, 6 BLR 1-282, 1-283-4 (1983). On remand, of course, the administrative law judge must consider Dr. Branscomb's qualifications along with the qualifications of the other x-ray readers in assessing the credibility of the x-ray readings. 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

[3] Dr. Branscomb classified the February 2, 2000 x-ray as 2/1 s, p, but also made the following comments, "There is a very fine interstitial change more intense near the pleura and more in the lower lobes. The process looks much more like UIP or sarcoid than CWP." Employer's Exhibit 1.

Turning to the remaining six positive readings, the administrative law judge found it significant that all were by different B-readers, three of whom were also Board-certified radiologists, especially since the most recent x-ray was interpreted as positive for pneumoconiosis by a B-reader. He found that the twelve negative interpretations represented readings by only three different B-readers, who each reread four of claimant's x-rays. As employer contends, however, the administrative law judge did not consider that this x-ray was taken only four months after the next most recent x-ray which was interpreted as positive by one Board-certified B-reader, but negative by three Board-certified B-readers.[4] On remand, while the administrative law judge may properly credit the most recent x-ray of record, *see Adkins, supra*; in this case, he must provide more explanation and discussion for why he finds that x-ray more credible, where the x-rays are only separated by a short period of time. *See* 20 C.F.R. §718.202(a)(1); *Adkins, supra*; *see also Staton, supra*; *Woodward, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

Further, because the record in this case indicates that claimant's last coal mine employment took place in Virginia, the law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, must be applied in deciding this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989). The Fourth Circuit has held that, in determining whether the existence of pneumoconiosis is established at Section 718.202(a), the administrative law judge must weigh all relevant evidence together, rather than merely within the discrete subsections of Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162, 2-170 (4th Cir. 2000); *compare Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107, 2-119 (6th Cir. 2000); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Because the administrative law judge has failed to do so in this case, his finding of pneumoconiosis must be vacated and the case must be remanded for consideration pursuant to *Compton*, *supra*.

Employer next contends that the administrative law judge erred in finding disability causation established at Section 718.204(c) as: the evidence of record shows that the cause of claimant's disability was cigarette smoking, heart disease, and obesity which the administrative law judge failed to address; the evidence is insufficient to prove that

[4] Moreover, the x-ray taken December 12, 2000, one month before the January 13, 2001, x-ray was also read as positive by one Board-certified B-reader, but negative by three Board-certified B-readers. *See* Decision and Order at 4.

pneumoconiosis contributed to claimant's disability; and the administrative law judge erred in according greater weight to the opinions of Drs. Forehand and Rasmussen over the better reasoned opinions of Drs. Fino, Branscomb, and Castle. Additionally, employer contends that the administrative law judge erred in applying the newly amended regulation at Section 718.204(c) to this claim in which the date of claimant's last exposure to coal dust was prior to the effective date of the new regulations and the claim was filed prior to the effective date of the new regulations.

Contrary to employer's contention the administrative law judge properly considered this claim under the new regulation at Section 718.204(c). 20 C.F.R. §718.2. In finding that the opinions of Drs. Forehand and Rasmussen established that claimant's pneumoconiosis constituted "a material adverse effect [on claimant's respiratory condition] as required by the amended regulations," Decision and Order at 13, the administrative law judge credited them over the opinions of Drs. Fino, Branscomb, and Castle because he found Dr. Rasmussen's credentials to be most impressive of record based on his extensive "expertise in the specific area of black lung disease" inasmuch as he "participated in several coal mine health and research advisory committees, including the one which developed the disability standards for the Federal Black Lung program," and "authored many articles relevant to the area of black lung disease and several which are specifically related to the effects of smoking and occupational exposure." Decision and Order at 13; Claimant's Exhibit 2; Director's Exhibit 8. While the administrative law judge could accord greater weight to the opinion of Dr. Rasmussen based on his superior credentials, *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, 21 BLR 2-269 (4th Cir. 1997); *see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), the administrative law judge, as employer contends, failed to explain sufficiently why he found Dr. Forehand's opinion more credible that the opinions of Drs. Castle, Fino, and Branscomb inasmuch as the latter physicians provided better explained opinions for their conclusion that smoking was the cause of claimant's respiratory disability. *See Hicks*, *supra*; *Akers*, *supra*; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985); *Clark*, *supra*.

Additionally, the administrative law judge found that the smoking history reported by claimant to his examining physicians ranged between 8 and 10 pack years which is consistent with his testimony that he started smoking at age 25 (which would be in 1972, since claimant was born in 1948) and smoked about a half pack of cigarettes per day until his first heart attack in 1988 when he quit smoking. Decision and Order at 13. The administrative law judge, therefore, rejected the opinions of Drs. Fino and Castle, because their opinions that claimant's disability was due to smoking were based on an assumption that claimant was a heavier smoker than was established by the record. Decision and Order at 13. Employer contends, however, that claimant gave conflicting smoking histories to the examining physicians, *i.e.*, anywhere from 7.5 pack years to a maximum of 52 pack years from 1962 to 1988, which the administrative law judge must resolve in determining the credibility of the

opinions on disability causation. Specifically, employer contends that claimant reported to Dr. Fino that he had a 10 to 20 pack year history of cigarette smoking from 1962 to 1982; he reported to Dr. Forehand that he had a 15 to 30 pack year history from 1973 to 1988; and he reported to Dr. Rasmussen that he had a 10 to 20 year smoking history from 1968 to 1986. Employer's Brief at 21.

A review of the medical opinions shows that claimant reported a 10 to 30 year smoking history to the various physicians. Claimant reported, however, smoking only half a pack daily to all the physicians, which would appear to support the administrative law judge's finding of an 8 to 10 pack year history. *See* Employer's Exhibits 1, 6; Director's Exhibits 37, 8; Claimant's Exhibit 1. A review of the record shows that Dr. Castle stated that the results of objective testing done on claimant would indicate that he had a far greater smoking history than he had reported. Employer's Exhibit 6 at 8. Accordingly, inasmuch as we are remanding this case for reconsideration of the evidence on the issue of pneumoconiosis, the administrative law judge should also reconsider the medical opinion evidence on disability causation and the evidence regarding claimant's smoking history.[5]

Likewise, because the administrative law judge erred in rejecting Dr. Branscomb's finding that claimant's x-ray did not show evidence of pneumoconiosis without considering his commentary on the x-ray, we must also vacate the administrative law judge's accordance of less weight to Dr. Branscomb's disability causation opinion for that reason. Additionally, as employer contends, the fact that Dr. Branscomb did not personally examine claimant, does not automatically render his opinion less credible than the other opinions of record. *See Hicks*, *supra*; *Akers*, *supra*. The administrative law judge must, therefore, reconsider the evidence regarding disability causation, if reached.

[5] There is no evidence in the record which appears to support employer's assertion that any of the physicians reported a two pack a day smoking history for up to 40 years. Employer's Brief at 23; *see* Employer's Exhibits 1, 6; Director's Exhibits 8, 37; Claimant's Exhibit 1. Employer may be reading the notation of "1/2" on the physicians' reports as one to two years instead of one-half. *See* Employer's Exhibits 1, 6; Director's Exhibits 8, 37; Claimant's Exhibit 1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge