BRB No. 06-0843 BLA

ROBERT S. TAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 08/24/2007
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2004-BLA-5350) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge found that claimant established a coal mine employment history of eighteen years. Decision and Order at 6. In considering entitlement, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or

that he was totally disabled by the disease pursuant to 20 C.F.R. §718.204(c).[1] Decision and Order at 6-17. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred: in disregarding portions of claimant's rehabilitative evidence; in failing to consider all the evidence and resolve inconsistencies in the evidence regarding claimant's smoking history; and in failing to find that the x-ray and the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4). Employer responds, urging that the decision denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[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).

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).[3]

We first address claimant's argument that the administrative law judge erred in disregarding portions of claimant's rehabilitative evidence. Specifically, claimant contends that the administrative law judge erred in excluding portions of Dr. Cohen's

---

[1] The administrative law judge found that the parties stipulated that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 17.

[2] The administrative law judge's finding of eighteen years of coal mine employment, as well as his findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the state of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

Second Supplemental Consulting Medical Opinion (second supplemental opinion), dated October 17, 2005, Claimant's Exhibit 7, which was submitted as rehabilitative medical evidence pursuant to Section 725.414(a)(2)(ii),[4] in response to Dr. Branscomb's opinion criticizing Dr. Cohen's first opinion. Claimant contends that all of Dr. Cohen's second supplemental opinion should have been considered as rehabilitative evidence.

The procedural history relevant to this issue is as follows. Claimant initially submitted a medical report by Dr. Cohen, dated March 10, 2005, in which the physician opined that claimant suffered from pneumoconiosis.[5] Claimant's Exhibit 5. Subsequent to the date of that opinion, Dr. Branscomb was deposed on behalf of employer. Dr. Branscomb testified that claimant suffered from severe emphysema, bronchitis and asthma, unrelated to coal mine dust exposure. Employer's Exhibit 11. Reviewing Dr. Cohen's opinion, Dr. Branscomb criticized Dr. Cohen's conclusions, noting that Dr. Cohen was unaware of claimant's lengthy cigarette smoking history. Dr. Branscomb further testified that Dr. Cohen's findings were entirely consistent with asthma, not coal workers' pneumoconiosis. In response to Dr. Branscomb's opinion, claimant submitted the second supplemental opinion from Dr. Cohen, seeking to rehabilitate Dr. Cohen's earlier conclusions. On November 14, 2005, employer requested that Dr. Cohen's second supplemental opinion be stricken from the record, arguing that because the opinion went beyond rehabilitation, it constituted a separate medical opinion and was, therefore, barred

---

[4] Section 725.414(a)(2)(ii) states in pertinent part:

> Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

20 C.F.R. §725.414(a)(2)(ii).

[5] Section 725.414(a)(2)(i) limits the amount of evidence that can be submitted by claimant in support of his affirmative case, *e.g.*, no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i).

The medical opinions submitted by claimant in support of his affirmative case were the March 10, 2005 report of Dr. Cohen, Claimant's Exhibit 5, and an August 3, 2005 supplemental report from Dr. Cohen. Claimant's Index of Exhibits.

by the evidentiary limitations at 20 C.F.R. §725.414(a)(2)(i).[6] Claimant objected to employer's motion to strike, explaining how all of Dr. Cohen's second supplemental opinion was rehabilitative. Pursuant to employer's request, by Order dated November 22, 2005, the administrative law judge found that Dr. Cohen's second supplemental opinion constituted both a rebuttal and a rehabilitative opinion. Rather than granting employer's motion to strike Dr. Cohen's second supplemental opinion, the administrative law judge admitted it and allowed employer to file a supplemental report from Dr. Branscomb in response to Dr. Cohen's second supplemental opinion. November 22, 2005 Order Denying Employer's Motion to Strike Dr. Cohen's Second Supplemental Medical Report. Subsequent to that Order, employer informed the administrative law judge that Dr. Branscomb had retired and was not, therefore, able to provide any further information. Accordingly, employer again requested that Dr. Cohen's second supplemental opinion be stricken, or that, in the alternative, employer be allowed to rehabilitate Dr. Branscomb's opinion with an opinion from Dr. Zaldivar. The administrative law judge denied employer's request to strike Dr. Cohen's second supplemental opinion in its entirety. Instead, the administrative law judge found that portions of the opinion constituted rebuttal, not rehabilitative evidence, and struck those sections he determined were rebuttal. The administrative law judge, however, found the remaining portions of the report to be admissible as rehabilitative evidence, and stated that they would be considered in his weighing of the evidence. January 25, 2006 Order Denying Employer's Request for Reconsideration of Its Motion to Strike Dr. Cohen's Second Supplemental Medical Report.

Claimant asserts, however, that the disregarded portions of Dr. Cohen's second supplemental opinion were rehabilitative in nature and should not, therefore, have been deleted without any explanation as to why the administrative law judge found them to be rebuttal as opposed to rehabilitative. Claimant asserts that the disregarded portions were rehabilitative because they responded to Dr. Branscomb's criticism of what Dr. Cohen found in his initial report regarding the effects of coal dust exposure on claimant's pulmonary disease, particularly with regard to the existence of asthma and the connection between claimant's chronic obstructive pulmonary disease and coal mine employment. Claimant asserts, therefore, that because Dr. Cohen's entire second supplemental opinion responded to Dr. Branscomb's criticism, no portion of it should have been stricken and that the administrative law judge failed to explain why some portions of the opinion were stricken as rebuttal evidence while other portions were admitted as rehabilitative. Claimant's argument has merit.

[6] In a supplemental opinion dated August 3, 2005, Dr. Cohen stated that he had reviewed additional treatment records, as well as a July 16, 2002 x-ray. Based on his review of this additional evidence, he reiterated his finding that claimant suffered from a coal mine dust related disease. Claimant's Exhibit 6.

While an administrative law judge is granted broad discretion in resolving procedural disputes, *see Troup v. Reading Anthracite Coal Co.*, 21 BLR 1-211 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984), this discretion is not unfettered. The Administrative Procedure Act (the 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), requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record.

In the instant case, review of Dr. Cohen's second supplemental opinion appears to show that Dr. Cohen was responding to Dr. Branscomb's critique of Dr. Cohen's earlier opinion. Claimant's Exhibit 7. The administrative law judge, however, failed to explain his basis for determining what was rebuttal evidence and not, therefore, admissible, as opposed to what was rehabilitative evidence and, therefore, admissible. This failure constitutes a violation of the APA. We, thus, vacate the administrative law judge's Decision and Order Denying Benefits and remand the case to the administrative law judge to clarify his analysis of Dr. Cohen's second supplemental opinion.

Claimant also contends that the administrative law judge erred in finding that the x-ray evidence of record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, claimant contends that although the administrative law judge correctly summarized the x-ray evidence, and correctly noted that there were an equal number of positive and negative readings of the three x-rays of record, his finding that the readings were in equipoise failed to resolve the credibility of the conflicting readings or consider the comments made by the readers regarding their x-ray findings.

In considering the evidence pursuant to Section 718.202(a)(1), the administrative law judge found that the record consisted of eleven readings of three x-rays. He found that five of those readings were positive for pneumoconiosis, Director's Exhibit 19; Claimant's Exhibits 1-4, while five were negative for pneumoconiosis, Director's Exhibits 31, 32; Employer's Exhibits 1, 9, 10, and one was read for quality only, Director's Exhibit 20. Because of the equal number of negative and positive readings rendered by physicians with the dual-qualifications of B reader and Board-certified radiologist,[7] the administrative law judge properly found that claimant was unable to

[7] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S.

affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §§718.102(c); 718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). Contrary to claimant's assertion that the administrative law judge failed to observe the comments made by the physicians in addition to the classification of the x-rays under ILO/U-C standards, comments made by physicians on the readings, regarding the presence or absence of emphysema, were not relevant to whether the readings established the presence of clinical pneumoconiosis at Section 718.202(a)(1). 20 C.F.R. §§718.102, 718.202; *see Cranor v. Peabody Coal Co.*, 21 BLR 1-201 (1999); *Trent*, 11 BLR at 1-28. We affirm, therefore, the administrative law judge's finding that the x-ray evidence failed to establish the presence of pneumoconiosis at Section 718.202(a)(1), as he rationally found the readings were in equipoise and thus not supportive of claimant's burden of affirmatively establishing the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant also challenges the administrative law judge's finding regarding claimant's smoking history and his finding that the medical opinion evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4). Claimant contends that the administrative law judge failed to sufficiently explain how he determined that claimant had a smoking history of "over one pack to half a pack of cigarettes per day from 1961 to 2002,"[8] Claimant's Brief at 12; Decision and Order at 16, in contrast to claimant's testimony that he did not start smoking until 1967, and did not exceed an average daily use of less than one pack per day. Claimant's Brief at 3; Hearing Transcript at 30-31. Claimant contends, therefore, that the administrative law judge erred in finding that claimant began smoking in 1961 and smoked over a pack a day based on information contained in claimant's treatment accord, as the information contained in the treatment record was conflicting and the administrative law judge did not resolve the conflict.[9]

1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

[8] The record shows that claimant stopped smoking in February of 2002 when he had heart bypass surgery.

[9] The various smoking histories contained in the record include a range of twenty to forty years of smoking and either one-half to two packs daily.

In determining claimant's smoking history, the administrative law judge acknowledged that claimant testified that he started smoking in 1967 and quit in 2002, but found claimant's hearing testimony to be less persuasive than the various smoking histories listed in claimant's treatment records. Based upon those records, the administrative law judge found that claimant smoked "over a pack to half-a pack" of cigarettes per day from 1961 to 2002, *i.e.*, a twenty to forty pack year history. Decision and Order at 9.

We reject claimant's assertions regarding the administrative law judge's length of smoking determination and hold that the administrative law judge's determination is rational and supported by substantial evidence. The administrative law judge's determination regarding claimant's smoking history reflects his consideration of all of the notations in the record pertaining to claimant's smoking history. As employer points out in his response brief, the determination of a twenty to forty pack year smoking history is consistent with the opinion of Dr. Zaldivar, who opined that the miner smoked approximately one-half pack per day for forty-two years, Employer's Exhibit 4, and the opinion of Dr. Cohen, who opined that the miner had a seventeen to thirty-four year pack history, Employer's Exhibit 5. Likewise, as employer points out, the smoking histories contained in the treatment records were reported to the doctors by claimant. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge, therefore, rationally found that claimant's testimony that he only started smoking in 1967 was not persuasive as it was inconsistent with the entirety of the evidence in the treatment records and medical opinions regarding claimant's smoking history. *See generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). We, therefore, affirm the administrative law judge's smoking history determination as it is supported by substantial evidence.

Finally, claimant contends that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Branscomb, that claimant had asthma and emphysema due to smoking, rather than pneumoconiosis, and in discounting the opinions of Drs. Porterfield and Cohen, that claimant had pneumoconiosis. In finding that the medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge recognized that claimant suffered from a severe respiratory impairment, but found that the medical opinion evidence did not establish that it was pneumoconiosis, as defined by the Act and the regulations. Decision and Order at 15. The administrative law judge noted that claimant's treatment records did not contain a diagnosis of pneumoconiosis, but mentioned claimant's smoking and tobacco abuse history as the "primary areas of concern." Decision and Order at 11. Regarding the medical opinions, the administrative law judge noted that both Drs. Zaldivar and Branscomb found pneumoconiosis to be absent, and pointed to tobacco abuse as the cause of claimant's respiratory impairment, while Dr. Porterfield diagnosed clinical pneumoconiosis by x-ray and also found legal pneumoconiosis as claimant's

respiratory impairment was 70% due to coal mine employment and 30% due to smoking. The administrative law judge also found that Dr. Cohen diagnosed pneumoconiosis.

The administrative law judge, however, discounted Dr. Porterfield's diagnosis of clinical pneumoconiosis by x-ray as it was contrary to the administrative law judge's finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis. Likewise, the administrative law judge discounted Dr. Porterfield's diagnosis of legal pneumoconiosis as the doctor failed to provide any rationale for his conclusion and the doctor found that claimant's smoking history did not begin until 1982, approximately twenty years later than that found in other medical records and that found by the administrative law judge.[10] The administrative law judge discounted Dr. Cohen's opinion because Dr. Cohen found only a "minimal" smoking history, while the record established that claimant's smoking history was significant. The administrative law judge further noted that although Dr. Cohen ultimately conceded that claimant's smoking history was a contributing factor to claimant's pulmonary impairment, his opinion was still not as persuasive as that of Dr. Zaldivar's, since Dr. Zalidvar detailed claimant's pulmonary condition and etiology in a comprehensive and persuasive manner, provided a well-reasoned and well-documented opinion regarding claimant's bullous emphysema, and appeared to consider the most accurate work and smoking histories. The administrative law judge further noted that Dr. Zaldivar's opinion, that claimant's pulmonary impairment was due to smoking, not coal mine employment, was supported by Dr. Branscomb's opinion, that smoking was the cause of claimant's significant pulmonary disease, and claimant's treatment records which repeatedly referred to claimant's tobacco abuse but failed to include a diagnosis of pneumoconiosis. The administrative law judge also found Dr. Zaldivar's opinion supported by Dr. Scott's findings on CT scan.[11] The administrative law judge concluded, therefore, that the opinion of Dr. Zaldivar, as supported by the opinion of Dr. Branscomb, Employer's Exhibits 4, 5, 11, 12, was entitled to greatest weight, as the opinion "contain[ed] full and compelling explanations [for] why the [c]laimant's pulmonary impairment [was] the result of tobacco abuse as opposed to coal mine dust inhalation." Decision and Order at 16. Accordingly, the administrative law judge found that the medical opinion evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

Because we have held that administrative law judge has not properly analyzed the second supplemental opinion of Dr. Cohen in order to determine whether the entirety of

[10] As discussed previously, claimant testified that he started smoking in 1967.

[11] Dr. Scott, a Board-certified radiologist and B reader, reviewed a CT scan performed on May 12, 2004, Employer's Exhibit 6, and found no evidence of silicosis or coal workers' pneumoconiosis.

the opinion is admissible as rehabilitative evidence, we must vacate the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as the finding was based, in part, upon the relative weight to accord the physicians, including Dr. Cohen. Thus, after determining the admissibility of Dr. Cohen's second supplemental opinion as a rehabilitative opinion, the administrative law judge must again assess the credibility of the medical opinions in light of that determination.[12] Further, in determining whether the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge must weigh the medical opinion evidence together with the x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

[12] We affirm the administrative law judge's rejection of the opinion of Dr. Porterfield. The administrative law judge permissibly rejected Dr. Porterfield's finding that claimant had clinical pneumoconiosis based on the x-ray evidence as the administrative law judge found that the x-ray evidence did not establish pneumoconiosis. The administrative law judge rationally discounted Dr. Porterfield's finding of legal pneumoconiosis because it was based, in part, on the doctor's finding that claimant did not begin smoking until 1987, contrary to the administrative law judge's finding that claimant began smoking in 1961. *See Maypray v. Island Creek coal Co.*, 7 BLR 1-683 (1985).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.[13]

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[13] If, on remand, the administrative law judge determines that claimant has established the existence of pneumoconiosis, he must then determine whether the pneumoconiosis arose out of coal mine employment, and whether it caused claimant's totally disabling respiratory impairment. 20 C.F.R. §§718.203(b), 718.204(c); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).