

BRB No. 06-0864 BLA

LLOYD L. LENTZ)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 08/28/2007
)	
INLAND STEEL COMPANY)	
)	
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 Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose LLC), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (05-BLA-5455) of Administrative Law Judge Michael P. Lesniak 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). Based on claimant's filing date of March 24, 2003, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge accepted the parties' stipulations to eighteen years of coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 2 and n.3; Hearing Transcript at 7, 8.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge determined that the x-ray evidence was equally positive and negative. The administrative law judge found that 20 C.F.R. §718.202(a)(2) and (a)(3) were not applicable in this case, as the claim at issue was filed by a living miner and the record contains no evidence of complicated pneumoconiosis. Upon considering the relevant medical opinions under 20 C.F.R. §718.202(a)(4), the administrative law judge found that the medical opinion of Dr. Schaaf was sufficient to establish the existence of pneumoconiosis. Weighing the medical evidence together, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 13-14; *citing Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).¹ The administrative law also determined that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment. In addition, he found the evidence sufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence of record is sufficient to establish the existence of pneumoconiosis, arguing that the administrative law judge erred in his weighing of Dr. Fino's medical opinion. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not respond in this appeal.²

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. 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

¹ The record supports the administrative law judge's finding that this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 2 n.2.

² The parties do not challenge the administrative law judge's decision to credit the claimant with eighteen years of coal mine employment, or his findings under 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(b)(2). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

Pursuant to Section 718.202(a)(4), the relevant evidence consists of the opinions of Drs. Schaaf, Malhotra, Fino, and Zlupko. Decision and Order at 5-8, 11-13. Based upon an examination and objective testing, Dr. Schaaf diagnosed coal workers' pneumoconiosis, emphysema, and chronic bronchitis. Dr. Schaaf identified coal dust exposure and smoking as the causes of these conditions. Director's Exhibit 11; Claimant's Exhibit 5. Dr. Malhotra examined claimant and diagnosed pneumoconiosis caused by coal dust exposure. Director's Exhibit 12. Based upon an examination, objective testing, and a review of claimant's medical records, Dr. Fino diagnosed emphysema caused by cigarette smoking. Director's Exhibit 15; Employer's Exhibit 2. Dr. Zlupko examined claimant and diagnosed a severe obstructive ventilatory impairment unrelated to coal dust exposure. Director's Exhibit 47; Employer's Exhibit 1.

In weighing the conflicting evidence, including the physician's professional credentials,³ the administrative law judge found that the opinion of Dr. Schaaf was entitled to the greatest weight, as it was reasoned and supported by the objective evidence. Decision and Order at 12-13; Director's Exhibit 11; Claimant's Exhibit 5. The administrative law judge discredited Dr. Malhotra's opinion on the ground that the physician did not address claimant's smoking history. Decision and Order at 12; Director's Exhibit 12. With regard to the contrary opinions, the administrative law judge determined that Dr. Fino's opinion was entitled to little weight, finding that Dr. Fino's definition of a coal dust related disease "does not comport with the reading of the Federal Black Lung regulations." Decision and Order at 12; Director's Exhibit 15; Employer's Exhibit 2. Specifically, the administrative law judge found that Dr. Fino did not identify coal mine dust exposure as a clinically significant contributing factor to claimant's emphysema because he determined that claimant does not have clinical pneumoconiosis. *Id.* The administrative law judge also found that the opinion of Dr. Zlupko, that claimant is not suffering from pneumoconiosis, was entitled to little weight because he did not explain why the evidence presented reveals a smoking related respiratory condition and not a coal dust related condition. Decision and Order at 13; Director's Exhibit 47; Employer's Exhibit 1. In addition, the administrative law judge found that Dr. Zlupko's opinion "does not comply with the Black Lung Regulations" because Dr. Zlupko opined that since

³ The administrative law judge found that Drs. Schaaf and Fino are both Board-certified in Internal Medicine and Pulmonary Disease, as well as B readers. Decision and Order at 13. Drs. Malhotra and Zlupko are Board-certified in Internal Medicine, but are not B readers. *Id.*

claimant's respiratory condition did not develop until after claimant left the mines, it could not be due to coal dust exposure. *Id.*

In challenging the administrative law judge's award of benefits, employer contends that the administrative law judge erred in his weighing of the opinion of Dr. Fino, that claimant's respiratory condition was due solely to his cigarette smoking, arguing that the administrative law judge mischaracterized Dr. Fino's opinion. Employer's Brief at 3. Specifically, employer contends that the administrative law judge erred in finding that Dr. Fino's opinion does not comport with the regulations, arguing that, in this particular case, Dr. Fino concluded that claimant's disabling obstruction is related to his cigarette smoking and not coal dust exposure, but did not conclude that coal dust exposure can never cause a disabling obstructive impairment. Employer's Brief at 4-5. In addition, employer contends that the administrative law judge's characterization of Dr. Fino's opinion results in "the 2000 amendments to the Regulations defining pneumoconiosis at 20 C.F.R. §718.201 as a presumption that all obstructive pulmonary disease in a coal miner is caused by coal dust exposure." Employer's Brief at 4. These contentions have merit, in part.⁴

The administrative law judge found that Dr. Fino concluded that claimant does not have coal workers' pneumoconiosis and that his obstructive bronchitis and emphysema are due to cigarette smoking. Decision and Order at 12. The administrative law judge determined that Dr. Fino's opinion regarding the existence of pneumoconiosis is entitled to little weight, however, because the doctor ultimately rested his conclusions on the fact that he did not find evidence of clinical pneumoconiosis. *Id.* The administrative law judge points to, *inter alia*, Dr. Fino's explanation that the amount of emphysema due to coal dust exposure is directly related to the amount of clinical pneumoconiosis seen on a chest film or autopsy. Decision and Order at 12; Employer's Exhibit 2 at 12-13. Similarly, the administrative law judge found that Dr. Fino stated that because claimant does not have clinical pneumoconiosis, coal dust exposure is not a clinically significant contributing factor to claimant's emphysema. *Id.* Consequently, the administrative law judge found that Dr. Fino's definition of a coal dust related disease does not comport with the regulations.⁵ Decision and Order at 12.

⁴ We affirm the administrative law judge's findings discrediting the opinions of Drs. Malhotra and Zlupko, as they have not been challenged on appeal. *See Skrack*, 6 BLR at 1-711.

⁵ Pneumoconiosis is defined in 20 C.F.R. §718.201(a) as encompassing both clinical and legal pneumoconiosis. 20 C.F.R. §718.201(a)(1), (2). Legal pneumoconiosis is any chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 20 C.F.R. §718.201(a). Legal pneumoconiosis is further defined to include any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 30 U.S.C. §902(b); 20 C.F.R.

However, contrary to the administrative law judge's characterization, Dr. Fino provided a more detailed explanation for his conclusions and did not rely entirely on the fact that he found the x-ray evidence negative for coal workers' pneumoconiosis. Rather, Dr. Fino set forth in detail the rationale for his opinion. In particular, Dr. Fino stated:

I read the chest x-ray as negative. That will, in my opinion, rule out radiographic pneumoconiosis, but certainly does not rule out pneumoconiosis under the broad definition. But the pattern --- the obstruction that I talked about, the bullous emphysema seen on the CT scan of the chest, the lung volume and diffusing capacity studies which clearly show an emphysematous pattern, all of that to me points to a smoking related condition. Considered coal mine dust as a contributing cause, but for the reasons I have already discussed do not find that it is a contributing cause in a clinically significant way.

Employer's Exhibit 2 at 17-18.

The administrative law judge is required to address the specific opinions a physician provides in a particular case, and not selectively analyze portions of that opinion. In this case, the administrative law judge found that Dr. Fino "rests his opinion on the fact that he did not find pneumoconiosis radiographically" and, therefore, found that Dr. Fino's definition of pneumoconiosis does not comport with the regulations. Decision and Order at 12. However, the administrative law judge did not consider the remainder of Dr. Fino's explanation for finding that claimant does not suffer from clinical or legal pneumoconiosis. See Employer's Exhibit 2 at 17. Consequently, the administrative law judge did not consider all of the bases that Dr. Fino identified in support of his opinion. See *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002) citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)(administrative law judge is required to consider quality of a physician's reasoning). Accordingly, the administrative law judge's rejection of Dr. Fino's opinion under Section 718.202(a)(4) for the general reason that it does not comport with the regulations is vacated. In addition, because the administrative law judge relied on his weighing of Dr. Fino's opinion at Section 718.202(a)(4) in determining that claimant

§718.202(a)(2). The comments to the regulations further define chronic obstructive pulmonary disease to include chronic bronchitis, emphysema and asthma. The comments also include a discussion of the literature and background material, which support the Department of Labor's inclusion of emphysema, as well as bronchitis and asthma, within the definition of legal pneumoconiosis. 65 Fed. Reg. 79939-41, 79969-72, 79941-42 (Dec. 20, 2000).

established total disability due to pneumoconiosis, we must also vacate the administrative law judge's finding under Section 718.204(c).

On remand, the administrative law judge must initially reevaluate the opinion of Dr. Fino, *in toto*, pursuant to Section 718.202(a)(4), taking into account his explanation that the objective studies in this case do not support a finding that coal dust exposure contributed to claimant's obstructive disease, in determining whether the physician's overall assessment of claimant's health is credible. Director's Exhibit 15; Employer's Exhibit 2 at 17; *see Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Therefore, the administrative law judge must weigh the explanations provided by Dr. Fino for his conclusions that, in this case, the miner's COPD and emphysema were not due to coal dust exposure but were due to claimant's smoking history, with the opinion of Dr. Schaaf, that claimant suffers from pneumoconiosis, and determine whether claimant has proven the existence of pneumoconiosis pursuant to Section 718.202(a)(4). If the administrative law judge finds that claimant has met his burden under Section 718.202(a)(4), he must then weigh all of the evidence relevant to the existence of pneumoconiosis together to determine whether the presence of the disease has been established at Section 718.202(a). *Williams*, 114 F.3d at 24, 21 BLR at 2-111.

If, on remand, the administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a), he must also determine whether claimant has proven that pneumoconiosis is a substantially contributing cause of his total disability pursuant to Section 718.204(c). 20 C.F.R. §718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge