BRB No. 06-0504 BLA

ROBERT C. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
C & O MINING, INCORPORATED	)	
	)	
and	)	
	)	
HARTFORD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 02/28/2007
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (04-BLA-5217) of Administrative Law Judge Alice M. Craft rendered 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). The administrative law judge credited claimant with 25.32 years of coal mine employment[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4), and she found that employer did not rebut the presumption that the pneumoconiosis arose out of claimant's coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established that claimant suffered from a totally disabling respiratory or pulmonary impairment due, at least in part, to his coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that the evidence established the existence of pneumoconiosis pursuant to Section 718.2002(a)(1),(4), that claimant's pneumoconiosis arose out of his coal mine employment, and that claimant established that his disability was due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. Employer has filed a reply brief, restating its position. The Director, Office of Workers' Compensation Programs, has not submitted a brief.[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).

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*

[1] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibits 2, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

[2] We affirm the administrative law judge's finding of 25.32 years of coal mine employment, and her finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), as they are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(1), employer alleges several errors in the administrative law judge's analysis of the x-ray evidence. The administrative law judge considered eight readings of five x-rays. Dr. Forehand, a B reader, read the September 27, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 14. However, Dr. Wiot, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 41. Based upon Dr. Wiot's "superior radiological qualifications," the administrative law judge accorded greater weight to the negative reading of the September 27, 2002 x-ray. Decision and Order at 19.

Dr. Patel, a B reader and Board-certified radiologist, read the April 3, 2003 x-ray as positive for pneumoconiosis, and Dr. Castle, a B reader, read the April 16, 2003 x-ray as positive for pneumoconiosis. Director's Exhibits 40, 42. Because both of these positive readings were uncontradicted, the administrative law judge found the April 3, 2003 and April 6, 2003 x-rays supportive of a finding of pneumoconiosis.

Dr. Robinette, a B reader, read the February 3, 2004 x-ray as positive for pneumoconiosis, and Dr. Mullens, whose radiological credentials are not in the record, stated that the same x-ray revealed lung disease "consistent with CWP/silicosis." Claimant's Exhibit 1. However, Dr. Wheeler, a B reader and Board-certified radiologist, read the February 3, 2004 x-ray as negative (0/1) for pneumoconiosis. Employer's Exhibit 3. Additionally, Dr. Wheeler classified the July 21, 2004 x-ray as positive (Category 2) for pneumoconiosis. Employer's Exhibit 5. The administrative law judge found that Dr. Wheeler had "superior qualifications," and credited his negative reading of the February 3, 2004 x-ray, and his positive reading of the July 21, 2004 x-ray. Decision and Order at 19. Citing the "temporal proximity" of these two x-rays, the administrative law judge found that "Dr. Wheeler's Category 2 interpretation of the Ju[ly] 2004 study is the most probative and supports a finding of pneumoconiosis." *Id*. Based on this determination, the administrative law judge found that "the majority of recent x-rays . . . were positive, and . . . the positive interpretations are entitled to greater weight than the negative interpretations . . . ." *Id*. Accordingly, the administrative law judge found that claimant established the existence of pneumoconiosis by the x-ray evidence.

Employer first asserts that in considering Dr. Wheeler's interpretation of the July 21, 2004 x-ray, the administrative law judge erred in failing to consider the physician's additional notations on the x-ray form. On the facts of this case, we agree. Dr. Wheeler classified the July 2004 x-ray as 2/1 q, q, and commented, "many small calcified granulomata both hila and few in lower lungs compatible with healed TB or histoplasmosis . . . . *TB can explain all lung disease* and TB or histoplasmosis caused the calcified granulomata but *some small nodules could be CWP*. Get CT for better

evaluation." Employer's Exhibit 5 (emphasis added). A physician's comment that does not undermine the physician's x-ray diagnosis of pneumoconiosis, but merely addresses the source of the diagnosed pneumoconiosis, need not be considered at Section 718.202(a)(1), but is to be considered by the fact finder at Section 718.203, where the issue is whether the pneumoconiosis arose out of coal mine employment. *Cranor v. Peabody Coal Co*., 22 BLR 1-1, 1-5-6 (1999)(*en banc*). On the other hand, a physician's comment that may represent an alternative diagnosis, thereby calling into question the physician's x-ray diagnosis of pneumoconiosis, must be considered at Section 718.202(a)(1). *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*). Because Dr. Wheeler commented that "TB can explain all lung disease," and that "some small nodules *could* be CWP," Employer's Exhibit 5 (emphasis added), those comments address whether pneumoconiosis exists. Consequently, the administrative law judge must consider Dr. Wheeler's comments in determining whether Dr. Wheeler has positively diagnosed pneumoconiosis by x-ray at Section 718.202(a)(1). *See Melnick,* 16 BLR at 1-37. We therefore vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand this case for further consideration.

Employer argues further that the administrative law judge erred by discounting Dr. Wheeler's negative reading of the February 3, 2004 x-ray, based on its temporal proximity with Dr. Wheeler's reading of the July 21, 2004 x-ray, which was treated as positive by the administrative law judge. We agree. The administrative law judge found that "[g]iven the temporal proximity of" the February 3, 2004 and July 21, 2004 x-rays, Dr. Wheeler's "Category 2 interpretation of the Ju[ly] 2004 study is the most probative and supports a finding of pneumoconiosis." Decision and Order at 19. In so doing, the administrative law judge did not explain how the "temporal proximity" of the two x-rays rendered the positive x-ray reading more probative than the contemporaneous, negative reading. *Cf. Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-65 (4th Cir. 1992)(explaining that later, positive x-rays may be more reliable than earlier, negative x-rays). As employer notes, the administrative law judge treated the other x-rays as separate, independent x-rays, yet found that the "temporal proximity" of the February 3, 2004 and July 21, 2004 x-rays caused the positive reading of the July 21, 2004 film to affect the validity of the negative reading of the February 3, 2004 film.[3] We therefore vacate the administrative law judge's finding and remand the case for her to reconsider the x-ray evidence.

However, we reject employer's argument that the administrative law judge's decision to credit Dr. Castle's uncontradicted, positive reading of the April 16, 2003 film

[3] As employer further notes, the administrative law judge treated both of the April 2003 x-rays, taken thirteen days apart, as separate x-rays, in contrast to her treatment of the February 3, 2004 and July 21, 2004 x-rays, taken five months apart.

was inconsistent with her decision to credit the readings by Board-certified radiologists and B readers when resolving conflicting interpretations of other x-rays. The administrative law judge accurately noted that the positive reading of the April 16, 2003 x-ray by B reader Dr. Castle was uncontradicted. Decision and Order at 19; Director's Exhibit 42. Because Dr. Castle's interpretation was the only interpretation of the x-ray taken on April 16, 2003, the administrative law judge did not err in relying on it, even though Dr. Castle is not a dually qualified physician. *See* 20 C.F.R. §718.202(a)(1); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-138 (2006)(*en banc*)(Boggs, J., concurring).

We now consider employer's challenges to the administrative law judge's findings pursuant to Section 718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis,[4] *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). In this case, the administrative law judge found that the medical opinion evidence established the existence of clinical pneumoconiosis only. Decision and Order at 23.

Employer asserts that the administrative law judge erred in finding that the medical opinion evidence established the existence of clinical pneumoconiosis, contending that the physicians who diagnosed clinical pneumoconiosis based their opinions solely on x-ray readings. The administrative law judge found the opinions of Drs. Forehand, Rasmussen, Castle, and Robinette, diagnosing clinical pneumoconiosis, to be more probative that Dr. Ghio's opinion of no clinical pneumoconiosis, "as they are better supported by a preponderance of the objective medical data of record, *i.e.* the preponderantly positive chest x-ray interpretations." Decision and Order at 21; Director's Exhibits 10, 40, 42; Claimant's Exhibit 1; Employer's Exhibit 1.

Because we have vacated the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we also vacate the administrative law judge's finding of clinical pneumoconiosis pursuant to Section 718.202(a)(4). On remand, the administrative law judge must reconsider the medical opinions, after she has reconsidered the x-ray evidence. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Ultimately, the administrative law judge on remand must weigh together the x-ray and medical opinion evidence to determine whether the existence of pneumoconiosis is established. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

[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 also contends that the administrative law judge erred when she found Dr. Ghio's opinion, that claimant does not have legal pneumoconiosis, to be less persuasive. Because the administrative law judge found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), Decision and Order at 23, we need not address employer's assertions in this regard, as any error in the administrative law judge's consideration of Dr. Ghio's opinion concerning the absence of legal pneumoconiosis is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Pursuant to Section 718.203(b), employer asserts that the administrative law judge erred by finding Dr. Wheeler's comments on the July 21, 2004 x-ray to be equivocal and thus insufficient to meet employer's burden to rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment.[5] The administrative law judge was within her discretion to determine whether Dr. Wheeler's comments were equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). However, because we have vacated the administrative law judge's findings that the existence of clinical pneumoconiosis was established by the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1),(4), we also vacate the administrative law judge's finding pursuant to Section 718.203(b), and instruct the administrative law judge on remand to reconsider whether claimant's pneumoconiosis, if established, arose out of coal mine employment.

Employer also challenges the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Because we have vacated the administrative law judge's findings that the existence of pneumoconiosis was established, we also vacate the administrative law judge's disability causation finding pursuant to Section 718.204(c), and instruct the administrative law judge to reconsider this issue, if reached.

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[5] The administrative law judge found equivocal Dr. Wheeler's comment:

> Minimal ill defined mixed irregular and small nodular infiltrates mainly in right apex and lateral portion mid and upper lungs involving pleura mixed with small calcified granulomata with minimal right apical pleural thickening and probable calcified granulomata in hila compatible with TB or histoplasmosis at least partly healed. . . . some small nodules could be CWP but pattern is asymmetrical, mainly peripheral and in right apex which all favors TB. Get CT for better evaluation.

Employer's Exhibit 3; Decision and Order at 24.

Accordingly, the administrative law judge's Decision and Order Granting 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge