

BRB No. 06-0525 BLA

JOHN D. HAMMOND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAUREL CREEK MINING COMPANY, INCORPORATED	)	DATE ISSUED: 02/27/2007
	)	
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 Jeffrey Tureck,  
Administrative Law Judge, United States Department of Labor

Otis R. Mann, Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Charleston, West Virginia, for  
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5705) of  
Administrative Law Judge Jeffrey Tureck rendered 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 credited  
claimant with nineteen years of coal mine employment pursuant to the parties'  
stipulation, and considered the claim, filed on February 13, 2004, pursuant to the

regulations at 20 C.F.R. Part 718.<sup>1</sup> Director's Exhibit 3. The administrative law judge found that the claimant had established that he was totally disabled and, therefore, demonstrated a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d).<sup>2</sup> However, in considering all the evidence of record, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the evidence under 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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'Keefe 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).

Pursuant to Section 718.202(a)(1), the administrative law judge considered nine newly submitted x-ray readings.<sup>3</sup> Decision and Order at 3. The administrative law judge

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<sup>1</sup> The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>2</sup> Claimant's previous claim, filed on September 7, 1993, was denied by the district director on March 3, 1994 because claimant had not demonstrated the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibits 1-4.

<sup>3</sup> The administrative law judge also considered Dr. Simpao's positive interpretations of x-rays dated April 26, 2004 and September 9, 2004, and Dr. Verhulst's reading of the x-ray dated April 26, 2004. The administrative law judge found that Dr. Simpao is not a B reader or a Board-certified radiologist. The administrative law judge

relied on the five interpretations by B readers, which included three positive readings by Dr. Ahmed, who is also a Board-certified radiologist, one negative reading by Dr. Gaziano, who is also a Board-certified pulmonologist, and one negative reading by Dr. Binns, who is also a Board-certified radiologist. *Id.* In comparing the readings by these B readers, the administrative law judge noted that he does not believe readings by dually-qualified B readers are entitled to more weight than those who are also pulmonary specialists, as “[b]oth specialties receive comparable training in the interpretation of chest x-rays.” *Id.* at 3 n. 4. Consequently, in weighing the evidence, the administrative law judge stated that he saw “no basis to give Dr. Ahmed’s three positive readings more weight than the negative readings by two comparably expert physicians.” *Id.* at 4. Claimant argues that each x-ray should be considered individually, and that when the physicians’ interpretations and qualifications are weighed appropriately, all four x-rays establish pneumoconiosis.

The Department of Labor’s regulations direct the proper adjudication of Black Lung claims. According to the regulations, 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)(emphasis added). The regulations go on to provide definitions of Board-certified radiologist, Board-eligible radiologist, certified “B” reader or “B” reader, and qualified radiologic technologist or technician. 20 C.F.R. §718.202(a)(1)((ii)(C)(D)(E)(F). In his analysis, the administrative law judge indicates that there is comparable proficiency between pulmonary specialists, radiologists, and qualified B readers, an opinion not authorized by the regulatory language. *See* 20 C.F.R. §718.202(a)(1)(ii)(C)-(E). Because the administrative law judge impermissibly equated the qualifications of “pulmonary specialists” with those of Board-certified radiologists and certified B readers, we cannot affirm the administrative law judge’s finding that claimant has failed to establish the existence of pneumoconiosis by the x-ray evidence of record. *See* 20 C.F.R. §718.202(a)(1). We must, therefore, vacate the administrative law judge’s findings pursuant to Section 718.202(a)(1).

Under Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Simpao, Majmudar, and Gaziano and found that they were insufficient to establish the existence of either clinical or legal pneumoconiosis.<sup>4</sup> Dr. Simpao examined

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further found the interpretation by Dr. Verhulst to be too ambiguous to be probative because the x-ray was not classified pursuant to 20 C.F.R. §718.102(b), and it did not clearly state whether the x-ray was negative. Decision and Order at 3; Director’s Exhibits 14, 47.

<sup>4</sup> Clinical pneumoconiosis is defined as “those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent

claimant and diagnosed clinical pneumoconiosis based upon his interpretation of the April 26, 2004 x-ray and determined that claimant has a totally disabling pulmonary impairment based upon the results of a pulmonary function study obtained on the same date. The doctor stated that claimant's "multiple years of coal dust exposure [are] medically significant in his pulmonary impairment." Director's Exhibit 14. Dr. Majmudar examined claimant and concluded that he does not have pneumoconiosis and that his totally disabling obstructive impairment was caused solely by cigarette smoking. Director's Exhibit 53. Dr. Gaziano also performed a physical examination and indicated that claimant is totally disabled by chronic obstructive pulmonary disease (COPD) related to smoking and coal dust exposure. Claimant's Exhibit 1.

The administrative law judge discredited Dr. Simpao's opinion on the ground that his diagnosis of clinical pneumoconiosis was merely a restatement of his positive interpretation of the April 26, 2004 x-ray, which conflicted with the administrative law judge's finding that the x-ray evidence was, at best, ambiguous as to the presence of clinical pneumoconiosis. Decision and Order at 4. With respect to the existence of legal pneumoconiosis, the administrative law judge noted that Dr. Simpao did not refer to Dr. Verhulst's report indicating that the April 26, 2004 x-ray was consistent with COPD and did not discuss the significance of claimant's smoking history. *Id.* The administrative law judge also stated that Dr. Simpao did not explain "why pneumoconiosis, rather than or in addition to smoking, is responsible for claimant's impairment." *Id.*

With respect to Dr. Majmudar's opinion, the administrative law judge found that it was not entitled to any weight because the physician failed to explain why he concluded that claimant's COPD was caused solely by his cigarette smoking and neglected to address claimant's employment and smoking histories. Decision and Order at 5. The administrative law judge also discredited Dr. Gaziano's opinion, finding that "it is completely unexplained." *Id.*

Claimant argues that the administrative law judge erred in finding that the evidence did not establish legal pneumoconiosis under Section 718.202(a)(4). Claimant specifically argues that Dr. Gaziano's report is "more documented" and "more reasoned" on this issue and that Dr. Gaziano's qualifications as a B reader and pulmonologist entitle

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deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as any chronic lung disease or impairment that is caused by coal dust exposure arising out of coal mine employment, including any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

his opinion to great weight. Claimant's Brief at 14. Claimant's allegation of error is without merit. The administrative law judge properly discredited Dr. Gaziano's opinion that claimant has legal pneumoconiosis because Dr. Gaziano did not explain how he determined that claimant's COPD was due to both smoking and coal dust exposure. Decision and Order at 5; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

The remainder of claimant's discussion of the administrative law judge's weighing of the medical opinions under Section 718.202(a)(4) consists of identifying the evidence that supports a finding that claimant has pneumoconiosis. Claimant's Brief at 11-14. This constitutes a request that the Board reweigh the evidence, a function that the Board is not empowered to perform. *Anderson*, 12 BLR 1-111, 1-113. Thus, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

In summary, we have affirmed the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4) but vacated the administrative law judge's determination that the x-ray evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(1). Therefore, we remand this case to the administrative law judge for reconsideration of the x-ray evidence under Section 718.202(a)(1) in light of the qualifications of the readers. If the administrative law judge determines on remand that the x-ray evidence supports a finding of clinical pneumoconiosis under Section 718.202(a)(1), the administrative law judge must weigh all of the evidence relevant to Section 718.202(a) together, like and unlike, in order to determine whether claimant has established the existence of pneumoconiosis as defined in Section 718.201(a) by a preponderance of the evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If the administrative finds that claimant has established the existence of pneumoconiosis, he must then address the remaining elements of entitlement.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge