BRB No. 02-0334 BLA

FRANCIS WISCOUNT, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Timothy S. Williams (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-BLA-0040) of Administrative Law Judge Robert D. Kaplan with respect to 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). This is the second time that this case has been before the Board. In a Decision and Order issued on July 23, 2001, the Board vacated the administrative law judge's evidentiary determinations which resulted in the admission of an x-ray reading that the Director, Office of Workers' Compensation Programs (the Director), did not submit within twenty days of the date of the hearing and the withdrawal of three of claimant's x-ray readings from the record. The Board instructed the administrative law judge to determine whether the Director had good cause for failing to timely submit the x-ray reading pursuant to 20 C.F.R. §725.456(b)(2). The Board also instructed the

administrative law judge to provide a rationale for the exclusion of three of claimant's timely submitted x-ray readings. In addition, the Board vacated the administrative law judge's finding, under 20 C.F.R. §718.202(a)(4) (2000), that the medical opinions of record were insufficient to establish the existence of pneumoconiosis.[1] Finally, the Board vacated the administrative law judge's findings with respect to whether claimant was engaged in comparable and gainful employment and with respect to the length of claimant's coal mine employment and instructed the administrative law judge to reconsider these findings on remand. *Wiscount v. Director, OWCP*, BRB No. 00-0933 BLA (July 23, 2001)(unpub.).

In his second Decision and Order, the administrative law judge found that the Director had good cause for his inability to proffer Dr. McLoud's x-ray interpretation more than twenty days before the date of the hearing in this case. The administrative law judge also determined that because the three readings claimant submitted were unnecessarily duplicative, he would not admit them into the record. With respect to the length of claimant's coal mine employment, the administrative law judge found that claimant's testimony regarding his part-time work as a coal truck driver was entitled to no weight. Regarding the merits of entitlement, the administrative law judge determined that the x-ray evidence of record was in equipoise and, therefore, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge found that the medical opinions of record did not support a finding of pneumoconiosis under Section 718.202(a)(4), as the administrative law judge gave greatest weight to the opinion in which Dr. Talati ruled out the presence of the disease. The administrative law judge concluded, therefore, that claimant did not establish the existence of pneumoconiosis and denied benefits accordingly.

[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, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant argues on appeal that the administrative law judge's evidentiary findings were in error and that the administrative law judge did not properly weigh the evidence regarding length of coal mine employment and the existence of pneumoconiosis . The Director has responded and concurs in claimant's allegation that the administrative law judge erred in determining claimant's history of coal mine employment; in weighing the x-ray evidence; and in considering Dr. Kruk's opinion pursuant to Section 718.202(a)(4).[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first turn to the issue of the administrative law judge's admission of the Director's untimely submitted x-ray reading. By the time of the hearing in this case, which was held on February 15, 2000, the Director had submitted two negative readings of the only film of record, which was obtained on July 15, 1999. Director's Exhibits 10, 19. At the hearing, the Director requested an extension of time within which to obtain and submit the x-ray interpretation of Dr. McLoud. The administrative law judge granted the Director's request and subsequently admitted Dr. McLoud's reading into the record. On remand, in accordance with the Board's instructions, the administrative law judge considered whether good cause existed for the late submission of Dr. McLoud's reading. The administrative law judge found that:

> [The] Director's recitation at the hearing of the circumstances surrounding the delay in his obtaining Dr. McLoud's interpretation of the film X-ray warrants my (previously unarticulated) determination that there is good cause to waive the 20-day rule in 20 C.F.R. §725.456. In short, Director, through no fault of his own, was unable to obtain the film from Dr. R. Kraynak until shortly before Christmas of 1999 and subsequently Dr. McLoud's interpretation dated February 22, 2000.

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[2]The administrative law judge's determination that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) is affirmed, as the parties have not challenged it on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 2.

Claimant argues that the administrative law judge's finding must be vacated, as the Director had the film for several months before the film was sent, at claimant's request, to Dr. Smith for the interpretation dated December 12, 1999. Thereafter, the Director had the film for thirty days prior to the date on which the twenty-day limit was triggered. Claimant's Exhibit 20. An administrative law judge is granted broad discretion in resolving procedural disputes and his determinations will be vacated only if he has committed a clear abuse of the discretion given to him. *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). We hold that, in the present case, the administrative law judge rationally determined that good cause existed for the post-hearing submission of Dr. McLoud's reading of the July 15, 1999 film in light of the fact that the Director sought the reading in response to the interpretation of Dr. Smith, who had the film in his office until late December of 1999. *See Troup*, *supra*; *Clark*, *supra*.

Claimant also maintains that the administrative law judge erred in limiting the parties to an equal number of readings performed by physicians who are qualified as B-readers. Claimant asserts that the limitation violates claimant's due process rights because it caused claimant to unnecessarily incur expenses and it made inevitable the administrative law judge's finding that the x-ray evidence was in equilibrium. In addressing the limitation argument in claimant's prior appeal, the Board instructed the administrative law judge that he could not exclude timely submitted evidence unless he determined that it was irrelevant, immaterial or unduly repetitious. *Wiscount*, *supra*, slip op. at 3-4.

In his Decision and Order on remand, the administrative law judge initially noted that his standard Notice of Hearing permits each party a maximum of three interpretations of each x-ray. While he acknowledged that another administrative law judge had issued the Notice of Hearing in this case, the administrative law judge indicated that his restriction on the number of interpretations of a film is based upon his finding that three readings of a film "is sufficient evidence to establish the party's point about the film." Decision and Order at 3. Accordingly, the administrative law judge determined that the three positive interpretations previously submitted by claimant constituted adequate evidence. Therefore, the administrative law judge excluded claimant's three additional readings on the ground that they were unduly repetitious. *Id*.

We hold that in light of the fact that the record in this case contains only one original chest x-ray, the administrative law judge's decision to exclude three of claimant's x-ray readings, thereby restricting the number of B reader interpretations submitted by each party, was supported by an adequate rationale and did not represent an abuse of

discretion.[3] We also affirm, therefore, the administrative law judge's determination that the three excluded readings were unduly repetitious. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989)[4]; *see also Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989).

[3]The Director, Office of Workers' Compensation Programs, has conceded, however, that pursuant to 20 C.F.R. §725.456(b)(4), claimant is entitled to have the record reopened for thirty days to allow him the opportunity to respond to the post-hearing submission of Dr. McLoud's x-ray interpretation.

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's qualifying coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

With respect to the administrative law judge's calculation of the length of claimant's coal mine employment, on remand, the administrative law judge discredited claimant's testimony regarding his part-time work as a coal truck driver between 1950 and 1952 because it was not corroborated by the Itemized Record of Earnings statements maintained by the Social Security Administration (SSA). Decision and Order at 2. Claimant and the Director both argue that the administrative law judge did not provide a rationale for failing to credit claimant's testimony, which was not expressly contradicted by the SSA records. This contention has merit. Although the Board has held that an administrative law judge may rely upon SSA records in making his determination regarding the length of a claimant's coal mine employment, the Board and the United States Court of Appeals for the Third Circuit have also held that an administrative law judge must address claimant's uncontradicted testimony regarding his coal mine work and determine whether it constitutes credible evidence.[5] *See Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *Hutnick v. Director, OWCP*, 7 BLR 1-326 (1984). Because the administrative law judge did not make a finding as to the credibility of claimant's statements, we vacate the administrative law judge's finding and remand the case to the administrative law judge for reconsideration of this issue.[6]

[5]The administrative law judge noted correctly that the Board held that he rationally determined that the Itemized Statement of Earnings provided by the Social Security Administration (SSA) was the most reliable evidence regarding claimant's work for his father's coal trucking company. *Wiscount v. Director, OWCP*, BRB No. 00-0933 BLA (July 23, 2001)(unpub.), slip op. at 9-10. Claimant's testimony regarding his work as a truck driver for Jim Byerly between 1950 and 1952 is neither corroborated nor contradicted by the SSA records.

[6]The length of claimant's coal mine employment was a relevant factor in the administrative law judge's Decision and Order on remand, as he referred to the extent to

Turning to the administrative law judge's findings on the merits of entitlement, the administrative law judge determined, on remand, that because the record contained three negative readings by B readers and three positive readings by B readers, the x-ray evidence was in equipoise and therefore, did not support a finding of pneumoconiosis under Section 718.202(a)(1). Decision and Order at 3; Director's Exhibits 10, 19, 20; Claimant's Exhibits 11, 13, 20. Claimant and the Director both assert that the administrative law judge's finding cannot be affirmed, as he did not engage in a meaningful consideration of the evidence. This contention also has merit. As the parties maintain, the administrative law judge did not consider relevant factors such as the physicians' designation of the quality of the July 15, 1999 film and the comparative qualifications of the physicians beyond their B reader status. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *see also Clark*, *supra*. Accordingly, we vacate the administrative law judge's finding under Section 718.202(a)(1) and remand the case to the administrative law judge for reconsideration of the x-ray evidence of record.

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which the work histories recorded by the physicians of record corresponded to his finding of twelve years of coal mine employment when weighing their opinions under 20 C.F.R. §718.202(a)(4).

Pursuant to Section 718.202(a)(4), the administrative law judge reconsidered the opinions in which Drs. R. Kraynak and Kruk diagnosed pneumoconiosis and the contrary opinion of Dr. Talati. The administrative law also judge examined the pulmonary function study (PFS) evidence to assess the extent to which it supported the diagnosis of a pulmonary impairment related to coal dust exposure and the administrative law judge accorded greatest weight to the nonqualifying study obtained by Dr. Talati on December 16, 1999.[7] Decision and Order at 4-5; Director's Exhibit 17. The administrative law judge determined that Dr. R. Kraynak's rebuttal of Dr. Talati's opinion was not persuasive, as Dr. R. Kraynak used equivocal language in analyzing the significance of the blood gas study that Dr. Talati obtained and Dr. R. Kraynak's qualifications are inferior to Dr. Talati, a Board-certified internist and pulmonologist. Decision and Order at 6; Director's Exhibit 17; Claimant's Exhibits 32 at 17, 36. The administrative law judge also determined that Dr. R. Kraynak's status as a treating physician did not entitle his opinion to greater weight, stating that:

> I find nothing in the record to indicate that as a treating physician Dr. R. Kraynak had any special information or knowledge of claimant that would warrant a finding that that physician's opinion is entitled to greater weight than that of an examining physician, such as Dr. Talati.

Id. The administrative law judge further found that Dr. Kruk's opinion was not entitled to as much weight as Dr. Talati's because Dr. Kruk's diagnosis of pneumoconiosis did not have an adequate foundation. The administrative law judge stated that Dr. Kruk relied upon a negative x-ray interpretation, an inaccurate history of coal mine employment, and an unidentified PFS. Decision and Order at 7; Claimant's Exhibit 5.

[7]The administrative law judge's reference to the objective studies of record when considering the evidence relevant to the existence of pneumoconiosis was not inapposite, as the existence of a respiratory or pulmonary impairment which is attributed to coal dust exposure may support a finding of pneumoconiosis pursuant to 20 C.F.R. §§718.201 and 718.202(a).

Claimant argues that the administrative law judge erred in discrediting the opinions of Drs. R. Kraynak and Kruk. The Director concurs only with respect to the administrative law judge's weighing of Dr. Kruk's opinion. We hold that the administrative law judge's findings regarding Dr. R. Kraynak's opinion are rational and supported by substantial evidence. The administrative law judge acted within his discretion in determining that Dr. R. Kraynak's position as a treating physician did not give him any special advantage as compared to an examining physician.[8] *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). The administrative law judge also rationally found that Dr. Talati's conclusions regarding the blood gas study (BGS) that he administered were entitled to more weight based upon Dr. Talati's qualifications, the fact that Dr. R. Kraynak's statements concerning claimant's alleged hyperventilation on the exercise portion of the BGS were equivocal, and the fact that Dr. Talati acknowledged claimant's hyperventilation, but implicitly discounted it in assessing the significance of the BGS. *See Clark, supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Claimant's and the Director's allegations of error regarding the administrative law judge's weighing of Dr. Kruk's opinion have merit, however. The administrative law judge was incorrect in stating that Dr. Kruk relied upon a negative x-ray reading and an unidentified PFS. Decision and Order at 6-7; Claimant's Exhibit 5. Dr. Kruk stated in his report that he referred to the positive x-ray reading performed by Dr. R. Kraynak and the PFS that he obtained during his examination of claimant on October 13, 1999. The x-ray reading and PFS are in the record. Director's Exhibit 11; Claimant's Exhibit 5. Because the administrative law judge did not accurately characterize Dr. Kruk's opinion, we vacate his finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must reconsider his relative weighing of the opinions of Drs. Talati and Kruk. In addition, if the administrative law judge determines that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) or (a)(4), he must weigh all of the relevant evidence together in order to determine whether claimant has met his burden of proof under Section 718.202(a).[9] *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

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[8]Dr. R. Kraynak started treating claimant when he examined him at the Department of Labor's request on July 15, 1999. Director's Exhibit 8. The record contains the report of this examination and Dr. Kraynak's deposition. Dr. Kraynak stated at his deposition that he has seen claimant every two months since the July 15, 1999 examination. Claimant's Exhibit 32 at 17.

[9]If the administrative law judge reaches the issue of total disability on remand, he must reconsider his initial findings in light of the instructions provided in the Board's prior Decision and Order. *Wiscount v. Director, OWCP*, BRB No. 00-0933 BLA (July

Finally, claimant requests that this case be remanded to a different administrative law judge for decision. Because there is no evidence establishing bias or prejudice on the part of the administrative law judge, we decline to grant claimant's request. *See* 20 C.F.R. §§725.352; *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107-08 (1992); *Zamora v. C.F. & I. Steel Corp.*, 7 BLR 1-568, 1-572 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

23, 2001)(unpub.), slip op. at 8-9.