BRB No. 06-0597 BLA

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| CAROLYN ANN ROSS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| GOLDEN OAK MINING COMPANY | ) | |
| | ) | |
| and | ) | DATE ISSUED: 01/31/2007 |
| | ) | |
| AMERICAN MINING INSURANCE | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5813) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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). This case involves a claim filed on October 31, 2002. After crediting claimant with 15.86 years of coal mine employment, the administrative

law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[1]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge committed numerous errors in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[2] Claimant initially argues that the administrative law judge erred in according less weight to Dr. Hussain's opinion diagnosing pneumoconiosis. We disagree. The administrative law judge permissibly considered that the January 8, 2003 x-ray that Dr. Hussain interpreted as positive for pneumoconiosis was interpreted by a better qualified physician as negative for pneumoconiosis,[3] thus calling into question the reliability of Dr. Hussain's diagnosis of

[1] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(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).

[3] While Dr. Hussain, a physician without any special radiological qualifications, and Dr. Baker, a B reader, interpreted claimant's January 8, 2003 x-ray as positive for pneumoconiosis, Director's Exhibit 12; Claimant's Exhibit 4, Dr. Halbert, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease. Director's Exhibit 22.

pneumoconiosis.[4] *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984)*; Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 13; Director's Exhibits 12, 22. We therefore hold that the administrative law judge permissibly discredited Dr. Hussain's diagnosis of pneumoconiosis.

Claimant next argues that the administrative law judge erred in finding Dr. Alam's opinion insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge noted that Dr. Alam based his diagnosis of coal workers' pneumoconiosis on claimant's coal mine employment history, a chest x-ray interpretation, pulmonary function study results and a lung biopsy. The administrative law judge discredited Dr. Alam's diagnosis of pneumoconiosis because the administrative law judge previously determined that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, and because Dr. Alam mischaracterized the biopsy evidence as showing "anthrasilicotic pigment compatible with coal workers' pneumoconiosis," when the pathologists of record diagnosed only anthracotic pigmentation on the biopsy, a finding that is insufficient to establish the existence of pneumoconiosis. Decision and Order at 10, 12; *see* 20 C.F.R. §718.202(a)(2). Because claimant does not challenge the administrative law judge's bases for discrediting Dr. Alam's diagnosis of coal workers' pneumoconiosis, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant, however, argues that Dr. Alam's opinion supports a finding of "legal" pneumoconiosis, noting that Dr. Alam indicated, on a questionnaire, that claimant's pulmonary impairment was due to coal dust exposure and tobacco abuse. *See* Director's Exhibit 27. On the August 11, 2003 questionnaire, Dr. Alam specifically indicated that claimant suffered from "clinical" pneumoconiosis, not "legal" pneumoconiosis. *Id.* Consequently, we reject claimant's contention that Dr. Alam's opinion supports a finding of "legal" pneumoconiosis.

Claimant also argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Dr. Baker diagnosed coal workers' pneumoconiosis 1/0 based upon his interpretation of claimant's x-ray and findings on a CT scan. Claimant's Exhibit 1. The

[4] The administrative law judge also permissibly discredited Dr. Hussain's diagnosis of pneumoconiosis because he found that it was not sufficiently reasoned, noting that the diagnosis was based only on a positive x-ray interpretation and a history of coal dust exposure. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Decision and Order at 13; Director's Exhibit 12.

administrative law judge discredited Dr. Baker's diagnosis of coal workers' pneumoconiosis because he found that the x-ray evidence was insufficient to support a finding of pneumoconiosis. Decision and Order at 14. The administrative law judge also found that Dr. Baker's report was insufficiently documented. *Id.* Because claimant does not challenge the administrative law judge's bases for discrediting Dr. Baker's diagnosis of coal workers' pneumoconiosis, they are affirmed. *Skrack*, 6 BLR at 1-711.

Claimant, however, argues that the administrative law judge failed to address whether Dr. Baker's additional diagnosis of obstructive airway disease supports a finding of "legal" pneumoconiosis. We agree. In addition to diagnosing coal workers' pneumoconiosis, *i.e.*, "clinical" pneumoconiosis, Dr. Baker also diagnosed obstructive airway disease. In his April 27, 2005 report, Dr. Baker discussed whether this condition was related to coal mine dust exposure:

> There is no way to partition the effects of coal dust and cigarette smoking on the lungs. All major textbooks of pulmonary disease, as well as review articles and even a recent statement by the National Heart and Lung Institution . . . all state that coal dust can cause obstructive airway disease. It seems it would be intellectually difficult when a person has exposure to two possible etiologies, that they can totally exclude one as a possible cause of the condition that exposure could cause.
>
> Studies from NIOSH have concluded that one-half to one year of coal dust exposure would equal one-pack year of cigarette smoking. . . . On this basis, I feel there is some contribution from her approximate 15 years of coal dust exposure, but in comparison to her 60-pack years of cigarette smoking, it is of a small degree, perhaps of 15 to 20%. If this is a significant contribution, then her condition would be significantly related to and substantially aggravated by coal dust from her employment as a coal miner. . . .
>
> On comparison with her smoking history to her coal dust exposure, there is approximately a 15 to 20 or 25% contribution to her symptoms.

Claimant's Exhibit 1 at 2.

The administrative law judge summarized this portion of Dr. Baker's opinion, but did not discuss it when he weighed the opinion. Decision and Order at 9-10, 14. To the extent that the administrative law judge finds that Dr. Baker attributed claimant's obstructive airway disease to claimant's coal mine employment, this diagnosis constitutes "legal" pneumoconiosis. 20 C.F.R. §718.201(a)(2). Because the administrative law judge did not consider whether Dr. Baker's diagnosis of obstructive airway disease

constitutes a diagnosis of "legal" pneumoconiosis, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for him to do so.

Although Drs. Westerfield and Dahhan opined that claimant did not suffer from coal workers' pneumoconiosis, they also diagnosed other lung conditions. Dr. Westerfield diagnosed chronic obstructive pulmonary disease attributable to claimant's cigarette smoking. Director's Exhibit 29; Employer's Exhibit 1. Although Dr. Dahhan diagnosed chronic bronchitis and emphysema, he did not directly address the etiology of these diseases. Director's Exhibit 20. Claimant contends that neither Dr. Westerfield nor Dr. Dahhan explained how he was able to rule out coal dust exposure as a cause, or contributing factor, of claimant's lung disease. Claimant also argues, *inter alia*, that the opinions of Drs. Westerfield and Dahhan are inconsistent with the revised regulations. *See* Claimant's Brief at 7-8. On remand, when considering whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge