

BRB No. 01-0847 BLA

JOHN J. TRENT)		
)		
Claimant-Respondent)		
)		
v.)	DATE	ISSUED:
)		
PBS COALS, INCORPORATED)		
)		
and)		
)		
OLD REPUBLIC INSURANCE COMPANY)		
)		
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 - Awarding Benefits on Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Gregory J. Fischer (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer-carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits on Remand (98-BLA-1116) 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).¹ This case is before the Board for the second time. In a Decision and Order dated September 29, 1999, the administrative law judge considered the claim, a duplicate claim which was filed on January 21, 1998,² pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). After crediting claimant with nineteen and one-half years of coal mine employment, the administrative law judge found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and, accordingly, concluded that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Considering the claim on the merits, the administrative law judge found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000), but found the medical opinion evidence of record sufficient to establish the presence of the disease pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge also determined that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment

¹The 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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). On August 14, 2001, the Board rescinded its prior order requiring the parties to submit briefs on the issue of the impact of the amended regulations to this case.

²Claimant filed a prior claim on July 23, 1986. Director's Exhibit 35. Administrative Law Judge Henry W. Sayrs denied the claim in a Decision and Order dated September 22, 1988. *Id.* In denying benefits, Judge Sayrs found the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000), total disability and total disability due to pneumoconiosis under 20 C.F.R. §718.204 (2000). *Id.* Claimant did not take any further action in pursuit of benefits until filing the instant duplicate claim on January 21, 1998. Director's Exhibit 1.

pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was not rebutted. The administrative law judge further found the evidence of record sufficient to establish total disability and total disability due to pneumoconiosis under 20 C.F.R. §718.204(c), (b) (2000). Consequently, the administrative law judge found claimant entitled to benefits. Employer appealed. The Board affirmed, as unchallenged on appeal, the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1) (2000), 718.203(b) (2000), and 718.204(c)(1) and (c)(2) (2000). *Trent v. PBS Coal Co.*, BRB No. 00-0332 BLA (Dec. 8, 2000)(unpublished). The Board vacated, however, the administrative law judge's findings under 20 C.F.R. §§725.309(d) (2000), 718.202(a)(4) (2000), 718.204(c)(4) (2000) and 718.204(b) (2000), and remanded the case for the administrative law judge to reconsider the medical opinions of Drs. Ignacio and Schaaf.

In his Decision and Order - Awarding Benefits on Remand dated July 3, 2001, the administrative law judge found Dr. Schaaf's medical opinion sufficient to establish total disability under Section 718.204(c) (2000) and, consequently, a material change in conditions under Section 725.309 (2000). Weighing all of the evidence of record, the administrative law judge further found Dr. Schaaf's opinion sufficient to establish the existence of pneumoconiosis under Section 718.202(a) (2000), and total disability due to pneumoconiosis pursuant to Section 718.204(c), (b) (2000). Accordingly, the administrative law judge awarded benefits. The administrative law judge also determined that the record does not contain adequate documentation to support a conclusion that claimant's son, James, is disabled as defined in §223(d) of the Social Security Act, 42 U.S.C. §423(d), so as to meet the proof requirements for entitlement to benefits as an augmentee of claimant pursuant to 20 C.F.R. §725.209 (2000). The administrative law judge stated that he was thus remanding the case to the district director for further investigation on that issue. On appeal, employer contends that the administrative law judge erred in finding Dr. Schaaf's opinion sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000), and to establish total disability causation at Section 718.204(b) (2000). Claimant responds in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in the proceedings on appeal.³

The Board's scope of review is defined by statute. The administrative law judge's

³We affirm, as unchallenged on appeal, the administrative law judge's findings under 20 C.F.R. §§725.309 (2000) and 718.204(c) (2000). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2-5.

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).

On appeal, employer argues that it was improper for the administrative law judge to credit Dr. Schaaf's medical opinion as sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000) because, Dr. Schaaf based his opinion on a positive x-ray interpretation which was at odds with the negative interpretations of better-qualified radiologists and the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis. Employer also argues that the administrative law judge erred in crediting Dr. Schaaf's opinion because Dr. Schaaf failed to indicate that he had an accurate understanding of claimant's smoking history.

Employer's contentions lack merit. Contrary to employer's suggestion, an administrative law judge may not discredit a medical report under Section 718.202(a)(4) based in part on a positive x-ray merely because the preponderance of the x-ray evidence is not probative. *See Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986). Dr. Schaaf examined claimant on December 22, 1997, and opined that claimant suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to the disease. Director's Exhibit 14. Dr. Schaaf read the x-ray taken during the examination as positive for pneumoconiosis, and indicated that the pulmonary function testing revealed moderate obstructive airways disease with a restrictive physiologic component. *Id.* The administrative law judge properly found Dr. Schaaf's opinion to be well-reasoned and documented because Dr. Schaaf's report and deposition testimony indicate that he considered relevant data, including claimant's coal mine employment, smoking and medical histories, respiratory symptoms, physical examination findings, and chest x-ray and pulmonary function study results. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining, Inc.*, 12 BLR 1-11 (1989)(*en banc*); Decision and Order at 3, 6; Director's Exhibit 14; Employer's Exhibit 6. The administrative law judge found the underlying documentation and data generated by Dr. Schaaf's examination and testing adequate to support the doctor's conclusions apart from the positive x-ray. *Id.* The administrative law judge also credited Dr. Schaaf's opinion as well-reasoned and documented because Dr. Schaaf had the opportunity to review the other evidence in the record dating back to 1986, and had the opportunity to testify in detail as to his findings and rationale in the face of the contrary evidence of record. *See Clark, supra; Tackett, supra*; Decision and Order at 3, 6; Employer's Exhibit 6. Furthermore, contrary to employer's contention, the administrative law judge correctly stated that Dr. Schaaf's report and deposition testimony demonstrated his awareness of the varied smoking histories claimant provided through the years, and that the doctor's testimony further indicated that even if claimant had smoked a pipe for forty-six years, as employer contends, he would still opine

that claimant suffers from pneumoconiosis.⁴ See Decision and Order at 6-7; Director's Exhibit 14; Employer's Exhibit 6 at 9-11, 23-24. The administrative law judge properly weighed the medical opinion of Dr. Schaaf against the other relevant evidence at Section 718.202(a)(1)-(4) (2000), in this case, the x-ray evidence, and explained that he found the well-reasoned and documented medical opinion of Dr. Schaaf entitled to determinative weight because the medical opinion evidence takes into consideration a totality of factors, whereas an x-ray is one type of isolated evidence.⁵ *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Decision and Order at 7. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000). See 20 C.F.R. §718.202(a); *Williams, supra*.

⁴In his report dated December 22, 1997, Dr. Schaaf stated that claimant's smoking histories in the records he reviewed "created some confusion and I tried to carefully understand how much he actually smoked." Director's Exhibit 14. Dr. Schaaf noted that claimant stated he began smoking at approximately age eighteen, and quit smoking cigarettes in his twenties, having smoked, according to claimant's wife, up to a pack per week, but never more than that. *Id.* Dr. Schaaf further noted that claimant indicated he started smoking a pipe sometime after quitting cigarettes in the early 1940's, and that he smoked a pipe until completely quitting in 1962. *Id.*

⁵Furthermore, the administrative law judge properly credited Dr. Schaaf's opinion in part because Dr. Schaaf is a Board-certified pulmonary specialist. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6; Employer's Exhibit 6.

Employer also contends that the administrative law judge erred in relying upon Dr. Schaaf's opinion to find that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000), *see* 20 C.F.R. §718.204(c),⁶ because Dr. Schaaf's opinion on the matter is unclear. Employer argues that Dr. Schaaf's opinion is legally insufficient to establish total disability causation because the doctor indicated he could not quantify in what percentages pneumoconiosis, obesity and smoking contribute to claimant's restrictive lung impairment, and he failed to specifically indicate that pneumoconiosis is a substantially contributing factor in claimant's total disability.

⁶The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

Employer's contention is without merit. Total disability due to pneumoconiosis is established pursuant to 20 C.F.R. §718.204(c) where the evidence establishes that pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment.⁷ 20 C.F.R. §718.204(c)(1); *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). In the instant case, the administrative law judge properly inferred from the report and deposition testimony of Dr. Schaaf that Dr. Schaaf considered pneumoconiosis a material and important factor in claimant's total disability, notwithstanding that he did not personally use the words "substantially contributing factor" in his report. Decision and Order at 7; Director's Exhibit 14. The administrative law judge correctly stated that, although Dr. Schaaf indicated he could not assign a specific percentage to the contribution pneumoconiosis, obesity, and smoking made to claimant's total disability, he would not rule out pneumoconiosis as a "substantial contributing factor" in claimant's total disability even assuming that claimant had a greater smoking history than Dr. Schaaf assumed. Decision and Order at 7; Employer's Exhibit 6 at 22-23. We affirm, therefore, the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000). *See* 20 C.F.R. §718.204(c); *Bonessa, supra*.

⁷The regulation at 20 C.F.R. §718.204(c)(1) further provides:

Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material or adverse effect on the miner's respiratory or pulmonary condition;
- or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1) (emphasis in the original).

Finally, we affirm the administrative law judge's finding that the record does not contain adequate documentation to support a conclusion that claimant's son, James, is disabled as defined in §223(d) of the Social Security Act, 42 U.S.C. §423(d), so as to meet the proof requirements for entitlement to benefits as an augmentee of claimant pursuant to 20 C.F.R. §725.209 (2000). Decision and Order at 7-8. Inasmuch as it was claimant's burden to introduce sufficient evidence into the record to establish his son James's entitlement to benefits as an augmentee, we vacate the administrative law judge's decision to remand the case to the district director for further evidentiary development with regard to this issue. *See White v. Director, OWCP*, 6 BLR 1-368 (1983). Claimant is free, however, to submit additional evidence on the issue to the district director along with a request for modification of the terms of the award of benefits, pursuant to 20 C.F.R. §725.310 (2000). *See* 20 C.F.R. §725.310(a) (2000).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

