BRB No. 01-0945 BLA

ROBERT N. YOST	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED:
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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Robert N. Yost, N. Tazewell, Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, Virginia, for employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (00-BLA-0501) of Administrative Law Judge Alice M. Craft 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).[1] The instant case involves a duplicate claim filed on June

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

25, 1999.[2] Administrative Law Judge Alice M. Craft (the administrative law judge) found

[2]Claimant initially filed a claim for benefits on December 28, 1973. Director's Exhibit 22. The district director denied the claim on October 31, 1979. *Id.* By letter dated December 30, 1979, claimant requested more time so that he could submit additional evidence. *Id.* By letter dated January 10, 1980, the district director informed claimant that he could have additional time, but requested that claimant inform him by January 31, 1980 when the new evidence could be expected. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on January 2, 1985. Director's Exhibit 23. The district director denied the claim on June 25, 1985. *Id.* At claimant's request, his claim was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* Claimant, however, subsequently requested that his claim be withdrawn. *Id.* Claimant explained that he might be called back to work by his former employer and desired to see whether he could perform coal mine work. *Id.* By Order dated December 9, 1987, Administrative Law Judge Giles J. McCarthy found that claimant had shown that it was in his best interests to have his claim withdrawn. *Id.* Accordingly, Judge McCarthy dismissed the claim. *Id.*

Claimant filed another claim on November 14, 1990. Director's Exhibit 24. In a Decision and Order dated November 9, 1992, Administrative Law Judge Eric Feirtag, after crediting claimant with twenty-three years of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). Accordingly, Judge Feirtag denied benefits. *Id.* By Decision and Order dated February 17, 1995, the Board affirmed Judge Feirtag's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Yost v. Consolidation Coal Co.*, BRB No. 93-0565 BLA (Feb. 17, 1995) (unpublished). The Board also held that Judge Feirtag's failure to address whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) (2000) constituted harmless error inasmuch as claimant was precluded from establishing the existence of pneumoconiosis pursuant to these subsections. *Id.* The Board, however, vacated Judge Feirtag's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and remanded the case for reconsideration. *Id.*

Due to Judge Feirtag's unavailability, Administrative Law Judge Joan Huddy Rosenzweig considered the claim on remand. Judge Rosenzweig found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Director's Exhibit 24. Judge Rosenzweig also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, Judge Rosenzweig denied benefits. *Id.* There is no evidence that

that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] The administrative law judge, therefore, considered claimant's 1999 claim on the merits. After crediting claimant with twenty-three years of coal mine employment, 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)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. 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.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

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claimant took any further action in regard to his 1990 claim.

Claimant filed a new claim on June 25, 1999. Director's Exhibit 1.

[3]Although Section 725.309 has been revised, these revisions apply only to claims filed after January 19, 2001.

[4]Inasmuch as no party challenges the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In her consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge noted that the record contains interpretations of two x-rays taken on July 28, 1999 and April 11, 2000. Decision and Order at 31-32. The administrative law judge noted that although Dr. Alexander, a dually qualified B reader and Board-certified radiologist, interpreted claimant's July 28, 1999 x-ray as positive for pneumoconiosis, six equally qualified physicians, Drs. Navani, Wiot, Spitz, Wheeler, Scott and Kim, interpreted this x-ray as negative for pneumoconiosis. Decision and Order at 31-32; Director's Exhibits 11, 20; Employer's Exhibits 1, 3, 5, 6. The administrative law judge noted that Dr. Forehand, a B reader, also interpreted claimant's July 28, 1999 x-ray as negative for pneumoconiosis. Decision and Order at 32; Director's Exhibit 10. There are no other interpretations of claimant's July 28, 1999 x-ray in the record.[5] Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's July 28, 1999 x-ray is negative for pneumoconiosis.

The administrative law judge accurately noted that the record does not contain any positive interpretations of claimant's April 11, 2000 x-ray. Decision and Order at 32. Drs. Wiot, Spitz, Wheeler, Scott and Kim, all dually qualified B readers and Board-certified radiologists, interpreted claimant's April 11, 2000 x-ray as negative for pneumoconiosis. Employer's Exhibits 7, 10, 12. Dr. Hippensteel, a B reader, also interpreted claimant's April 11, 2000 x-ray as negative for pneumoconiosis. Employer's Exhibit 4.

In regard to the remaining x-ray interpretations of record, the administrative law judge stated that:

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[5]The administrative law judge erred in finding that Dr. Hippensteel rendered a negative interpretation of claimant's July 28, 1999 x-ray. *See* Decision and Order at 32. Dr. Hippensteel actually rendered a negative interpretation of claimant's April 11, 2000 x-ray. *See* Employer's Exhibit 4. However, given that a majority of the best qualified physicians rendered negative interpretations of claimant's July 28, 1999 x-ray, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

> I have also reviewed all of the x-ray readings of record in this case and concur with Judge Feirtag and the Benefits Review Board that these x-rays also do not establish the existence of pneumoconiosis.

Decision and Order at 32.

The Board, in its 1995 Decision and Order, after noting that Administrative Law Judge Eric Feirtag had considered all of the relevant x-ray evidence of record, affirmed his finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Yost v. Consolidation Coal Co.*, BRB No. 93-0565 BLA (Feb. 17, 1995) (unpublished). Although the administrative law judge, in the instant case, should have provided an independent analysis of the previously submitted x-ray evidence, we find no error in her finding that the previously submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis.

Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 30-31. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[6] *Id.* at 31.

In her consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly found that Dr. Forehand was the only physician to opine that claimant suffered from pneumoconiosis. In a report dated July 28, 1999, Dr.

[6]Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

Forehand diagnosed coal workers' pneumoconiosis and chronic bronchitis attributable to coal dust exposure and cigarette smoking. Director's Exhibit 8. The administrative law judge discredited Dr. Forehand's opinion, stating that:

> Dr. Forehand's diagnosis of coal workers' pneumoconiosis and chronic bronchitis due to a combination of coal dust exposure and smoking was not as well-explained. In fact, Dr. Forehand's report of the [c]laimant's examination does not offer any discussion regarding the reasoning behind the diagnoses, but rather only notes that the findings were based on physical examination, pulmonary function tests, and the [c]laimant's history. He did not explain how these factors aided his diagnoses.

Decision and Order at 34.

Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge found that Dr. Forehand failed to adequately explain the basis for his diagnoses of coal workers' pneumoconiosis and chronic bronchitis due to a combination of coal dust exposure and cigarette smoking. Decision and Order at 34; Director's Exhibit 8. By contrast, the administrative law judge found that Dr. Hippensteel better explained his conclusion that claimant did not suffer from coal workers' pneumoconiosis.[7] Decision and Order at 34; Employer's Exhibits 4, 13, 21.

[7]Dr. Hippensteel examined claimant on April 11, 2000. Dr. Hippensteel also reviewed the medical evidence. In a report dated May 15, 2000, Dr. Hippensteel opined that there was insufficient evidence to make a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 4. Dr. Hippensteel further opined that the "impairment that [claimant] has suffered has come from continued cigarette smoking and it is the cigarette smoking that has caused him to have the breathing symptoms and impairment he has rather than any prior coal dust exposure...." *Id.*

During a deposition on July 11, 2000, Dr. Hippensteel opined that claimant did not suffer from medical or legal pneumoconiosis. Employer's Exhibit 13 at 27.

Dr. Hippensteel subsequently reviewed additional medical evidence. In a report dated December 4, 2000, Dr. Hippensteel stated that:

> There is no additional evidence to show that this man has suffered any of this pulmonary impairment, however, related to coal workers' pneumoconiosis or his prior coal dust exposure with this variable and partially

The administrative law judge noted that Dr. Hippensteel possessed excellent

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> reversible problem. This man has continued to smoke a heavy amount of cigarettes each day and this has been associated temporally with his deterioration in function since he left work in the mines without the development of coal workers' pneumoconiosis radiographically. These findings are in keeping with his continued cigarette smoking and also now, with the last pulmonary function test, show some evidence of an asthmatic component also contributing to this dysfunction. Asthma and his cigarette smoking have nothing to do with his prior coal mine employment and would mean that he would be just as ill from a pulmonary standpoint from these problems had he never set foot in a coal mine.
>
> I think the additional data reviewed in these records, corroborate my opinion regarding the lack of development of coal workers' pneumoconiosis as a cause for his problems with a reasonable degree of medical certainty.

Employer's Exhibit 21.

qualifications.[8] *Id.* The administrative law judge further noted that while Drs. Forehand and Hippensteel each examined claimant, Dr. Hippensteel also reviewed additional medical evidence of record. *Id.* The administrative law judge properly credited Dr. Hippensteel's opinion that claimant did not suffer from pneumoconiosis because he found that it was based upon more comprehensive documentation. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). The administrative law judge also found that Dr. Hippensteel's opinion that claimant did not suffer from pneumoconiosis or any other respiratory or pulmonary impairment arising out of his coal mine employment was supported by the opinions of Drs. Stewart, Loudon, Fino, Morgan and Castle. Decision and Order at 35; Employer's Exhibits 8, 9, 11, 15, 17-20, 22, 23. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant, however, contends that the administrative law judge erred in failing to "review/consider the medical opinions submitted with the previous claims regarding establishing coal workers' pneumoconiosis, both legal and clinical." Claimant's *Pro Se* Statement at 4. Having found the evidence sufficient to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000), the administrative law judge was obligated to consider claimant's claim on the merits. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). In considering whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge weighed the previously submitted medical opinion evidence and newly submitted medical opinion evidence separately.

In regard to the previously submitted medical opinion evidence, the

[8]The Fourth Circuit has held that experts' respective qualifications are important indicators of the reliability of their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998). Dr. Hippensteel is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 4. Dr. Forehand's qualifications are not found in the record.

administrative law judge simply stated that:

> I have reviewed the medical opinions from the Claimant's previous claims and concur with Judge Rosenzweig's opinions on remand. The medical opinions from the prior claims also support a finding of no pneumoconiosis. I conclude, therefore, that the weight of the medical opinions of record fails to establish that the Claimant has pneumoconiosis as the Act requires for entitlement to benefits.

Decision and Order at 35.

As previously noted, the Board, in its 1995 Decision and Order, vacated Judge Feirtag's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and remanded the case for reconsideration.[9] *Yost v. Consolidation Coal Co.*, BRB No. 93-0565 BLA (Feb. 17, 1995) (unpublished).

[9]The Board specifically directed Judge Feirtag to "reconsider the opinions of Drs. Taylor and Abernathy and provide his rationale for rejecting their diagnoses of pneumoconiosis." *Yost v. Consolidation Coal Co.*, BRB No. 93-0565 BLA (Feb. 17, 1995) (unpublished). The Board further held that Judge Feirtag improperly rejected Dr. Rasmussen's diagnosis of pneumoconiosis because he relied upon a positive x-ray which conflicted with the weight of the x-ray evidence. *Id.* Additionally, the Board held that Dr. Rasmussen's diagnosis of "chronic bronchitis-coal mine dust and cigarette smoking" constituted a diagnosis of statutory pneumoconiosis. *Id.* The Board, therefore, directed Judge Feirtag to "address all of the medical reports in their entirety including the opinions of Drs. Stewart and Palte, to render a finding whether claimant has established the existence of pneumoconiosis." *Id.*

Due to Judge Feirtag's unavailability, Administrative Law Judge Joan Huddy Rosenzweig considered the claim on remand. In her consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, Judge Rosenzweig found, *inter alia*, that Dr. Abernathy's finding of "probable coal workers' pneumoconiosis" was entitled to little weight due to its equivocal nature. Director's Exhibit 24. Judge Rosenzweig further found that Dr. Taylor's diagnosis of "Black Lung" was "poorly reasoned." *Id.* Among the remaining opinions, Judge Rosenzweig noted that Dr. Rasmussen diagnosed coal workers' pneumoconiosis and chronic bronchitis attributable to coal mine dust exposure and cigarette smoking while Drs. Palte, Fino, Loudon and Stewart opined that claimant did not suffer from pneumoconiosis. *Id*. In finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis, Judge Rosenzweig stated:

> I find that the respective opinions of Drs. Palte, Fino, Loudon and Stewart are most persuasive, because they are most consistent with the credible clinical evidence, including the overwhelming preponderance of the negative x-ray evidence, and the nonqualifying pulmonary function and arterial blood gas evidence. I additionally note that Drs. Fino, Loudon, and Stewart are well-credentialed pulmonary specialists.

Director's Exhibit 24.

We initially note that Judge Rosenzweig ignored the Board's admonition not to reject Dr. Rasmussen's diagnosis of pneumoconiosis because the doctor relied upon a positive x-ray which conflicted with the weight of the x-ray evidence. Judge Rosenzweig also erred in crediting the opinions of Drs. Palte, Fino, Loudon and Stewart because their respective findings of no pneumoconiosis were consistent with the "nonqualifying pulmonary function and arterial blood gas evidence." Director's Exhibit 24. Pulmonary function and arterial blood gas studies are relevant only to the issue of total disability and not the existence of pneumoconiosis. *See Trent*, *supra*.

In the instant case, we hold that the administrative law judge's cursory analysis of the previously submitted medical opinion evidence does not comply with the requirements of the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration. On remand, the administrative law judge is instructed to conduct her own independent evaluation of the previously submitted medical opinion evidence and consider whether all the medical opinion

evidence of record, when weighed together, is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

On remand, if the administrative law judge finds the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), she must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4) together in determining whether claimant suffers from pneumoconiosis.[10] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Should the alj find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), she must address whether the evidence is sufficient to establish that the pneumoconiosis arose out of coal mine employment and whether the pneumoconiosis is totally disabling. 20 C.F.R. §§718.203, 718.204; *Trent, supra*; *Gee, supra*; *Perry, supra.*

[10]The Fourth Circuit has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge