

BRB No. 10-0588 BLA

JOHNEY E. GARTEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNION CARBIDE CORPORATION)	
)	DATE ISSUED: 07/27/2011
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits (2005-BLA-05575) of Administrative Law Judge Ralph A. Romano rendered on claim filed on February 12, 2004, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at

¹ Claimant is the deceased miner, Johny E. Garten, who died while his claim was pending. The miner’s widow is pursuing his claim on his behalf.

30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² The administrative law judge credited the miner with twenty-one years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the existence of pneumoconiosis was not established under 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 did not properly consider the x-ray, CT scan and medical opinion evidence pursuant to 20 C.F.R. §§718.107(b), 718.202(a)(1), (4). Employer responds in support of the administrative law judge's denial of benefits, asserting that the administrative law judge reviewed the relevant x-ray, CT scan and medical opinion evidence, and rationally concluded that the evidence was insufficient to establish the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.³

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.⁴ 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must prove the existence of pneumoconiosis arising out of coal mine employment, the presence of a totally disabling respiratory or pulmonary impairment, and that such impairment is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, and apply to claims filed after January 1, 2005, are not relevant to this claim, as it was filed prior to January 1, 2005. Director's Exhibit 2.

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-one years of qualifying coal mine employment and failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6.

⁴ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In weighing the x-ray evidence at 20 C.F.R. §718.202(a)(1), the administrative law judge considered three readings of the x-ray taken on April 27, 2004 and four readings of the x-ray taken on August 25, 2004. Decision and Order at 4-5. The administrative law judge observed that Drs. Patel and Ahmed, both Board-certified radiologists and B readers, read the April 27, 2004 x-ray as positive for pneumoconiosis, while Dr. Wheeler, who is a Board-certified radiologist and B reader, read the film as negative, 0/1. Director's Exhibits 15; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge found that the August 25, 2004 x-ray was read as positive by Dr. Ahmed and Dr. Zaldivar, a B reader. Decision and Order at 5; Director's Exhibit 15; Claimant's Exhibits 2,6. The administrative law judge further noted that this film was interpreted as negative by Dr. Wheeler and Dr. Repsher, a B-reader. Decision and Order at 5; Employer's Exhibits 1, 2. Noting that he was not required to defer to numerical superiority, the administrative law judge concluded that the April 27, 2004 and August 25, 2004 x-rays were in equipoise, both individually and when weighed together, in light of the conflicting positive and negative readings by equally-qualified physicians. Decision and Order at 5. Accordingly, the administrative law judge concluded that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1). *Id.*

Claimant maintains that the administrative law judge's finding, that the negative and positive readings of the April 27, 2004 x-ray were in equipoise, cannot be affirmed, as the quantitative weight of the interpretations of this x-ray is positive for pneumoconiosis. Claimant further asserts that, in light of the conflict between the interpretations offered by physicians with similar qualifications, the administrative law judge was obligated to examine the individual readings more closely for consistency and reliability. Claimant argues that the negative readings submitted by Dr. Wheeler are suspect, as he read the April 27, 2004 film as 0/1, but interpreted the later film, dated August 25, 2004, as completely negative. Claimant also notes that, although Dr. Wheeler's ILO classifications varied, both ILO forms contained comments identifying the same conditions. In addition, claimant suggests that Dr. Wheeler did not properly complete the ILO form for the April 27, 2004 x-ray, as he indicated in the comments section that the opacities he identified in a profusion of 0/1 were not consistent with coal workers' pneumoconiosis. Claimant further alleges that Dr. Wheeler erroneously relied on a CT scan to render his x-ray interpretation. Regarding Dr. Repsher's negative reading of the September 25, 2004 x-ray, claimant alleges that Dr. Repsher did not properly complete the ILO form, as he indicated that claimant suffered from another disease, but did not identify it. Claimant also states that it was error for the administrative law judge to fail to reconcile the conflict between Dr. Repsher's diagnosis of usual interstitial pneumonia (UIP) and/or idiopathic pulmonary fibrosis (IPF) and Dr.

Crisalli's statement that Dr. Repsher's finding was inconsistent with the American Thoracic Society's criteria.

Claimant's allegations of error are without merit. The administrative law judge considered the films individually, and together, and acted within his discretion in finding that the April 27 and August 25, 2004 x-rays were in equipoise, because both dually-qualified readers and lesser-qualified readers proffered conflicting interpretations. See 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP [Ondecko]*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 5. In addition, claimant has not identified anything in the readings by Drs. Wheeler and Repsher that the administrative law judge was required to consider. The mere assertion that Dr. Wheeler interpreted the April 2004 film as 0/1 and the August 2004 film as completely negative, and described both films in similar terms, does not establish that his readings were suspect, nor does it alter the fact that both of his readings were negative for pneumoconiosis under the ILO system. Furthermore, Dr. Wheeler's comment, that the opacities he observed on the April 2004 film were not consistent with coal workers' pneumoconiosis, did not conflict with the instructions on the ILO form, as the section in which he categorized the profusion of parenchymal abnormalities as 0/1 required him to identify abnormalities that were consistent with pneumoconiosis, without specifying the type of pneumoconiosis. See Employer's Exhibit 6. Claimant's statement, that Dr. Wheeler relied on a CT scan to perform his reading of the April 2004 x-ray, rather than comparing it to standard ILO films, as required, is also unsupported by the record. In the comments section of his reading of the April 2004 film, Dr. Wheeler merely indicated that a CT scan dated October 25, 2004, showed no pneumoconiosis. *Id.*

Claimant is also incorrect in maintaining that Dr. Repsher did not identify the other disease that he observed on the August 2004 x-ray. Dr. Repsher filled in the section on the reverse of the ILO form, as directed, and indicated that the x-ray showed "diffuse pulmonary fibrosis, not characteristic of pneumoconiosis." Employer's Exhibit 2. In addition, Dr. Repsher's diagnosis of UIP/IPF by x-ray is ultimately supported by Dr. Crisalli's opinion, as Dr. Crisalli also diagnosed IPF and concluded that the miner did not have coal workers' pneumoconiosis. Because claimant's allegations of error regarding the administrative law judge's finding that the x-ray evidence was in equipoise are without merit, we affirm this finding and the administrative law judge's determination that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1). See *Ondecko*, 512 U.S. at 269, 281, 18 BLR at 2A-3-12.

The administrative law judge next considered the CT scan evidence of record. Pursuant to 20 C.F.R. §718.107, claimant designated Dr. Cohen's positive interpretation

of an October 25, 2004 CT scan as affirmative evidence and employer designated Dr. Repsher's negative interpretation of the same CT scan as its affirmative evidence. Claimant's Exhibit 3; Employer's Exhibit 2. Dr. Repsher opined that the CT scan was consistent with UIP/IPF, or some other nonpneumoconiotic diffuse interstitial lung disease. Employer's Exhibit 2. Upon considering the CT scan evidence of record, the administrative law judge stated:

I find both doctors to be reliable in their interpretation of the CT scan. However, I find Dr. Repsher's opinion to be more complete, thorough, and better reasoned. As a result, I find the CT scan evidence does not establish the presence of pneumoconiosis.

Decision and Order at 6.

Claimant asserts that the administrative law judge failed to fully analyze the conflicting CT scan interpretations of Drs. Cohen and Repsher. Claimant's contention has merit. As claimant alleges, the administrative law judge did not explain why he found Dr. Repsher's CT scan report was "more complete, thorough and better reasoned" than Dr. Cohen's report, nor did the administrative law judge address whether the parties established, as is required under 20 C.F.R. §718.107(b), that CT scans are medically acceptable and relevant to establishing the existence of pneumoconiosis. Furthermore, the administrative law judge's rationale for deciding that both doctors' CT scan reports are "reliable" is unclear. Because the administrative law judge's findings are not in accordance with the Administrative Procedure Act (APA), 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 U.S.C. §932(a), we must vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.107(b), and remand the case for reconsideration of the CT scan evidence.⁵ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

On remand, the administrative law judge must determine whether a foundation was laid for admitting the CT scan interpretations, and then reconsider the probative value of the conflicting interpretations. In so doing, the administrative law judge should assess the respective qualifications of Drs. Cohen and Repsher to review CT scans for the presence or absence of pneumoconiosis and determine whether the physicians applied recognized and accepted medical principles in a reliable way. See *Milburn Colliery Co.*

⁵ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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 U.S.C. §932(a).

v. Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *see also Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 893, 22 BLR 2-409, 2-423 (7th Cir. 2002). Further, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Houser, Crisalli, Repsher and Zaldivar. Drs. Rasmussen and Houser diagnosed pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 4. In contrast, Drs. Crisalli, Repsher and Zaldivar opined that the miner's respiratory condition was due to IPF/UIP. Employer's Exhibits 6, 7, 12, 13. After finding that "all five doctors give reasoned and documented opinions," the administrative law judge stated that the opinions of Drs. Zaldivar and Houser were less persuasive, as they based their opinions on the x-rays that the administrative law judge found to be in equipoise. Decision and Order at 13. In contrast, the administrative law judge accorded the most weight to Dr. Crisalli's opinion because he "examined [c]laimant, reviewed all of the medical evidence of record, and generated a reasoned and logical conclusion based on the evidence [of] record" and "never equivocat[ed] from his original stance" in his medical report and two depositions. *Id.* Based upon his weighing of the medical opinion evidence, the administrative law judge determined that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4). *Id.*

Claimant contends that the administrative law judge did not properly consider the medical opinions of Drs. Rasmussen, Houser, Zaldivar and Crisalli. Claimant's Brief at 13. Claimant asserts that the administrative law judge failed to consider Dr. Rasmussen's opinion on the issue of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that he provided an improper reason for rejecting Dr. Houser's opinion. In addition, claimant maintains that the administrative law judge should have excluded the medical report of Dr. Zaldivar, as it was admitted solely for impeachment purposes. Moreover, claimant asserts that the administrative law judge did not give an adequate rationale for crediting Dr. Crisalli's opinion over the contrary opinions of Drs. Rasmussen and Houser. Claimant's allegations of error have merit.

With respect to Dr. Rasmussen's opinion, that the miner had pneumoconiosis, the administrative law judge did not comply with the APA, as he did not set forth any specific findings as to the weight to which Dr. Rasmussen's opinion was entitled, other than to note that it was documented and reasoned. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 13. We further find merit in claimant's assertion that the administrative law judge failed to provide a valid reason for discounting Dr. Houser's opinion. The entirety of the administrative law judge's analysis of Dr. Houser's opinion consists of his finding that Dr. Houser based his opinion on the x-rays that the

administrative law judge found were in equipoise. Decision and Order at 13. As claimant contends, however, Dr. Houser conducted a complete pulmonary evaluation and based his opinion on his review of the miner's medical records, an examination of the miner, the results of the objective studies, and accurate smoking and coal dust exposure histories. Therefore, the administrative law judge did not accurately address the underlying bases for of Dr. Houser's opinion. See *Wojtowicz*, 12 BLR at 1-165; *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-690 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

As claimant contends, the report in which Dr. Zaldivar indicated that the claimant does not have pneumoconiosis is not a part of the medical opinion evidence of record in this case and, as such, the administrative law judge improperly relied upon it in rendering his findings under 20 C.F.R. §718.202(a)(4).⁶ See *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); Decision and Order at 13. Claimant also asserts correctly that the administrative law judge selectively analyzed the opinion in which Dr. Crisalli ruled out the presence of pneumoconiosis and failed to state a valid reason for according greatest weight to Dr. Crisalli's opinion. The administrative law judge indicated that he found Dr. Crisalli's opinion to be the most persuasive because he examined the miner, reviewed the medical evidence of record, rendered "a reasoned and logical conclusion" based thereon, and never "equivocat[ed] from his original stance." Decision and Order at 13. The administrative law judge did not, however, explain how these factors distinguished Dr. Crisalli's opinion from the opinions of Drs. Rasmussen and Houser when Dr. Rasmussen also examined the miner and Drs. Rasmussen and Houser both reviewed the medical evidence and provided, according to the administrative law judge, reasoned and documented opinions. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984).

In light of the meritorious allegations of error raised by claimant, we must vacate the administrative law judge's findings concerning the medical opinions of Drs. Rasmussen, Houser, Zaldivar and Crisalli and his determination that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must reconsider these medical opinions, set forth his findings in detail, including his underlying rationale, in accordance with the APA. See *Wojtowicz*, 12 BLR at 1-165. When weighing the conflicting opinions, the administrative

⁶ At the hearing, employer proffered Dr. Zaldivar's report for the limited purpose of impeaching his positive interpretation of the August 25, 2004 x-ray. Hearing Transcript at 5-6. In addition, inclusion of Dr. Zaldivar's medical report in the record would exceed the limitation on employer's affirmative medical opinion evidence. See 20 C.F.R. §725.414(a)(3)(i).

law judge should take into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Further, in determining whether the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge must weigh the medical opinion evidence together with the x-ray and CT scan evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If the administrative law judge determines that the existence of pneumoconiosis has been established, he must address whether claimant has established that the pneumoconiosis arose out of coal mine employment and that the pneumoconiosis was totally disabling pursuant to 20 C.F.R. §§718.203, 718.204(b)(2), (c).

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 consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge