BRB No. 98-1208 BLA

CARLOS MOLLETTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SMC COAL & TERMINAL CO.	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Laura Metkoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (96-BLA-1804) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge credited claimant with twenty-two years and ten months of coal mine employment. Noting claimant's request for modification of the district director's denial of the instant claim, the administrative law judge found that claimant established that he is now totally disabled, and, thereby, established modification at 20 C.F.R. §725.310. Considering the entirety of the evidence on the merits of the claim under 20 C.F.R. Part 718, the administrative law judge's further found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the credible x-ray and medical opinion evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), respectively, and alleges reversible error in the administrative law judge's contrary findings. Employer responds, and seeks affirmance of the decision below, asserting claimant's failure to identify any error in the administrative law judge's findings. Alternatively, employer argues that the decision below must be affirmed as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand the case based on his contention that the administrative law judge erred in weighing the x-ray evidence at Section 718.202(a)(1). The Director also argues that the administrative law judge's erroneous weighing of the x-ray evidence tainted his weighing of Dr. Baker's opinion at Section 718.202(a)(4), and asserts that if, on remand, the administrative law judge finds the existence of pneumoconiosis established, he must then reconsider the credibility of the medical opinions in determining the issues of total disability and total disability due to pneumoconiosis.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Both claimant and the Director challenge the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). The administrative law judge noted that the x-ray evidence consists of fifty-seven interpretations of seven x-ray films. Decision and Order at 7, 9. Weighing this evidence he found,

Of the fifty-six interpretations submitted by physicians who are B-readers

> and/or Board-certified radiologists, twenty-five were positive, twenty were negative for pneumoconiosis, and eleven were read as having a profusion of 0/1, thus negative as well for a total of thirty-one. The positive interpretations of record were rendered by seven different physicians while the negative interpretations were rendered by thirteen different physicians. Based on my review of this evidence, I find that the Claimant has failed to establish the presence of pneumoconiosis. Although the Claimant has submitted a number of positive interpretations, I find that this evidence is outweighed by the more numerous negative interpretations of record. Most important in this decision was the fact that thirteen different physicians rendered the thirty-one negative interpretations as opposed to the positive interpretations which were rendered by only seven different physicians. At best, this evidence could be perceived as being in equipoise. However, this finding would not favor the Claimant as he bears the burden of establishing each element of entitlement. Consequently, I find that the x-ray evidence fails to prove, by a preponderance of the evidence, the existence of pneumoconiosis under the criteria set forth in Section 718.202(a)(1).

Decision and Order at 9-10. Claimant argues that the administrative law judge should have accorded greater weight to the more recent x-ray evidence, developed subsequent to his departure from coal mine employment, which, claimant asserts, shows the existence of pneumoconiosis. The Director contends that rather than assessing and resolving, by individual x-ray, the conflicting readings resulting from five of the seven x-ray films, the administrative law judge erroneously summarily concluded that the numerical superiority of the negative interpretations of record as a whole outweighed the positive readings. The Director argues that it was illogical for the administrative law judge to permit, thereby, numerous negative readings of one x-ray to influence the weighing of positive readings of another. The Director further asserts that the administrative law judge arbitrarily preferred one B-reader's negative interpretations over another B-reader's positive interpretations.

We agree with the Director's contentions. The United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this claim arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), has held that it is error for the administrative law judge to rely on the quantitative weight of the evidence, *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Thus, to the extent that the administrative law judge, in the instant case, relied on his finding that "thirteen different physicians rendered the thirty-one negative interpretations as opposed to the positive interpretations which were rendered by only seven different

physicians," Decision and Order at 10, he erred. *Id.* We thus vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), and remand the case for reconsideration of the x-ray evidence. On remand, the administrative law judge must resolve conflicting interpretations of individual x-rays of record, and then consider the quality, quantity, and sequence of the readings as a whole to determine whether claimant has met his burden of proof. *Id.*; *Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant further contends that the credible medical opinions from Drs. Younes and Baker, who examined claimant, establish the existence of pneumoconiosis at Section 718.202(a)(4). Claimant's only assertion of error on the administrative law judge's part in considering the medical opinions, is that the administrative law judge erred in crediting the opinions of Drs. Renn, Castle, and Tuteur since the physicians opined that chronic obstructive pulmonary disease cannot be equated with coal workers' pneumoconiosis and thus, their opinions are hostile to the intent of the Act. The Director argues that insofar as the administrative law judge accorded less weight to Dr. Baker's opinion because the physician diagnosed pneumoconiosis and the administrative law judge determined that the weight of the x-ray evidence was negative, the administrative law judge's finding at Section 718.202(a)(4) cannot be upheld if the weight of the x-ray evidence is, in fact, positive. The Director also asserts that the administrative law judge's "assessment of the weight assigned to the reports of Drs. Dahhan, Renn, Tuteur and Castle may also change if pneumoconiosis is proved by x-ray." Director's Motion to Remand at 6.

A review of the administrative law judge's findings at Section 718.202(a)(4), *see* Decision and Order at 10-14, reveals that the administrative law judge discounted Dr. Baker's opinion because, *inter alia*, Dr. Baker based his diagnosis of legal pneumoconiosis on a positive x-ray where the administrative law judge found the preponderance of the x-ray evidence to be negative, *Id*. at 13. Given our remand of the case to the administrative law judge for a redetermination of the weight of the x-ray evidence at Section 718.202(a)(1), we vacate the administrative law judge's finding at Section 718.202(a)(4) since his assessment of the medical opinions thereunder was affected by his findings at Section 718.202(a)(1).[1] If, on remand, the

[1]Inasmuch as we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) on this basis, and remand the case to the administrative law judge to reconsider the credibility of the medical opinion evidence, we do not specifically address claimant's argument regarding the opinions of Drs. Renn, Tuteur, and Castle. We note, however, that none of these physicians ruled out

administrative law judge finds the existence of pneumoconiosis established under Section 718.202(a), he must then determine whether claimant has met his burden to establish the other elements of entitlement under Part 718. *See Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order - Denial of Benefits, and remand the case to the administrative law judge for further consideration consistent with this opinion. We grant the Director's Motion to Remand.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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the possibility that coal workers' pneumoconiosis could result in an obstructive impairment, Employer's Exhibits 51, 52, 55, 71, 72, and, in fact, Drs. Renn and Castle testified that coal workers' pneumoconiosis results in both restrictive and obstructive impairments, Employer's Exhibits 71 at 18-22; 72 at 10, 12-14, 16.