BRB No. 06-0628 BLA

STEPHEN R. JOHNSTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	DATE ISSUED: 03/27/2007
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-6381) of Administrative Law Judge Richard A. Morgan rendered 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). Claimant filed his claim for benefits on August 24, 2003. Director's Exhibit 2. On March 17, 2004, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 16. Claimant requested a hearing, which was held on September 29, 2005. In a Decision and Order issued on April 28, 2006, the administrative law judge determined that claimant worked for at least thirty years in coal mine employment, that the evidence was sufficient to establish that claimant suffered from coal workers' pneumoconiosis pursuant to 20 C.F.R.

§§718.202(a), 718.203, and that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge further determined that the evidence was insufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in determining that he was not totally disabled due to pneumoconiosis. Claimant contends that the administrative law judge erred in rejecting Dr. Forehand's opinion relevant to the issue of disability causation under 20 C.F.R. §718.204(c). Employer has filed a response brief, contesting the administrative law judge's findings under 20 C.F.R. §§718.202(a) and 718.204(b)(2). Employer, however, also contends that the administrative law judge properly denied benefits because he found that pneumoconiosis was not a substantially contributing cause of claimant's total disability. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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. 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).

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

Initially, we address employer's contention that the administrative law judge erred in determining that claimant suffers from pneumoconiosis. *See* 20 C.F.R. §718.202(a); Employer's Brief at 6. In considering whether claimant established the existence of pneumoconiosis, the administrative law judge first considered the x-ray evidence under 20 C.F.R. §718.202(a)(1). The administrative law judge correctly noted that the record contained four x-rays, of which there were three positive and three negative interpretations for pneumoconiosis, rendered in accordance with the quality standards.[1]

[1] The revised regulations at 20 C.F.R. §§718.101(b), 718.102(a), (e) provide that no chest x-ray shall constitute evidence of the presence or absence of pneumoconiosis unless documented and reported in compliance with 20 C.F.R. §718.102 and Appendix A to Part 718, which set forth the standards for administering and interpreting chest x-rays, developed in consultation with the National Institute for Occupational Safety and Health

Decision and Order at 5. The administrative law judge properly noted that Dr. Forehand read an x-ray dated September 17, 2003 as positive for pneumoconiosis, while Dr. Giogineni and Dr. Binns read the same film as negative; Dr. Hippensteel read a September 2, 2004 x-ray as positive; and that both Dr. Aycoth and Dr. Capiello read an August 5, 2005 x-ray as positive for pneumoconiosis.[2] Decision and Order at 5; Director's Exhibit 9; Claimant's Exhibits 1, 2; Employer's Exhibits 1-3. In weighing the conflicting x-ray evidence, the administrative law judge took into consideration the progressive nature of pneumoconiosis and assigned greatest weight to the most recent x-ray dated August 5, 2005, because it had been read as positive for pneumoconiosis by two dually qualified Board-certified radiologists and B readers. The administrative law judge further noted that the negative readings of claimant's two earlier films were not necessarily inconsistent with his conclusion that claimant established the existence of pneumoconiosis based on the most recent x-ray. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Because substantial evidence supports the administrative law judge's determination that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence, we affirm his finding under 20 C.F.R. §718.202(a)(1).

Although the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (a)(3) or (a)(4), after weighing all of the evidence together at 20 C.F.R. §718.202(a), the administrative law judge was persuaded that claimant suffered from clinical pneumoconiosis as established by the most recent positive x-ray. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 9. Because the administrative law judge weighed all of the evidence and found that claimant established the existence of clinical pneumoconiosis, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a). *Id*.

Employer also challenges that administrative law judge's determination that claimant suffers from a totally disabling respiratory or pulmonary impairment. In considering whether claimant established total respiratory disability, the administrative

---

(NIOSH). *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 131 (2006) (*en banc*) (Boggs, J., concurring).

[2] The administrative law judge noted that Dr. Forehand and Dr. Hippensteel were B readers, while Dr. Aycoth, Dr. Binns, Dr. Cappiello and Dr. Gogineni were Board-certified radiologists and B readers. The administrative law judge assigned no weight to a positive reading for pneumoconiosis of an x-ray dated July 17, 2002 because there was no quality assessment of the x-ray, and the administrative law judge was unable to discern the name of the physician who rendered the interpretation. Decision and Order at 5; Director's Exhibit 10.

law judge noted that none of the pulmonary function studies was qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and that the medical opinions of Dr. Forehand and Dr. Hippensteel were in equipoise as to whether claimant had a disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(iv).[3] Decision and Order at 10-11. The administrative law judge also noted, however, that claimant underwent arterial blood gas testing on September 17, 2003 and September 4, 2004, and that the results of the latter study showed qualifying values for total disability on exercise. Decision and Order at 10. The administrative law judge considered the exercise portion of the most recent arterial blood gas study to be probative in light of the progressive and irreversible nature of pneumoconiosis, and "in view of the extensive manual labor required in claimant's last usual coal mine job." *Id.* He thus found that claimant established the existence of a totally disabling respiratory impairment based on the arterial blood gas study evidence under 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge next weighed all of the contrary probative evidence together, and stated that, "taken as a whole, [c]laimant has established total disability under [Section] 718.204(b)." Decision and Order at 11. Because the administrative law judge properly weighed all the relevant evidence in assessing whether claimant satisfied his burden of proof, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant has established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

We now turn to the issue of disability causation. Under the regulation at Section 718.204(c), a claimant must establish that his pneumoconiosis is "a substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c). Pneumoconiosis is considered to be a substantially contributing cause of a miner's total respiratory disability if it has "a material adverse effect on the miner's respiratory condition" or it "materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." *Id.*

In addressing the issue of disability causation at Section 718.204(c), the administrative law judge determined that claimant failed to provide a "well-reasoned and/or well-documented medical opinion which establishes that pneumoconiosis is a substantially contributing cause of [claimant's] total disability." Decision and Order at 11. Although the administrative law judge acknowledged that Dr. Forehand's opinion

[3] Claimant was unable to establish total disability under Section 718.204(b)(2)(iii) because there was no evidence in the record to establish that claimant had cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii).

was favorable to claimant's case, he discredited Dr. Forehand's diagnosis, that claimant suffered from a disabling respiratory impairment due to both smoking and coal dust exposure, for three reasons. First, the administrative law judge found that Dr. Forehand relied, in part, on a "questionable" positive x-ray interpretation. Decision and Order at 11. Second, the administrative law judge noted that Dr. Forehand relied on a physical finding of crackles "which was no longer evident to a pulmonary specialist [Dr. Hippensteel] on a subsequent examination." *Id*. Third, the administrative law judge stated that Dr. Forehand did not fully discuss what role, if any, heart disease played in claimant's disability. *Id*.

Claimant asserts that it was irrational for the administrative law judge to reject Dr. Forehand's disability causation opinion since the administrative law judge agreed with Dr. Forehand, and not employer's expert, Dr. Hippensteel, that claimant suffered from both coal workers' pneumoconiosis and total respiratory disability. Claimant's Brief (unpaginated). Claimant maintains that Dr. Forehand's opinion is credible and sufficient to establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. *Id*.

Claimant's contentions of error have merit. The administrative law judge determined, in light of the progressive nature of pneumoconiosis that, based on the most recent x-ray of record dated August 5, 2005, which had been read as positive for pneumoconiosis by two dually qualified physicians, claimant satisfied his burden of proof to establish the existence of the disease. Because the administrative law judge determined that a preponderance of the x-ray evidence established the existence of pneumoconiosis, the administrative law judge has failed to adequately explain how Dr. Forehand's opinion, that claimant is totally disabled due, at least in part, to pneumoconiosis, was undermined by Dr. Forehand's interpretation of the September 17, 2003 x-ray as also being positive for pneumoconiosis. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985); Decision and Order at 5, 11.

Additionally, contrary to the administrative law judge's suggestion, neither Dr. Forehand nor Dr. Hippensteel discussed the significance of the presence or absence of crackles on auscultation. Consequently, in pointing out the difference between the two physical examinations, and by relying on the absence of crackles on auscultation to reject Dr. Forehand's opinion, the administrative law judge has impermissibly drawn his own conclusion as to the importance of this physical finding. Thus, we conclude that the administrative law judge has improperly substituted his opinion for that of a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 11.

Additionally, the administrative law judge discredited Dr. Forehand's opinion because he found that Dr. Forehand had not specifically addressed the role of claimant's

heart condition in his total disability. The administrative law judge's credibility determination was based, in part, on his reliance on Dr. Hippensteel's opinion, that the miner's respiratory impairment was due to heart disease and not pneumoconiosis. However, because this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit,[4] the administrative law judge erred by failing to evaluate the medical opinion evidence relevant to disability causation in light of the physicians' findings as to the existence of pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109; 19 BLR 2-70 (4th Cir. 1995).[5] Because Dr. Hippensteel opined, contrary to the administrative law judge's finding, that claimant does not suffer from clinical pneumoconiosis, the administrative law judge should reconsider the probative value of Dr. Hippensteel's opinion as to the etiology of the miner's respiratory disability, in comparison to Dr. Forehand's opinion at Section 718.204(c).[6] *See Scott*, 289 F.3d at 268, 22 BLR at 2-382.

Moreover, the administrative law judge erred at Section 718.204(c) by failing to fully address all aspects of Dr. Forehand's opinion relevant to disability causation. Dr. Forehand opined that claimant was totally disabled from a respiratory standpoint due to coal workers' pneumoconiosis and chronic bronchitis. Dr. Forehand also stated that claimant's chronic bronchitis had been "compromised" by his coal dust exposure and

---

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

[5] Claimant alleges that, while Dr. Forehand did not specifically discuss claimant's heart disease, it is apparent from his report that he was fully apprised of that condition, and therefore, it was unreasonable for the administrative law judge to conclude that he failed to take claimant's heart disease into consideration when he wrote his opinion. Claimant's Brief (unpaginated). We note that Dr. Forehand reported that claimant had a history of hypertension, diabetes, and heart disease, beginning in 1992, with symptoms of chest pain (angina), for which he was prescribed nitroglycerin. Director's Exhibit 9. An electrocardiogram was also performed in conjunction with Dr. Forehand's opinion, and was interpreted as showing no acute changes. *Id*. On remand, the administrative law judge should more fully address the probative value of Dr. Forehand's opinion on disability causation in conjunction with the medical history listed in his report.

[6] Dr. Hippensteel opined that claimant did not suffer from clinical pneumoconiosis. Employer's Exhibit 1. Dr. Hippensteel opined that claimant's respiratory impairment, which could not accurately be assessed, was due to heart disease, obesity, and his "ongoing" smoking habit. *Id*.

smoking habit. Director's Exhibit 9. On remand, we instruct the administrative law judge to fully consider Dr. Forehand's disability causation opinion and determine whether it is sufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's total disability as defined at Section 718.204(c). *See* 20 C.F.R. §718.201; *See Scott*, 289 F.3d at 268, 22 BLR at 2-382; *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

Consequently, we vacate the administrative law judge's denial of benefits pursuant to 20 C.F.R. §718.204(c), and remand this case for further consideration as to whether claimant has established that pneumoconiosis was a substantially contributing cause of his total disability. On remand, the administrative law judge should weigh the conflicting medical opinion evidence in accordance with *Scott*, 289 F.3d at 268-270; 22 BLR at 2-382-385. The administrative must also reconsider Dr. Forehand's opinion, that claimant is totally disabled due to both coal workers' pneumoconiosis and chronic bronchitis, due in part to coal dust exposure, pursuant to 20 C.F.R. §718.204(c), and determine whether claimant has carried his burden of proof to establish his entitlement to benefits.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed in part, 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

_____
BETTY JEAN HALL
Administrative Appeals Judge