

BRB No. 09-0437 BLA

MATTHEW J. PECZUH )  
 )  
 Claimant-Respondent )  
 )  
 v. ) DATE ISSUED: 03/09/2010  
 )  
 ENERGY WEST MINING COMPANY )  
 C/O ACORDIA EMPLOYERS )  
 SERVICE/INSURANCE COMPANY OF )  
 THE STATE OF PENNSYLVANIA )  
 )  
 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 Granting Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

Spencer M. Wiegard (Gentry Locke Rakes & Moore LLP), Roanoke, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (06-BLA-5488) of Administrative Law Judge Richard K. Malamphy 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).<sup>1</sup> The administrative law judge credited

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<sup>1</sup> Claimant filed his claim for benefits on April 20, 2005. Director's Exhibit 2.

claimant with at least thirty-two years of coal mine employment, as stipulated,<sup>2</sup> found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and found that claimant is totally disabled by a respiratory or pulmonary impairment that is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings of pneumoconiosis at Section 718.202(a)(1), (4), and disability causation at Section 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.<sup>3</sup>

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge considered six readings of two x-rays and considered the readers' radiological qualifications. The May 23, 2005 x-ray was read as positive for pneumoconiosis by Dr. Hammond, a Board-certified radiologist, and by Drs. Miller and Aycoth, both of whom are Board-certified

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<sup>2</sup> The record indicates that claimant's coal mine employment was in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>3</sup> The administrative law judge's findings of at least thirty-two years of coal mine employment, that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), are unchallenged on appeal. Those findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

radiologists and B readers. Director's Exhibit 12; Claimant's Exhibits 1, 2. Drs. Scott and Wheeler, both Board-certified radiologists and B readers, read the May 23, 2005 x-ray as negative for pneumoconiosis.<sup>4</sup> Director's Exhibit 15; Employer's Exhibits 5, 6. The May 10, 2006, x-ray was read as positive by Dr. Morrison, a Board-certified radiologist and B reader, and there were no contrary readings. Employer's Exhibit 1. According "greater weight" to the readings by B readers, the administrative law judge found that "[t]he B-readers have split as to whether . . . CWP was shown on the May 2005 x-ray." Decision and Order at 4. However, the administrative law judge noted that the only reading of the May 10, 2006 x-ray by a B reader was positive for pneumoconiosis. Based on this analysis of the x-ray readings, the administrative law judge found that claimant established the existence of clinical pneumoconiosis<sup>5</sup> pursuant to Section 718.202(a)(1).

Employer's sole argument is that the administrative law judge erred in failing to weigh a CT scan reading along with the x-ray evidence.<sup>6</sup> Employer's Brief at 6. We reject employer's contention that the administrative law judge should have weighed CT scan evidence with the x-ray evidence, as CT scan evidence is properly considered at Section 718.107(b). *See* 20 C.F.R. §718.202(a)(1); *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring) *aff'd on recon.* 24 BLR 1-1, 1-7 (2007)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-34 (1991)(*en banc*). As substantial evidence supports the administrative law judge's finding that the x-ray evidence, viewed in light of the readers' qualifications, established the existence of clinical pneumoconiosis, *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003), and, as employer raises no

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<sup>4</sup> Dr. Navani, a Board-certified radiologist and B reader, reviewed the May 23, 2005 x-ray for its film quality only. Director's Exhibit 14.

<sup>5</sup> "Clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

<sup>6</sup> Specifically, employer asserts that the administrative law judge should have considered Dr. Morrison's reading of a May 19, 2006 CT scan "in concert with" Dr. Morrison's positive, "2/3" reading of the May 10, 2006 x-ray. Employer's Brief at 6.

other arguments, we affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1).<sup>7</sup>

Pursuant to Section 718.204(c),<sup>8</sup> the administrative law judge relied on the opinions of Drs. James, Gagon, and Etzel to find that clinical pneumoconiosis has "a major effect on the [c]laimant's total pulmonary disability."<sup>9</sup> Decision and Order at 10.

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<sup>7</sup> Section 718.202(a)(1)-(4) provides alternative methods of establishing the existence of pneumoconiosis. See *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1216, 24 BLR 2-155, 2-162 (10th Cir. 2009); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). Therefore, we need not address employer's challenge to the administrative law judge's finding that the medical opinion evidence also established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Further, because the administrative law judge found that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), he was not obliged to further weigh the CT scan reading identified by employer. See *Oliver*, 555 F.3d at 1216, 24 BLR at 2-162; *Dixon*, 8 BLR at 1-345; cf. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-170 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25, 21 BLR 2-104, 2-111 (3d Cir. 1997).

<sup>8</sup> Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material 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).

<sup>9</sup> Dr. James opined that claimant is totally disabled due, in part, to pulmonary fibrosis detected by chest x-ray and physical examination findings. Claimant's Exhibit 6 at 3. Dr. James indicated that claimant's coal mine dust exposure was a "significant contributing factor in the development of his pulmonary fibrosis." *Id.* Dr. Gagon attributed claimant's impairment in part to clinical pneumoconiosis. Director's Exhibit 12. Dr. Etzel opined that claimant's "severe primary lung disease" is due, in part, to

By contrast, the administrative law judge discounted Dr. Farney's opinion, that claimant is totally disabled due to chronic obstructive pulmonary disease (COPD) related to smoking, because Dr. Farney did not diagnose clinical pneumoconiosis, even though the x-ray that Dr. Farney reviewed was positive for the disease.<sup>10</sup>

Employer argues that the administrative law judge erred because "the medical evidence . . . supports a finding" that "[c]laimant's pulmonary disability is not related to his coalmine [sic] employment," but rather, is due to COPD caused by smoking. Employer's Brief at 10. Contrary to employer's suggestion, the Board is not authorized to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113. The administrative law judge reasonably questioned Dr. Farney's opinion regarding the cause of claimant's respiratory disability, because Dr. Farney did not believe that claimant has clinical pneumoconiosis, contrary to the administrative law judge's finding. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Moreover, we conclude that substantial evidence, in the form of the opinions of Drs. James, Gagon, and Etzel, supports the administrative law judge's determination that claimant is totally disabled due to clinical pneumoconiosis, as defined in Section 718.204(c). *See* 20 C.F.R. §718.204(c)(1)(i),(ii); *see also Mangus v. Director, OWCP*, 882 F.2d 1527, 1531-32, 13 BLR 2-9, 2-19 (10th Cir. 1989). The administrative law judge's finding is, therefore, affirmed.

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"fibrosis related to his work" that is "most likely" clinical coal workers' pneumoconiosis. Director's Exhibit 11 at 4-5; Claimant's Exhibit 8 at 1, 34.

<sup>10</sup> The x-ray to which the administrative law judge referred was the May 10, 2006 x-ray that Dr. Morrison read as positive for clinical pneumoconiosis, and which the administrative law judge credited to find the existence of clinical pneumoconiosis established under Section 718.202(a)(1). Employer's Exhibits 1, 4.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge