BRB No. 09-0451 BLA

CHARLES V. COLEMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY	)	DATE ISSUED: 03/16/2010
	)	
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 on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Charles V. Coleman, Pennington Gap, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

McGRANERY, Administrative Appeals Judge:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Remand (2006-BLA-6192) of Administrative Law Judge Linda S. Chapman 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). This case is before the

[1] Before the administrative law judge, claimant was assisted by a lay representative from Stone Mountain Health Services. Hearing Transcript at 4.

Board for the second time. In the last appeal, the Board affirmed, in part,[2] and vacated, in part, the administrative law judge's Decision and Order Denying Benefits, and remanded this case for a determination of whether employer demonstrated good cause for the admission into the record of Dr. Scatarige's x-ray reading, which exceeded the evidentiary limitations pursuant to 20 C.F.R. §725.414(a)(3)(ii).[3] On remand, the administrative law judge determined that employer failed to establish good cause for the admission of the x-ray, and found that the weight of the x-ray evidence and medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Accordingly, benefits were denied.

In the present appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits.[4] The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the

[2] The Board affirmed the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), since there was no biopsy evidence of record, and further affirmed her determination that claimant was ineligible for the presumptions described at 20 C.F.R. §§718.304, 718.305, or 718.306, and, therefore, was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). *C.V.C.* [*Coleman*] *v. Powell Mountain Coal Co.*, BLB No. 07-0985 BLA (Aug. 19, 2008)(unpub.).

[3] A showing of "good cause" is necessary in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony. *See* 65 Fed. Reg. 79,993 (Dec 20, 2000); 20 C.F.R. §725.456(b)(1).

[4] Employer also asserts that the administrative law judge committed "harmless error" in rejecting employer's good cause argument for the admission of Dr. Scatarige's x-ray reading pursuant to 20 C.F.R. §725.414(a)(3)(ii), but requests that the Board address its argument, should the Board not affirm the denial of benefits. Employer's Brief at 8. We decline to address employer's argument, as employer did not file a cross-appeal, but seeks to expand its rights by raising this issue in a response brief. *See generally Barnes v. Director, OWCP*, 19 BLR 1-73 (1995); 20 C.F.R. §802.212.

findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004)(*en banc*).

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).

In finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge considered eleven interpretations of five x-rays, dated May 9, 2005, August 16, 2005, March 29, 2006, January 18, 2007, and January 24, 2007. Decision and Order at 3; Decision and Order on Remand at 3-4; *see* 20 C.F.R. §718.202(a). The administrative law judge determined that the film dated May 9, 2005 was read as positive by Dr. Alexander, Director's Exhibit 14, and as negative by Dr. Scott, Director's Exhibit 17, both dually qualified Board-certified radiologists and B readers.[6] The administrative law judge further determined that the film dated August 16, 2005 was read as positive both by Dr. Miller, who is dually qualified, Director's Exhibit 16, and by Dr. Baker, a B reader, while Dr. Scott interpreted the film as negative. Director's Exhibit 15. The administrative law judge determined that the March 29, 2006 x-ray was read as positive by Dr. Alexander, Director's Exhibit 18, and as negative by Dr. Hippensteel, who is a B reader. Director's Exhibit 11. The administrative law judge next determined that the film dated January 18, 2007 was read as positive by Dr. Ahmed, Claimant's Exhibit 1, and as negative by Dr. Wheeler, Employer's Exhibit 3, both dually qualified physicians. Lastly, the administrative law judge determined that the January 24, 2007 film was read

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[6] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The terms "A reader" and "B-reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

as positive by Dr. Miller, Claimant's Exhibit 3, and as negative by Dr. Scott. Employer's Exhibit 6. According greater weight to the interpretations by dually qualified readers, the administrative law judge determined that the x-rays of May 9, 2005, August 16, 2005, January 18, 2007, and January 24, 2007 were in equipoise and thus did not establish the existence of pneumoconiosis by a preponderance of the evidence, while the March 29, 2006 x-ray was positive for pneumoconiosis. Finding that a numerical preponderance of the x-rays did not establish the existence of pneumoconiosis, the administrative law judge determined that claimant failed to satisfy his burden at Section 718.202(a)(1). Decision and Order on Remand at 4.

We find no error in the administrative law judge's weighing of the individual x-rays of record. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-64 (4th Cir. 1992); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc on recon.*). However, the administrative law judge failed to adequately explain why a finding that four x-rays in equipoise and one positive x-ray resulted in a finding that claimant failed to satisfy his burden at Section 718.202(a)(1). Moreover, the administrative law judge subsequently indicated that a preponderance of the x-rays, including the two most recent, were negative for pneumoconiosis, *see* Decision and Order on Remand at 4 n.1, rather than adhering to her previous finding that the positive and negative interpretations of four x-rays were evenly balanced, and one x-ray was positive for pneumoconiosis. As the administrative law judge's findings at subsection (a)(1) also affected her findings regarding physicians' diagnoses of clinical pneumoconiosis at subsection (a)(4), *see* Decision and Order on Remand at 4-5, we vacate her finding that clinical pneumoconiosis was not established by the x-ray and medical opinion evidence at Section 718.202(a)(1), (4), and remand this case for further findings and explanation that comport with the requirements of the Administrative Procedure Act (the Act), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

On the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge summarized the conflicting medical opinions of Drs. McSharry, Hippensteel, Molony, and Baker. Decision and Order at 4-8; Decision and Order on Remand at 4-6. The administrative law judge correctly determined that, even though Drs. McSharry and Hippensteel acknowledged claimant's long history of coal dust exposure, neither physician diagnosed pneumoconiosis, but instead attributed claimant's respiratory impairment to emphysema caused by cigarette smoking. Decision and Order on Remand at 4-6; Employer's Exhibits 3, 4, 5; Director's Exhibit 11. The administrative law judge permissibly found that Dr. McSharry's opinion, that claimant's respiratory impairment was due to "garden variety" emphysema, and Dr. Hippensteel's opinion, that the airway disease was related to claimant's cigarette smoking and bullous emphysema, were well-reasoned and documented, as the doctors based their opinions on their examinations of claimant and the totality of the medical evidence of record, including objective test

results. Decision and Order on Remand at 6; 20 C.F.R. §718.202(a)(4); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Next, the administrative law judge considered the opinion of Dr. Molony, claimant's treating physician, who found "severe resting arterial hypoxemia, chronic obstructive pulmonary disease (COPD) with a moderate obstructive defect, chronic bronchitis with cough, sputum production, wheezing and shortness of breath," stating that "[w]ith 30+ years of coal dust exposure, this would be legal pneumoconiosis." Claimant's Exhibit 2; Director's Exhibit 14. The administrative law judge noted that Dr. Molony did not explain why he found that claimant's coal dust exposure contributed to his respiratory impairment, and he failed to support his conclusion with objective test results or clinical findings. Additionally, the administrative law judge determined that the treatment records did not support Dr. Molony's conclusion that claimant's respiratory impairment was attributable to his coal mine employment. Director's Exhibit 11. Therefore, the administrative law judge permissibly accorded Dr. Molony's opinion little weight on the issue of legal pneumoconiosis, despite his status as claimant's treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (6th Cir. 2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 5.

Lastly, in considering the opinion of Dr. Baker, who performed a complete pulmonary evaluation on behalf of the Department of Labor, the administrative law judge noted the physician's diagnosis of chronic bronchitis, COPD, and hypoxemia due to a combination of coal dust exposure and cigarette smoking. Decision and Order on Remand at 4; Director's Exhibit 10. The administrative law judge determined that the physician "offered no rationale or support for his conclusory statement," that claimant's COPD, hypoxemia, and chronic bronchitis were due in part to his coal dust exposure. Decision and Order on Remand at 4. Thus, the administrative law judge found that Dr. Baker's opinion was not well-reasoned or supported by the objective medical evidence of record. *Id.* However, the administrative law judge's determination, that Dr. Baker did not "point to any objective findings in support of his conclusion [that claimant had legal pneumoconiosis]," *id.*, is not supported by the record. In the addendum to his report, Dr. Baker stated, in part:

> With legal pneumoconiosis, the patient alleges thirty-four years of coal dust exposure and has a symptom complex of chronic bronchitis, with cough, sputum production and wheezing and shortness of breath. He has a mild obstructive defect on pulmonary function testing and a severe degree of resting arterial hypoxemia, with a PO2 of 61 and a PCO2 of 32, which meets the disability requirements. The history of thirty-four years of coal dust exposure can cause the bronchitis and obstructive airway disease as well as resting arterial hypoxemia. He also has a significant history of

> smoking of forty-three years at the rate of one pack per day and continues to smoke at the present time. The smoking may have caused the majority of his symptoms but with a long history of coal dust exposure and his abnormal x-ray, I feel his coal dust exposure is significantly related to his impairment and substantially aggravates his condition.

Director's Exhibit 10.

Dr. Baker clearly referenced the objective findings that supported his conclusion that claimant had legal pneumoconiosis, suggesting that the administrative law judge may have overlooked Dr. Baker's addendum to the report; in light of claimant's *pro se* status, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4), and remand this case for further consideration. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). On remand, the administrative law judge should consider the entirety of Dr. Baker's opinion when weighing the medical opinion evidence of record pursuant to Section 718.202(a)(4). If, on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a), she must consider whether the evidence is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the decision of my colleagues to vacate the administrative law judge's denial of benefits and to remand this case for further findings. In my opinion, the administrative law judge's ultimate finding, that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a), is supported by substantial evidence, and should be affirmed.

I concur in the majority's holding that the administrative law judge properly weighed the conflicting interpretations of the individual x-rays of record at Section 718.202(a)(1), but would affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis thereunder. The administrative law judge acted within her discretion in finding that claimant failed to satisfy his burden, based on her finding that a numerical preponderance of the x-rays, taken both before and after the single positive x-ray, did not establish the existence of pneumoconiosis. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Because the administrative law judge's conclusion is supported by substantial evidence in the record, I would affirm her finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

In addition, I would affirm the administrative law judge's finding that the medical opinions of record were insufficient to establish the existence of clinical and/or legal pneumoconiosis at Section 718.202(a)(4), as supported by substantial evidence. The administrative law judge rationally determined that the opinions of Dr. Baker and Dr. Molony were conclusory and insufficient to establish the existence of either clinical or legal pneumoconiosis, as both doctors failed to adequately explain their diagnoses of legal pneumoconiosis, and a positive x-ray reading coupled with a history of coal dust exposure alone cannot establish clinical pneumoconiosis, in light of the administrative law judge's finding that the x-ray evidence as a whole did not establish the existence of pneumoconiosis. The administrative law judge also rationally found that there were no treatment records to document or support Dr. Molony's conclusions. *See Clark*, 12 BLR at 1-149; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985).

Accordingly, as deference must be given to the fact-finder's inferences and credibility assessments, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), I would affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a), and affirm her denial of benefits.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge