

BRB No. 97-0896 BLA

JEAN SHUMAKER)
(Widow of GEORGE R. SHUMAKER))
)
 Claimant-Respondent)
)
 v.) DATE ISSUED:
)
 PEABODY COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
) DECISION and ORDER
 Party-in-Interest)

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld & Schiller), Pittsburgh, Pennsylvania, for claimant.

Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1532) of Administrative Law Judge Thomas F. Phalen, Jr. awarding benefits on claims¹ filed pursuant to the provisions

¹ Claimant is Jean Shumaker, widow of George R. Shumaker, the miner, whose application for benefits filed on May 3, 1994 was pending when he died on June 8, 1995. Director's Exhibits 1, 34. Mrs. Shumaker filed her claim for survivor's benefits on July 6,

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 the miner with twenty-one years of coal mine employment and found that employer is the responsible operator. The administrative law judge found that the medical evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), and (4), and further found total respiratory disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204. The administrative law judge also concluded that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits on both the miner's and the survivor's claims.

On appeal, employer contends that the administrative law judge erred in his weighing of the x-rays, biopsies, and medical opinions pursuant to Section 718.202(a)(1), (2), and (4). Employer further asserts that the administrative law judge failed to consider all of the relevant evidence pursuant to Section 718.204(c), failed to analyze separately the issue of disability causation pursuant to Section 718.204(b), and mechanically rejected certain medical opinions. Employer also alleges that the administrative law judge failed to consider all of the evidence relevant to the cause of the miner's death pursuant to Section 718.205(c)(2). Claimant has not responded, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(1), employer contends that the administrative law judge impermissibly relied upon his own interpretation of the medical data. Employer's Brief at 18-20. The record contains fourteen readings of twelve x-rays. Overall, one reading was positive for the existence of pneumoconiosis, two readings were expressly negative, and eleven readings did not indicate specifically the presence or absence of

1995. Director's Exhibit 33.

² We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, responsible operator status, and pursuant to 20 C.F.R. §§718.202(a)(3) and 718.204(c)(3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis. The first eight x-rays, taken between November 1985 and April 1991, were interpreted as diagnostic of emphysema. Director's Exhibits 10, 25, 41. The next x-ray, taken on May 19, 1994, was read twice. Dr. Gaziano, a B-reader, read this x-ray as "1/0" for pneumoconiosis, while Dr. Safko, whose radiological credentials are not of record, concluded that pneumoconiosis was absent. Director's Exhibits 15, 16. The December 12, 1994 x-ray was read as negative for pneumoconiosis by Dr. Grodner, whose radiological qualifications are not of record. Director's Exhibit 26. Dr. Safko read the May 6, 1995 x-ray and diagnosed emphysema and middle lobe infiltrate. Director's Exhibit 41. Dr. Schowengerdt, the miner's treating surgeon, read the May 6 and May 15, 1995 x-rays as indicative of probable bronchitis. *Id.*

The administrative law judge stated that "although there [were] several x-rays that show[ed] emphysematous lungs," he credited Dr. Gaziano's 1/0 reading of the May 19, 1994 x-ray because it was "confirmed by" Dr. Schowengerdt's two later x-ray readings. Decision and Order 13, 15. However, as employer notes, Dr. Schowengerdt's readings of the May 6, 1995 and May 15, 1995 x-rays were not classified in the form required to constitute evidence of pneumoconiosis.³ Director's Exhibit 35; see 20 C.F.R. §718.102(b). Instead, Dr. Schowengerdt noted only "right middle lobe infiltrate and atelectasis" and diagnosed "persistent right middle lobe syndrome. Probable severe smoker's bronchitis. Rule out neoplasm." Director's Exhibit 35 at 4. Nevertheless, the administrative law judge offered his own opinion that Dr. Schowengerdt's description of atelectasis was consistent with the existence of pneumoconiosis and therefore "confirmed" Dr. Gaziano's earlier 1/0 reading. Decision and Order at 15. The administrative law judge thus concluded that Dr. Schowengerdt's readings coupled with the 1/0 reading established the existence of pneumoconiosis. Decision and Order at 15.

An administrative law judge exercises broad discretion in weighing the medical evidence and may, for example, accord greater weight to the x-ray interpretation of a B-reader. See *Woodward v. Director*, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Trent v. Director*, OWCP, 11 BLR 1-26 (1987). However, the interpretation of medical data, including x-rays, is for the medical experts and the administrative law judge may not substitute his own medical judgment for that of a physician. See *Marcum v. Director*, OWCP, 11 BLR 1-23 (1987). Here, the administrative law judge cited Dr. Gaziano's B-reader credentials, see *Woodward*, *supra*, but also relied on his own inferences regarding the medical significance of Dr. Schowengerdt's x-ray findings to conclude that the x-ray evidence established the existence of pneumoconiosis. See *Marcum*, *supra*. Because the administrative law judge impermissibly substituted his own medical analysis of Dr. Schowengerdt's unclassified readings to bolster Dr. Gaziano's B-reading, we cannot say that the administrative law judge's error is harmless. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand this case for him to perform a quantitative and qualitative analysis of all of the properly classified x-

³ To establish the existence of pneumoconiosis, a chest x-ray must be classified as Category 1, 2, 3, A, B, or C. 20 C.F.R. §718.102(b).

ray readings. See *Woodward, supra*.

Pursuant to Section 718.202(a)(2), employer asserts that the administrative law judge failed to explain adequately how all of the pathology evidence established the existence of pneumoconiosis. Employer's Brief at 21-23. Two biopsies were performed. Decision and Order at 15-16. Dr. Schowengerdt performed a bronchoscopy to obtain tissue samples from the middle lobe of the miner's right lung on May 19, 1995. In the surgical note detailing the procedure, he described a severely inflamed bronchial tree and a tumor in the right middle lobe and diagnosed severe bronchitis and neoplasm. Director's Exhibit 41. Dr. Thomas Forrestal, a pathologist,⁴ examined the resulting tissue and fluid samples and diagnosed squamous cell carcinoma. *Id.* He did not mention pneumoconiosis. On June 8, 1995, Dr. Schowengerdt performed a lung resection to remove the middle and lower lobes of the miner's cancerous right lung. In the surgical note he described the miner's lung as "anthracotic with mottled areas of scarring and fibrosis," and diagnosed squamous cell carcinoma, advanced chronic obstructive lung disease, and asthmatic bronchitis. *Id.* Dr. Forrestal conducted a gross and microscopic examination of the lung tissue removed by Dr. Schowengerdt and diagnosed squamous cell cancer, plaques of inflammation and adhesion, and "extensive emphysema and pigment deposition." Director's Exhibit 35 at 11-12.

Dr. Rosenberg, who is Board-certified in internal and pulmonary medicine, reviewed Dr. Forrestal's pathology reports. Dr. Rosenberg concluded that because the pathologist described cancer with pigment deposition only, "without any description of coal macules or related fibrosis," there was no pathological diagnosis of pneumoconiosis. Employer's Exhibit 1 at 3. However, in reply to a Department of Labor (DOL) inquiry, Dr. Schowengerdt opined that the miner's biopsy "specimen was consistent [with] at least a mixed dust pneumoconiosis." Director's Exhibit 35 at 1. Dr. Haggenjos, the miner's personal physician, was also consulted and stated that the miner had "pneumoconiosis which has been established by physical examination and Dr. Schowengerdt's biopsy reports from the lung. The a[n]thrasilicosis was observed on multiple slides." Director's Exhibit 46.

Without expressly weighing Dr. Forrestal's first pathology report regarding the May 19, 1995 bronchoscopy tissue samples, the administrative law judge found that Dr. Forrestal's second report relating to the tissue removed during the June 8, 1995 lung resection "show[ed] evidence of pneumoconiosis" because Dr. Forrestal noted "plaques of inflammation and adhesions . . . and pigment deposition, that could have resulted from pneumoconiosis." Decision and Order at 15-16. The administrative law judge further stated that Dr. Schowengerdt's description in the surgical note of anthracotic lung with adhesions and fibrosis, coupled with Dr. Schowengerdt's later "reference to a 'mixed dust pneumoconiosis' permit[ted] a determination that the miner's history of such exposure,

⁴ The record indicates that Dr. Forrestal is the Director of Pathology at Good Samaritan Medical Center. Director's Exhibit 35 at 11.

combined with the other opinions of the treating physicians, would support a determination that [the miner] had chronic coal workers' pneumoconiosis as well as smoker's COPD I find that the biopsy reports support the finding of coal workers' pneumoconiosis." Decision and Order at 15.

A biopsy finding of anthracotic pigmentation is not sufficient, by itself, to establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(2); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111, 2-117 (6th Cir. 1995). Further, when weighing the biopsy evidence, the administrative law judge is not free to engage in his or her own medical reasoning. See *Marcum, supra*. Again, employer's argument has merit, as the administrative law judge impermissibly substituted his own opinion that the pigment deposition that Dr. Forrestal described "could have resulted from pneumoconiosis" Decision and Order at 16, and therefore constituted evidence of pneumoconiosis, without determining whether or not the pathologist viewing the tissue slides actually diagnosed pneumoconiosis, or whether his pathology reports were indeterminate by themselves but perhaps supportive of other medical evidence. And while the administrative law judge stated that he accorded greater weight to Dr. Schowengerdt's surgical note, the administrative law judge did not explain how he concluded that the surgeon's gross description of anthracotic lung and fibrosis and Dr. Forrestal's microscopic observation of pigment constituted pneumoconiosis as defined in the Act in light of the fact that Dr. Forrestal did not describe fibrosis, anthracosis, anthracotic lung, or coal macules. See 20 C.F.R. §718.202(a)(2); *Griffith, supra*; *Lykins v. Director, OWCP*, 819 F.2d 146, 10 BLR 2-129 (6th Cir. 1987); see also *Marcum, supra*. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(2). On remand, the administrative law judge should reweigh all of the relevant evidence and explain his finding with reference to the legal definition of pneumoconiosis. See 20 C.F.R. §§718.201, 718.202(a)(2). The administrative law judge should expressly weigh both sets of biopsy evidence on remand, as the May 19, 1995 biopsy was taken from the right middle lobe, and the June 8, 1995 biopsy was taken from the right middle and lower lobes. Director's Exhibits 35, 41.

Pursuant to Section 718.202(a)(4), employer correctly notes that the administrative law judge based his finding in part on his analysis of the biopsy evidence. Employer's Brief at 24-26; Decision and Order at 18. Because we have vacated the administrative law judge's finding pursuant to Section 718.202(a)(2), we must also vacate his finding pursuant to Section 718.202(a)(4). If the administrative law judge does not find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) or (a)(2), he must reweigh the medical opinions pursuant to Section 718.202(a)(4). If pneumoconiosis is found established, the administrative law judge must determine whether it arose out of the miner's coal mine employment pursuant to Section 718.203(b).

Pursuant to Section 718.204(c), employer asserts that the administrative law judge failed to consider and weigh properly all of the relevant evidence. Employer's Brief at 27-31; Decision and Order at 19-21. This contention has merit. Pursuant to Section

718.204(c)(1) and (2), the record contains three qualifying⁵ pulmonary function studies and three blood gas studies, one of which was qualifying.⁶ Pursuant to Section 718.204(c)(4), Dr. Knight examined and tested the miner and concluded that his pulmonary function was sufficiently impaired to render him unable to perform his usual coal mine employment. Director's Exhibit 10. Dr. Grodner examined and tested the miner and diagnosed a severe ventilatory obstructive defect. Director's Exhibit 26. Dr. Haggenjos, who treated the miner's chronic obstructive pulmonary disease, bronchitis, and emphysema, stated that the miner "was unable to perform his daily tasks" and certified to the miner's disability insurer that the miner was unable to work due to his bronchitis during the 1980's. Director's Exhibits 10, 25, 41. Dr. Rosenberg reviewed the record and concluded that the miner was disabled from a respiratory standpoint. Employer's Exhibit 1.

The administrative law judge summarized two of the pulmonary function studies and the qualifying blood gas study taken during the miner's final hospitalization and concluded that they were "further evidence of disability from pneumoconiosis." Decision and Order at 17. The administrative law judge then weighed together two of the pulmonary function studies, Dr. Gaziano's 1/0 x-ray reading, Dr. Schowengerdt's description of anthracotic lung, and Dr. Haggenjos' s statement that pneumoconiosis contributed to the miner's death and concluded that the miner "was totally disabled due at least in part to pneumoconiosis." Decision and Order at 20-21.

Section 718.204(c) provides that, in the absence of contrary probative evidence, total respiratory disability shall be established by one of several alternative methods listed at Section 718.204(c)(1)-(5). Thus, the administrative law judge must first weigh the like medical evidence at each separate category to determine whether it supports a finding of total respiratory disability. Section 718.204(c) does not provide for a finding of total respiratory disability "upon a mere showing of evidence satisfying any one (or more) of the five alternatative methods" of proving disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197 (1986). Rather, it provides that such evidence establishes total respiratory disability only in the absence of contrary probative evidence. *Shedlock*, 9 BLR at 1-198; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Therefore, the administrative law judge must also weigh all of the contrary probative evidence together, indicate the relative weight assigned thereto, and determine whether the evidence establishes a totally disabling respiratory impairment. *Id.* X-rays are not diagnostic of the extent of a respiratory or pulmonary impairment, *Short v. Westmoreland Coal Co.*, 10 BLR

⁵ A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

⁶ The June 8, 1995 qualifying blood gas study was taken in the hours after the miner's right middle and lower lobectomy, during which time he suffered a postoperative pulmonary embolus and myocardial infarction. Director's Exhibit 35 at 8. The miner apparently was on a ventilator at that time. *Id.*

1-127, 1-129, n.4 (1987), and thus are not relevant to the issue of respiratory disability at Section 718.204(c).

Because all three pulmonary function studies of record were qualifying, the administrative law judge's finding of respiratory disability pursuant to Section 718.204(c)(1) is supported by substantial evidence, and we therefore affirm that finding, notwithstanding the administrative law judge's consideration of only two studies.⁷ See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984)(error which does not affect the disposition of a case is harmless). However, the administrative law judge failed to include in his weighing of the like evidence at Section 718.204(c)(2) the non-qualifying blood gas studies taken on May 19 and December 12, 1994, Director's Exhibits 14, 26, and failed to determine whether the medical opinions established respiratory disability at Section 718.204(c)(4). In weighing the contrary probative evidence, the administrative law judge failed to consider any blood gas studies or any of the medical opinions relevant to the extent of the miner's respiratory impairment, and relied upon x-ray evidence to determine respiratory disability. Accordingly, we vacate the administrative law judge's finding and instruct him on remand to consider all of the relevant evidence at Section 718.204(c)(2) and (4) to determine whether it supports a finding of total respiratory disability, and then to weigh all of the contrary probative evidence to determine whether it establishes total respiratory disability pursuant to Section 718.204(c). See *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields, supra; Shedlock, supra*.

Pursuant to Section 718.204(b), employer contends that the administrative law judge failed to make a separate finding regarding disability causation and mechanically rejected the opinions of Drs. Grodner and Rosenberg. Employer's Brief at 30-32. These contentions have merit. Dr. Knight opined that the miner was totally disabled due in part to pneumoconiosis. Director's Exhibit 10. Drs. Grodner and Rosenberg, on the other hand, opined that he was disabled due to the effects of cigarette smoking. Director's Exhibit 26; Employer's Exhibit 1.

As described above, the administrative law judge combined his analysis of respiratory disability pursuant to Section 718.204(c) and disability causation at Section 718.204(b). Decision and Order at 20-21. The administrative law judge found that the miner smoked two packs of cigarettes per day for thirty years then one pack per day thereafter, and was warned repeatedly to stop. Decision and Order at 5. The administrative law judge, however, completely rejected the disability causation opinions of

⁷ Contrary to employer's contention, the administrative law judge was entitled to rely on the administering physician's notation of good effort and Dr. Long's report validating the FVC and FEV1 values of the May 19, 1994 pulmonary function study and was not required to weigh for himself the computer-generated messages on the tracings indicating that certain individual test values were outside the 95% confidence interval. Director's Exhibits 8, 9; see 20 C.F.R. Part 718 Appendix B. Although Dr. Long invalidated the MVV value, this test was qualifying based on the FEV1 and the FEV1/FVC values. Director's Exhibit 8.

Drs. Grodner and Rosenberg because he found that their opinions failed to meet the four-prong test of *Blevins v. Peabody Coal Co. [Blevins II]*, 1 BLR 1-1023 (1978), for determining substantial medical evidence.

Pursuant to Section 718.204(b), a separate element of entitlement from Section 718.204(c), the administrative law judge must determine whether all of the relevant evidence establishes that the miner's disability was due at least in part to pneumoconiosis. See *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52, 2-63 (6th Cir. 1989). In weighing the medical opinions regarding the source of a miner's impairment, the *Blevins II* test is no longer to be strictly construed. *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501, 1-504 (1984). A disability causation opinion need only be a reasoned medical judgment. *Blevins v. Peabody Coal Co. [Blevins III]*, 6 BLR 1-750, 1-756 (1983). Because the administrative law judge failed to make a separate finding at Section 718.204(b) and erroneously rejected probative medical evidence, we must vacate the administrative law judge's finding. On remand the administrative law judge should weigh the opinions of Drs. Knight, Grodner and Rosenberg at Section 718.204(b) to determine whether the miner's disability was due at least in part to pneumoconiosis. See *Adams, supra*. If so, the administrative law judge must then determine the date of onset of total disability due to pneumoconiosis. See *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Pursuant to Section 718.205(c)(2), employer's contention that the administrative law judge failed to weigh all of the relevant evidence has merit. Employer's Brief at 34. The administrative law judge rejected Dr. Rosenberg's opinion that the miner's death was unrelated to pneumoconiosis on the grounds that the physician "failed . . . to even discuss the *Blevins* standards for rebuttal." Decision and Order at 24. As noted above, it is not required that a physician be asked and respond to each *Blevins II* question for his or her opinion to be considered. Therefore, we must vacate the administrative law judge's finding. On remand, the administrative law judge must weigh Dr. Rosenberg's opinion along with the miner's death certificate and the opinions of Drs. Schowengerdt, Haggenjos, and Long to determine whether claimant has carried her burden to establish that pneumoconiosis hastened the miner's death. Director's Exhibits 34, 35, 37, 41, 46, 47; Employer's Exhibit 1; see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge