BRB No. 10-0169 BLA

RODNEY DUNN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	DATE ISSUED: 11/08/2010
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (04-BLA-6422) of Administrative Law Judge Daniel A. Sarno, Jr., (the administrative law judge) awarding

benefits on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for the third time.[3] Pursuant to the last appeal filed by claimant,[4] the Board vacated the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[5] and remanded the case for reconsideration of the medical opinion evidence in accordance with the Administrative Procedure Act (APA). *R.D.* [*Dunn*] *v. Perry County Coal Corp*., BRB No. 08-0442 BLA (Mar. 26, 2009)(unpub.). Specifically, the Board instructed the administrative law judge to determine whether the medical opinion evidence established the existence of clinical and/or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *R.D.* [*Dunn*], BRB No. 08-0442 BLA, slip op. at 7. In addition, the Board vacated the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), given that the administrative law judge did not adequately discuss all of the x-ray

[1] Claimant filed his first claim on October 12, 1993. Director's Exhibit 1. It was finally denied by the district director on August 22, 1994, because claimant failed to establish the existence of pneumoconiosis or total respiratory disability. *Id*. Claimant filed this claim on July 7, 2003. Director's Exhibit 3.

[2] As the Director, Office of Workers' Compensation Programs, correctly asserts, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as claimant filed his claims prior to January 1, 2005.

[3] The complete procedural history of this case is set forth in the Board's decisions in *R.D.* [*Dunn*] *v. Perry County Coal Corp.*, BRB No. 07-0154 BLA (Aug. 30, 2007)(unpub.), and *R.D.* [*Dunn*] *v. Perry County Coal Corp*., BRB No. 08-0442 BLA (Mar. 26, 2009)(unpub.).

[4] At this point in the case, the Board has affirmed the administrative law judge's findings that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d) and that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b) on the merits. *R.D.* [*Dunn*], BRB No. 07-0154 BLA, slip op. at 2 n.3, 7 n.5.

[5] Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

evidence of record, old and new, or explain why he found that the x-ray evidence was in equipoise. *R.D.* [*Dunn*], BRB No. 08-0442 BLA, slip op. at 8. The Board instructed the administrative law judge to resolve any conflicts in the x-ray evidence. *Id*. Further, the Board instructed the administrative law judge to determine whether the evidence established that the clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), if reached. *Id*. Lastly, the Board instructed the administrative law judge to determine whether the evidence established total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), if reached. *Id*.

On remand, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Further, the administrative law judge found that the evidence established that claimant's clinical and legal pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. Additionally, the administrative law judge found that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) and that claimant's total respiratory disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1). Employer also challenges the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief in this appeal.[6]

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 applicable law.[7] 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).

[6] Claimant's counsel has filed an attorney's fee petition for work performed before the Board in the two prior appeals. No objections to the fee petition have been received.

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4, 7.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Initially, we will address employer's contention that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, employer asserts that the administrative law judge erred in failing to fully consider the nature of the positive interpretations of the August 1, 2003 x-ray, given that both Dr. Baker and Dr. Alexander read the x-ray as positive, but did not agree on the degree of opacities seen on the x-ray. Employer's Brief at 14-15. Contrary to employer's assertion, the administrative law judge need not differentiate between the degree and extent of opacities seen by the interpreting physicians on the x-ray. Rather, the administrative law judge must determine whether the reading is positive, by showing a 1/0 or greater profusion of the opacities, or negative. 20 C.F.R. §§718.102, 718.202(a); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999). Thus, we reject employer's assertion that the administrative law judge erred in failing to fully consider the nature of the positive interpretations of the August 1, 2003 x-ray.

Employer also asserts that, because Dr. Wiot's credentials are superior to those of Drs. Baker and Poulos, the administrative law judge erred in finding that the readings of the August 1, 2003 x-ray were in equipoise. Specifically, employer argues that the administrative law judge should have considered the academic credentials of Dr. Wiot as a professor of radiology. In finding that the August 1, 2003 x-ray was in equipoise, the administrative law judge noted that Dr. Baker, a B reader, and Dr. Alexander, who is dually-qualified as a Board-certified radiologist and a B reader, read this x-ray as positive for pneumoconiosis, while Dr. Poulos, a dually-qualified radiologist, and Dr. Wiot, a B reader, read this x-ray as negative. Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibits 5, 8. It is the responsibility of the party attempting to rely on the reading of a physician to establish the physician's credentials. *Rankin v. Keystone Coal Mining Corp*., 8 BLR 1-54 (1985). Here, Dr. Wiot's credentials are not in the record. Dr. Wiot's x-ray report noted that the doctor is a B reader. Thus, based on the record in this case, we reject employer's assertion that the administrative law judge erred in finding that the readings of the August 1, 2003 x-ray were in equipoise, based on the administrative law judge's failure to consider Dr. Wiot's superior qualifications.

Employer additionally asserts that the administrative law judge was under the mistaken belief that he was required to prefer the reading of a physician who was a dually-qualified radiologist to that of a physician who was a B reader. In considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge noted that the

regulations provide that where two or more x-ray readings are in conflict, consideration must be given to the radiological qualifications of the physicians interpreting them. Decision and Order on Second Remand at 7. Further, the administrative law judge indicated that it was appropriate for him to accord greater weight to the reading of an x-ray because of a physician's superior qualifications. Then the administrative law judge accorded greater weight to the positive reading of the October 14, 2005 x-ray by Dr. Alexander, a dually-qualified radiologist, than to the negative reading of this x-ray by Dr. Broudy, a B reader. Because the administrative law judge acted within his discretion in finding that Dr. Alexander's qualifications were superior to those of Dr. Broudy, *Staton v. Norfolk & Western Ry. Co*., 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Cranor*, 22 BLR at 1-7; *Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211 (1985); Decision and Order on Second Remand at 7, we reject employer's assertion that the administrative law judge was under the mistaken belief that he was required to prefer the reading by a physician who was a dually-qualified radiologist to that by a physician who was merely a B reader.

Further, employer asserts that the administrative law judge erred in failing to consider Dr. Broudy's letter rehabilitating his negative reading of the October 14, 2005 x-ray, after he reviewed Dr. Alexander's positive reading of the same x-ray. The administrative law judge determined that the October 14, 2005 x-ray was positive for pneumoconiosis, based on his finding that the positive reading of this x-ray by Dr. Alexander, a dually-qualified radiologist, outweighed the negative reading of this x-ray by Dr. Broudy, a B reader.[8] Claimant's Exhibit 5; Employer's Exhibit 1. As employer asserts, the administrative law judge did not address Dr. Broudy's letter rehabilitating his reading of the October 14, 2005 x-ray. Nevertheless, we hold that any error by the administrative law judge in failing to consider Dr. Broudy's rehabilitation letter was harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as the administrative law judge properly accorded greater weight to the positive reading of the October 14, 2005 x-ray by Dr. Alexander, based on Dr. Alexander's superior radiological qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *Roberts*, 8 BLR at 1-213.

In addition, employer asserts that the administrative law judge erred in failing to consider all of the x-ray evidence. Contrary to employer's assertion, the administrative law judge properly considered all of the relevant x-ray evidence of record. Decision and Order on Second Remand at 5-7. The administrative law judge determined that the weight of the previously submitted x-ray evidence was negative for pneumoconiosis. *Id*.

[8] The record also contains Dr. Broudy's rehabilitation letter concerning his reading of the October 14, 2005 x-ray. Dr. Broudy stated, "I see absolutely no evidence of coal workers' pneumoconiosis or silicosis and would again read the films as negative or Category 0 according to the ILO classification system for pneumoconioses. I therefore disagree with Dr. Alexander's interpretation of these films." Employer's Exhibit 2.

at 6. Nonetheless, the administrative law judge determined that it was appropriate to give more deference to the newly submitted x-ray evidence because of the progressive and irreversible nature of pneumoconiosis. *Id*. Thus, we reject employer's assertion that the administrative law judge erred in failing to consider all of the x-ray evidence.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Next, we address employer's contention that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Ordinarily, affirmance of the administrative law judge's finding that pneumoconiosis was established at Section 718.202(a)(1) would obviate the need to review his finding that the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4). *See Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985). In this case, however, the administrative law judge's analysis of the medical opinion evidence regarding the existence of legal pneumoconiosis at Section 718.202(a)(4) affected his consideration of the disability causation issue at Section 718.204(c).

As instructed by the Board, the administrative law judge considered the opinions of Drs. Baker, Chaney, Broudy, and Rosenberg. The administrative law judge determined that, because each of the physicians diagnosed the presence of a chronic lung disease, the medical opinion evidence established the first element of legal pneumoconiosis at Section 718.201(b). Decision and Order on Second Remand at 8. The administrative law judge then stated that the medical opinion evidence must establish that claimant's chronic lung disease was related to his coal mine employment. *Id*. Further, as instructed by the Board, the administrative law judge considered the professional qualifications of the physicians and found them to be comparable; therefore, he found that the qualifications were not sufficiently differentiated to accord greater weight to one physician over the others. *Id*. However, the administrative law judge found that the opinions of Drs. Baker and Chaney, that claimant's chronic obstructive pulmonary disease was due, at least in part, to his coal dust exposure, were better reasoned than the contrary opinions of Drs. Broudy and Rosenberg. Consequently, the administrative law judge accorded determinative weight to Dr. Baker's opinion, as supported by the opinion of Dr. Chaney, claimant's treating physician, and found that the weight of the medical opinion evidence showed the presence of legal pneumoconiosis.[9]

[9] Employer does not specifically challenge the administrative law judge's determination that the opinions of Drs. Baker and Chaney were well-reasoned and

Employer asserts that the administrative law judge erred in giving less weight to the opinions of Drs. Broudy and Rosenberg than to the opinions of Drs. Baker and Chaney. It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Here, contrary to employer's assertion, the administrative law judge did not shift the burden of proof to employer. Rather, the administrative law judge reasonably found that, as the fact-finder, he had the discretion to discount a medical opinion that claimant's lung impairment was unrelated to coal dust exposure if the physician did not adequately explain his reasoning for excluding coal dust as a factor. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *accord Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-104-05 (7th Cir. 2008); Decision and Order on Second Remand at 10. Moreover, the administrative law judge rationally gave less weight to Dr. Broudy's opinion because Dr. Broudy did not adequately discuss the relationship between his observations and his conclusions. 20 C.F.R. §718.202(a)(4); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Second Remand at 10. Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Broudy's opinion because the physician did not state that coal dust was a factor in claimant's respiratory impairment.

Similarly, we reject employer's assertion that the administrative law judge erred by applying a stricter standard of review to Dr. Rosenberg's opinion than to the other medical opinion evidence. Contrary to employer's assertion, the administrative law judge reasonably found that Dr. Rosenberg's opinion, that claimant's pulmonary obstruction was not due to coal dust exposure, was not persuasive because Dr. Rosenberg relied on the lack of x-ray readings that were positive for pneumoconiosis.[10] 20 C.F.R. §§718.201(b), 718.202(a)(4); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe,* 710 F.2d at

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documented. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[10] Additionally, the administrative law judge reasonably found that Dr. Rosenberg relied on an incomplete record in opining that clinical pneumoconiosis was not present, as he found that Dr. Rosenberg did not adequately discuss the documentation underlying his opinion. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe,* 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Second Remand at 9.

255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order on Second Remand at 9.

Finally, employer asserts that the administrative law judge erred in failing to consider the medical opinion evidence that was previously submitted in conjunction with claimant's first claim regarding the issue of legal pneumoconiosis. We agree. As noted above, the administrative law judge considered only the opinions of Drs. Baker, Chaney, Broudy, and Rosenberg at Section 718.202(a)(4). The administrative law judge did not consider the medical opinion evidence submitted in conjunction with claimant's first claim concerning the issue of legal pneumoconiosis. Inasmuch as the Board affirmed the administrative law judge's prior finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), the administrative law judge, on remand, should have considered all of the medical opinion evidence on the merits at 20 C.F.R. §718.202(a)(4). 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994); *see also Grundy Mining Co. v. Flynn*, 353 F.3d 467, 480, 23 BLR 2-44, 2-66 (6th Cir. 2003) (Moore, J., concurring in the result); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for the administrative law judge to weigh all of the relevant medical opinion evidence. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge must resolve the conflicts in the medical opinion evidence and determine whether the evidence establishes the existence of clinical and/or legal pneumoconiosis at 20 C.F.R. §718.202(a).[11] *Woodward*, 991 F.2d at 320, 17 BLR at 2-85.

[11] On remand, if the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), then he need not separately determine the etiology of the disease at 20 C.F.R. §718.203, as his findings at Section 718.202(a)(4) will necessarily subsume that inquiry. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159 n.18 (2006).

Because we herein vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case for further consideration of all of the evidence in accordance with the APA, if reached. On remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[12] *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether clinical or legal pneumoconiosis contributed to the miner's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).[13]

[12] 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)(i), (ii).

[13] We decline to address, at this time, the fee petition filed by claimant's counsel for work performed before the Board in the two prior appeals. Because we have vacated the administrative law judge's award of benefits, there has not been a successful prosecution of the claim before the Board. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993); *Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993) (*en banc*) (Brown, J., concurring); *Markovich v. Bethlehem Mines Corp*., 11 BLR 1-105 (1987).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge