BRB Nos. 09-0495 BLA
and 09-0495 BLA-A

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| CARLOS BARKER | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
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| ARCH OF WEST VIRGINIA/APOGEE COAL COMPANY | ) | DATE ISSUED: 03/12/2010 |
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| Employer-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Wanda G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (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:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (2008-BLA-05074) of Administrative Law Judge Adele Higgins Odegard on a subsequent claim filed on January 9, 2007, 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).[1] Based on the parties' stipulation, the administrative law judge found that the miner had at least sixteen years of qualifying coal mine employment. The administrative law judge further found that because employer withdrew its controversion of the issue of total respiratory disability at 20 C.F.R. §718.204(b), the requisite change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309. Turning to the merits of the claim, the administrative law judge found the existence of clinical, but not legal, pneumoconiosis established at 20 C.F.R. §718.202(a) and that claimant's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). However, the administrative law judge found that total disability due to pneumoconiosis was not established at 20 C.F.R. §718.204(c). Accordingly, benefits were denied on the claim.

On appeal, claimant asserts that the administrative law judge erred in giving less weight to Dr. Francke's positive reading of the December 1, 1995 x-ray at Section 718.202(a)(1) on the ground that it was "remote in time," erred in not finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4), and erred in finding that disability causation was not established at Section 718.204(c). Claimant also contends that, if the administrative law judge properly found that Dr. Ranavaya's opinion on causation was not well-reasoned, he has not been provided with a complete, credible pulmonary evaluation as required by the Act, *see* 20 C.F.R. §725.406, and the case must be remanded for Dr. Ranavaya to clarify his opinion.

Employer filed a consolidated brief in response to claimant's appeal and in support of its cross-appeal.[2] In response to claimant's appeal, employer argues that the administrative law judge acted properly in according less weight to Dr. Francke's positive reading of claimant's 1995 x-ray as too "remote in time." Employer further contends that, even if the administrative law judge erred in according less weight to the 1995 x-ray for that reason, such error would be harmless since the administrative law judge credited claimant's two more recent x-rays, taken in 2007, and read as positive. Employer additionally contends that the administrative law judge properly found that the

[1] Claimant's first claim for benefits, filed on November 2, 1995, was denied on March 8, 1996, because claimant failed to establish total respiratory disability. Director's Exhibit 1. Claimant's second claim was filed on July 18, 2003, and denied on February 9, 2004, for the same reason. Director's Exhibit 2.

[2] By Order dated June 4, 2009, the Board allowed employer to file a consolidated brief in response to claimant's appeal and in support of its cross-appeal.

medical opinion evidence did not establish legal pneumoconiosis at Section 718.202(a)(4) or disability causation at Section 718.204(c). Finally, employer contends that claimant was provided a complete pulmonary evaluation, since Dr. Ranavaya addressed all of the elements of entitlement.

On cross-appeal, employer asserts that the administrative law judge erred in finding clinical pneumoconiosis established at Section 718.202(a)(1) by relying on the numerical superiority of the positive x-ray readings, instead of considering the specific qualifications of the x-ray readers. Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established clinical pneumoconiosis by selectively analyzing the medical opinion evidence and rejecting the opinions of Drs. Zaldivar and Hippensteel, that claimant did not have clinical pneumoconiosis, as unreasoned. Claimant has not responded to employer's cross-appeal. The Director, Office of Workers' Compensation Programs, (the Director) responds to both claimant's appeal and employer's cross-appeal, contending that he has provided claimant with a complete pulmonary evaluation (Dr. Ranavaya's opinion).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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).

## COMPLETE PULMONARY EVALUATION

At the outset, we address claimant's contention that, because the administrative law judge rejected Dr. Ranavaya's opinion on disability causation, as unreasoned, he has not been provided a complete, credible pulmonary evaluation. Both employer and the Director contend that, because Dr. Ranavaya addressed the issue of disability causation, as well as the other elements of entitlement, claimant was provided with a complete pulmonary evaluation, as required by the Act.

[3] Because claimant's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In finding that the medical opinion evidence did not establish disability causation at Section 718.204(c), the administrative law judge found that "[n]one of the physicians of record provided a well-reasoned opinion linking claimant's clinical pneumoconiosis to his [disability]." Decision and Order at 21. Specifically, the administrative law judge noted that, while Dr. Ranavaya diagnosed coal workers' pneumoconiosis, "Dr. Ranavaya attributed most of the [c]laimant's [disability] to his smoking." Decision and Order at 21. A review of Dr. Ranavaya's opinion shows that he diagnosed coal workers' pneumoconiosis and a disabling chronic obstructive pulmonary disease (COPD) due to smoking. Director's Exhibit 14. The Director contends that Dr. Ranavaya's opinion is "most logically interpreted" as indicating that any role that pneumoconiosis played in the claimant's disability was "inconsequential." Director's Brief at 2.

Based on our review of Dr. Ranavaya's opinion, we agree with employer and the Director that Dr. Ranavaya provided claimant with a complete pulmonary evaluation, as he sufficiently addressed the issue of disability causation.[4] The Director is not required to provide claimant with a dispositive opinion. *See Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). In this case, Dr. Ranavaya did not link claimant's disability to his clinical pneumoconiosis. Instead, he opined that claimant's disabling COPD was due to smoking. Because Dr. Ranavaya adequately addressed disability causation, we agree with employer and the Director that claimant was provided with a complete pulmonary evaluation, and we reject claimant's argument to the contrary.

## LEGAL PNEUMOCONIOSIS

We first address claimant's argument that the administrative law judge erred in finding that the medical opinion evidence failed to establish legal pneumoconiosis at Section 718.202(a)(4). Specifically, claimant contends that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Hippensteel, that claimant did not have legal pneumoconiosis, since they relied on x-ray evidence that was relevant to the existence of clinical, and not legal, pneumoconiosis. Additionally, claimant contends that the administrative law judge improperly relied on the opinions of Drs. Ranavaya and Crisalli, that claimant did not have legal pneumoconiosis, on the ground that they did not specify the contribution made to claimant's respiratory impairment by coal mine employment, versus smoking and coronary heart disease. Claimant's Brief at 17.

In its brief in response and on cross-appeal, employer contends that, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge is to consider both the x-ray evidence and the medical opinion

[4] Claimant does not assert that Dr. Ranavaya did not adequately address the other elements of entitlement.

evidence, as well as the evidence of clinical and legal pneumoconiosis, together. Employer contends, therefore, that the administrative law judge did not err in considering the opinions of Drs. Zaldivar and Hippensteel on the issue of legal pneumoconiosis, in light of the x-ray evidence establishing clinical pneumoconiosis. Employer also argues that the administrative law judge did not reject the opinions of Drs. Ranavaya and Crisalli, on legal pneumoconiosis, because they did not specifically apportion the relative contributions of coal mine employment, smoking, and heart disease, to claimant's respiratory impairment. Rather, employer contends that the administrative law judge properly rejected the opinions because they did not provide reasoned opinions establishing that coal mine employment significantly contributed to, or substantially aggravated, claimant's COPD.

We agree with employer. Contrary to claimant's argument, the administrative law judge did not improperly rely on the opinions of Drs. Zaldivar and Hippensteel regarding the absence of legal pneumoconiosis. The administrative law judge properly relied on the opinion of Dr. Zaldivar, that claimant's respiratory impairment was due to smoking, not coal mine employment, because of the absence of x-ray evidence showing pneumoconiosis and because claimant's test results and the totality of the medical evidence permitted him to make a distinction about the true cause of the impairment. Decision and Order at 17. Regarding Dr. Hippensteel's opinion, the administrative law judge noted that his conclusion that claimant did not have legal pneumoconiosis, but had bullous emphysema due to smoking, was supported by his evaluation of all of claimant's medical records, not only x-ray evidence. The administrative law judge properly relied, therefore, on the opinions of Drs. Zaldivar and Hippensteel, as reasoned opinions, that claimant did not have legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Accordingly, we affirm the administrative law judge's evaluation of the medical opinion evidence and his finding that it did not establish legal pneumoconiosis at Section 718.202(a)(4).

## CLINICAL PNEUMOCONIOSIS

Turning to the issue of clinical pneumoconiosis, claimant contends that the administrative law judge erred in according less weight to Dr. Francke's positive reading of the 1995 x-ray, on the ground that it was "remote in time." Claimant asserts that the administrative law judge's finding is an erroneous application of the later evidence rule, *i.e.*, that later positive evidence is more credible than earlier negative evidence, since the 1995 x-ray was read as positive. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (*en banc*); *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). We agree with employer, however, that since the administrative law judge ultimately concluded that all of claimant's x-rays were

positive for pneumoconiosis, including the two 2007 x-rays, error, if any, in the administrative law judge's accordance of less weight to Dr. Francke's positive reading of the 1995 x-ray, as remote in time, would be harmless in this case.[5] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In its cross-appeal, employer contends that the administrative law judge erred in finding that the x-ray evidence established clinical pneumoconiosis at Section 718.202(a)(1) by relying on the numerical superiority of the positive x-ray readings, without considering the specific qualifications of the x-ray readers. Employer contends that, although the administrative law judge accorded greater weight to the readings of the dually-qualified readers, she failed to consider the other qualifications of the readers and the specific radiographic findings of the readers. Specifically, employer contends that, in addition to being a dually-qualified reader, Dr. Wiot is "world renowned" as a reader of x-rays and a Professor Emeritus of Radiology. Employer contends, therefore, that he possesses even more superior credentials than those of a dually-qualified reader and that his negative reading should, therefore, be accorded greater weight. Employer's Brief at 32. Additionally, employer contends that the administrative law judge failed to specifically consider Dr. Wiot's report criticizing Dr. Ahmed's positive reading. Dr. Wiot opined that because "coal workers' pneumoconiosis invariably begins in the upper lung fields, and, as Dr. Ahmed's findings were in the mid and lower lung zones, it cannot be coal workers' pneumoconiosis. *Id*. at 33. Employer also contends that the administrative law judge did not sufficiently explain why he credited the positive x-ray readings.

In finding that the x-ray evidence established clinical pneumoconiosis at Section 718.202(a)(1), the administrative law judge, while noting that claimant's 1995 x-ray was read as positive, accorded it little weight because it was "remote in time." Instead, the administrative law judge accorded determinative weight to claimant's two 2007 x-rays. The administrative law judge found the March 2007 x-ray to be positive because the positive reading of Dr. Alexander, a dually-qualified reader, was supported by the positive reading of Dr. Ranavaya, a B reader, while the negative reading of Dr. Wiot, a dually-qualified reader, was not similarly supported. Regarding claimant's June 2007 x-ray, the administrative law judge determined that it was positive because it was read as positive by two dually-qualified readers, while only one dually-qualified reader and one B reader read it as negative.

[5] The administrative law judge ultimately found, after weighing all of the x-ray readings, including both positive and negative readings, that the three x-rays of record were positive. Decision and Order at 11.

An administrative law judge may, but is not required to, give greater weight to the readings of physicians who are professors of radiology. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). In this case, the administrative law judge properly based her finding of clinical pneumoconiosis at Section 718.202(a)(1) on both a quantitative and a qualitative analysis of the x-ray evidence, *i.e.*, taking into account both the number of positive readings and the qualifications of the readers. *See* 20 C.F.R. §718.202(a); *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004). Consequently, we reject employer's argument that the administrative law judge improperly deferred to the numerical superiority of the positive x-ray readings without considering the qualifications of the readers. We, therefore, affirm the administrative law judge's finding that the x-ray evidence established clinical pneumoconiosis at Section 718.202(a)(1). Employer's contention, that the administrative law judge erred in failing to explain why she found the positive x-ray evidence more probative is without merit. *See* 20 C.F.R. §718.202(a)(1).

Employer also contends that the administrative law judge failed to consider the entire assessments of Drs. Zaldivar and Hippensteel when she found that they relied on limited medical data to rule out the presence of coal workers' pneumoconiosis. Specifically, employer contends that Dr. Zaldivar disagreed with Dr. Ahmed's positive x-ray interpretation when he found that "the linear densities identified by Dr. Ahmed at a profusion of 1/0 in the middle and lower lung zones are inconsistent with coal workers' pneumoconiosis." Employer's Brief at 36.

In concluding that the evidence established clinical pneumoconiosis, after weighing the x-ray and medical opinion evidence together pursuant to *Compton*, 211 F.3d at 211, 22 BLR at 2-174, the administrative law judge found that the opinions of Drs. Zaldivar and Hippensteel were "not inconsistent with a finding of clinical pneumoconiosis," Decision and Order at 19, as they based their opinions, that claimant did not have clinical pneumoconiosis, on limited medical data, *i.e.*, primarily their own and other negative x-ray interpretations, and were unaware of the other significant positive x-ray evidence. The administrative law judge also noted that "[n]one of the physicians, except Dr. Crisalli, addressed why the [c]laimant could not have clinical pneumoconiosis, notwithstanding positive [x]-rays." Decision and Order at 19.

Contrary to employer's argument, the administrative law judge properly found that the x-ray and medical opinion evidence, when weighed together, established clinical pneumoconiosis. For the reasons previously discussed, the administrative law judge properly found that the three x-rays of record were positive. Further, in considering the medical opinions, the administrative law judge found that they did not refute the finding

of clinical pneumoconiosis based on the x-ray evidence. Contrary to employer's contention, the administrative law judge acknowledged that Dr. Zaldivar's report consisted of his entire medical evaluation of claimant, which included a physical examination, history, and the results of an x-ray, pulmonary function study and blood gas study. In addition, the administrative law judge noted that Dr. Zaldivar had reviewed the claimant's medical record. Nonetheless, the administrative law judge properly found that Dr. Zaldivar's finding concerning the absence of clinical pneumoconiosis, like Dr. Hippensteel's, was not well-reasoned because Dr. Zaldivar primarily relied on his negative x-ray reading. *See Anderson*, 12 BLR at 1-112. Further, contrary to employer's argument, the fact that Dr. Zaldivar disagreed with Dr. Ahmed's positive x-ray interpretation does not mean that the administrative law judge erred in crediting the positive reading of Dr. Ahmed, who was a dually-qualified reader, over the negative reading of Dr. Zaldivar, a B reader. Accordingly, we affirm the administrative law judge's finding of clinical pneumoconiosis at Section 718.202(a) based on his weighing of the x-ray and medical opinion together.[6]

## DISABILITY CAUSATION

Finally, claimant argues that the administrative law judge erred in finding that disability causation was not established at Section 718.204(c). Specifically claimant contends that, because the administrative law judge found clinical pneumoconiosis established, she could not then rely on the opinions of Drs. Zaldivar and Hippensteel, that claimant did not have clinical pneumoconiosis, to find that claimant did not establish disability causation. Further, claimant contends that the administrative law judge erred in rejecting the opinions of Drs. Crisalli and Ranavaya on the issue of disability causation because they failed to apportion the extent of the contribution of the miner's coal workers' pneumoconiosis to disability.

In finding that disability causation was not established, the administrative law judge, while noting that she found clinical pneumoconiosis established, found that "none of the physicians of record presented a well-reasoned opinion linking the [c]laimant's clinical pneumoconiosis to his [disability]." Decision and Order at 21. Specifically, the

[6] Claimant contends generally that Dr. Bellam's diagnosis of coal workers' pneumoconiosis should be accorded determinative weight because he was claimant's treating physician. The administrative law judge found that Dr. Bellam's opinion was not due deference, as the opinion of a treating physician, however, because she found it to be unreasoned. 20 C.F.R. §718.104(d)(5). In light of the administrative law judge's finding that x-ray and medical opinion evidence established clinical pneumoconiosis at 20 C.F.R. §718.202, error, if any, in the administrative law judge's treatment of Dr. Bellam's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

administrative law judge noted that Dr. Ranavaya, while diagnosing clinical pneumoconiosis, did not opine that claimant's disability was due to clinical pneumoconiosis, but opined that disability was related to his smoking. *See* Decision and Order at 16. Regarding Dr. Crisalli's opinion, attributing claimant's disability to both pneumoconiosis and smoking, the administrative law judge found that the opinion was "conclusory and not well-reasoned," Decision and Order at 21, because Dr. Crisalli did not explain how pneumoconiosis or smoking, or both, caused claimant's disability or how his physical findings supported a finding that claimant's disability was due to pneumoconiosis. The administrative law judge found that Dr. Crisalli's causation opinion was based on "insufficient rationale." Decision and Order at 17. Thus, the administrative law judge did not rely on the opinions of Drs. Zaldivar and Hippensteel, who did not find clinical pneumoconiosis, to find that claimant failed to establish disability causation. Rather, the administrative law judge properly concluded that claimant did not carry his burden of establishing disability causation because Dr. Zaldivar did not opine that claimant's clinical pneumoconiosis was disabling and because Dr. Crisalli's opinion, attributing "some" of claimant's disability to pneumoconiosis, was not credible. *See* 20 C.F.R. §718.204(c); *Clark*, 12 BLR at 1-155. The administrative law judge's finding that disability causation was not established at Section 718.204(c) is, therefore, affirmed.

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

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