BRB No. 97-1199 BLA

HARRY E. JUSTICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
ELKAY MINING COMPANY	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

John P. Anderson, Princeton, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (90-BLA-2466) of Administrative Law Judge Samuel J. Smith awarding benefits on a claim[1] filed

[1] Claimant is Harry E. Justice, the miner, whose initial application for benefits filed on December 12, 1972 was finally denied by the Social Security Administration on October 8, 1974, and by the Department of Labor on July 18, 1979. Director's Exhibit 22. Claimant took no further action until he filed the present claim on February 3, 1984. Director's Exhibit 1.

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 Board for the second time. Initially, the administrative law judge found that, since the previous denial of benefits, claimant had become totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(c). The administrative law judge concluded therefore that the record established a material change in conditions pursuant to 20 C.F.R. §725.309(d), and awarded benefits. Pursuant to employer's appeal, the Board vacated the administrative law judge's findings pursuant to Section 718.202(a)(1), (4) because he improperly discredited certain physicians'opinions as biased. *Justice v. Elkay Mining Co.*, BRB No. 92-1039 BLA (Jun. 24, 1993)(unpub.). Accordingly, the Board remanded the case for further consideration.[2]

On remand, the administrative law judge again found the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), (4). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge mischaracterized certain x-ray evidence and failed to consider all of the x-ray readings pursuant to Section 718.202(a)(1). Employer further asserts that the administrative law judge failed to consider all of the relevant evidence pursuant to Section 718.202(a)(4). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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

[2] The Board affirmed the administrative law judge's finding that total respiratory disability was established pursuant to 20 C.F.R. §718.204(c), and rejected employer's contention that the administrative law judge erred in weighing the medical opinion evidence regarding disability causation pursuant to 20 C.F.R. §718.204(b). *Justice v. Elkay Mining Co.*, BRB No. 92-1039 BLA (Jun. 24, 1993)(unpub.).

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 mischaracterized the radiological qualifications of a physician and failed to consider all of the relevant evidence. Employer's Brief at 5. These contentions have merit. The record contains twenty-three readings of six x-rays. There were seven positive readings and sixteen negative readings. The record indicates that four of the positive readings were rendered by physicians certified as B-readers,[3] and that all of the negative readings were rendered by physicians certified as B-readers, Board-certified radiologists,[4] or both.

The administrative law judge noted that the first two x-rays taken on February 19, 1973 and April 7, 1975 received uncontradicted positive readings. Director's Exhibit 22. The next x-ray taken on February 13, 1984 received conflicting readings. It was read positive 1/1 by Dr. Paranthaman, a B-reader, and as 0/1, a negative reading, by B-readers Drs. Gaziano and Fino, and by Dr. Al-Asbahi, a Board-certified radiologist. Director's Exhibits 14, 15, 28, 30. Section 718.202(a)(1) provides in part that where the x-ray readings conflict, the administrative law judge must consider the radiological qualifications of the physicians interpreting the x-rays. 20 C.F.R. §718.202(a)(1). In so doing, the administrative law judge determined that "[b]ecause Dr. Paranth[a]man is **both** a NIOSH approved B-reader and a Board-certified radiologist, his opinion is accorded the greatest weight," and therefore found the February 13, 1984 x-ray positive for pneumoconiosis. Decision and Order on Remand at 5 (emphasis supplied). The next two x-rays, taken on October 7, 1987 and January 29, 1988, were read positive by Dr. Aycoth, a B-reader, and as completely negative by Drs. Renn and Zaldivar, both B-readers, and by Drs. Shipley, Spitz, Wheeler, Wiot, and Scott, who are Board-certified radiologists and B-readers. Director's Exhibits 28, 34, 35; Employer's Exhibits 2, 3, 5. Instead of weighing these conflicting readings in light of the physicians' radiological credentials, the administrative law judge found that "[t]he multiple rereadings" submitted by employer were duplicative. Decision and Order on Remand at 5. The administrative law judge then turned to the last x-ray taken on November 22, 1991, which received

[3] A "B-reader" is a physician who has taken and passed a special proficiency test in interpreting chest x-rays under the ILO-U/C classification system for the presence of pneumoconiosis and other diseases. 20 C.F.R. §718.202(a)(ii)(E).

[4] A "Board-certified radiologist" is a physician certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C).

an uncontradicted positive reading by Dr. Myers.[5] The administrative law judge found the November 22, 1991 x-ray reading "highly probative" in light of its recency, and determined that it supported the earlier "preponderantly positive" x-ray evidence. Decision and Order on Remand at 6. The administrative law judge therefore determined to accord "greatest weight" to Dr. Aycoth's two positive readings of the October 7, 1987 and January 29, 1988 x-rays, and concluded that the x-ray evidence established the existence of pneumoconiosis. *Id*.

[5] Review of the record did not reveal Dr. Myers' radiological credentials.

The administrative law judge's decision to accord greatest weight to Dr. Paranthaman's positive reading of the February 13, 1984 x-ray based on the administrative law judge's conclusion that Dr. Paranthaman was more highly qualified in radiology is unsupported by the record. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*). Furthermore, the administrative law judge's apparent decision to discredit all of the negative readings by qualified physicians of the October 7, 1987 and January 29, 1988 x-rays is not affirmable. When weighing multiple x-ray readings, an administrative law judge need not, indeed may not, simply "count heads." *See Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Nevertheless, the administrative law judge must indicate that he or she has considered "all relevant evidence." 30 U.S.C. §923(b); *see Cochran v. Consolidation Coal Co*., 12 BLR 1-136, 1-139 (1989). Because the administrative law judge did not determine the weight to be accorded to at least that portion of the negative expert readings which he would presumably find to be non-duplicative and therefore of some probative value, it is not apparent that he considered all relevant evidence. Therefore, we must vacate the administrative law judge's finding and remand this case for him to reweigh all of the relevant evidence in light of the physicians' radiological qualifications.[6] *See Adkins, supra.*

[6] Because the most recent x-ray was interpreted as positive, we disagree with employer's contention that the administrative law judge's weighing of the November 22, 1991 x-ray was inconsistent with *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Employer's Brief at 6.

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge mechanically discredited the medical opinions of qualified physicians merely because they did not examine claimant and failed to provide a valid rationale for his weighing of Dr. Zaldivar's opinion. Employer's Brief at 6. These arguments also have merit. Dr. Craft, whose credentials are not of record, examined claimant in 1975 and 1977 and, based on a chest examination, x-ray, and claimant's complaints, diagnosed pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibit 22. Dr. Velasco, whose qualifications are not of record, examined claimant in 1979 and diagnosed chronic obstructive pulmonary disease related to coal dust exposure. *Id*. In 1980 and 1982, claimant was examined by physicians of the West Virginia Occupational Pneumoconiosis Board, who diagnosed pneumoconiosis based on a coal mine employment history, physical examination, an unspecified pulmonary function study, and a September 17, 1980 chest x-ray reading that does not appear in the record. *Id*. Dr. Thavaradhara[7] examined the miner in 1984 and based on a coal mine employment history, chest x-ray, and pulmonary function and blood gas studies, diagnosed chronic obstructive pulmonary disease due to both smoking and coal dust exposure, and "mild pneumoconiosis" by x-ray. Director's Exhibit 12; Employer's Exhibit 5. Dr. Zaldivar, who is Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader, examined and tested claimant in 1988 and concluded that he does not have pneumoconiosis but suffers from emphysema due to smoking. Director's Exhibit 34. Drs. Fino and Stewart, who are also Board-certified in Internal Medicine and Pulmonary Disease and are certified as B-readers, reviewed the medical evidence of record and concluded that the miner does not have pneumoconiosis but suffers from emphysema and chronic obstructive pulmonary disease caused by smoking. Employer's Exhibits 4, 6.

The administrative law judge found the opinions of Drs. Fino and Stewart "entitled to little weight," because they did not examine the miner. Decision and Order on Remand at 6. The administrative law judge then found the opinion of examining physician Dr. Thavaradhara to be well-reasoned and supported by that of examining physician Dr. Craft. In the only sentence relating to Dr. Zaldivar's opinion, the administrative law judge found that the opinions of Drs. Thavaradhara and Craft were more consistent with the "preponderantly positive x-ray studies" than were the opinions of Drs. Zaldivar, Fino, and Stewart. Decision and Order on Remand at 7. Finally, the administrative law judge found the report of the West Virginia Occupational Pneumoconiosis Board physicians to be "persuasive in light of the

[7] The x-ray classification form indicating Dr.Thavaradhara's B-reader status lists Internal Medicine, Pulmonary Medicine, and Pain Control under his name. Director's Exhibit 21. The form does not indicate whether these are Board-certifications or voluntary specializations.

other evidence of record," and concluded that the preponderance of the medical opinion evidence established the existence of pneumoconiosis. *Id*.

We note initially that, as the administrative law judge's finding pursuant to Section 718.202(a)(1) is not affirmable, his reference to the positive x-rays does not constitute a valid rationale for his weighing of the medical opinions at Section 718.202(a)(4). In addition, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recently held that the administrative law judge should not automatically credit the testimony of an examining physician merely because the physician personally examined the miner, but must also address the "qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Because the administrative law judge did not address the physicians' relative qualifications or the quality of their medical reasoning and explanation, the administrative law judge has not "'consider[ed] all of the relevant evidence bearing upon the existence of pneumoconiosis . . . .'" *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998)(citation omitted). Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for him to consider all of the relevant evidence to determine whether it establishes the existence of pneumoconiosis. *See Hicks, supra*; *Akers, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge