BRB No. 99-0640 BLA

HAYWARD R. FARMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN CONSTRUCTION COMPANY	)	
	)	
and	)	
	)	DATE ISSUED:
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Ronald C. Cox (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.
Denise M. Davidson (Barrett, Haynes, May, Carter & Roark), Hazard, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and Nelson, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1998-BLA-640) of Administrative Law Judge Thomas F. Phalen, Jr., awarding benefits 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). The administrative law judge found that claimant[1] established at least fifteen years of qualifying coal mine employment and that claimant established total disability due to pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(a), 718.204(b), (c)(1), (4). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.[2]

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. 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).

Employer initially contends that the administrative law judge erred in weighing the x-ray evidence of record pursuant to Section 718.202(a)(1). Employer's Brief at 16-20. The administrative law judge stated that the record contains twenty-one interpretations of ten x-rays. Decision and Order at 10. These numbers are incorrect, however, as the record contains twenty interpretations of eleven x-rays. Director's Exhibits 13, 15, 16, 27, 29, 33-37, 40; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3. The administrative law judge found that the x-rays dated February 11, 1994, July 8, 1994, June 16, 1997 and April 16, 1998 are positive for the existence of pneumoconiosis because they were read by physicians who are B-readers and/or Board-certified radiologists and they were uncontradicted by any other physician. Decision and Order at 10-11. The administrative law judge then found that the October 2, 1996 film was positive for the existence of pneumoconiosis because it was

[1]Claimant is Hayward R. Farmer, the miner, who filed a claim for benefits on March 24, 1997. Director's Exhibit 1.

[2]We affirm the administrative law judge's findings regarding the length of claimant's coal mine employment and that he is totally disabled pursuant to 20 C.F.R. §718.204(c)(1), (4) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

read as positive by a physician who is a B-reader and a physician who is dually qualified and read as negative by only one physician who is dually qualified. Decision and Order at 10.

The administrative law judge also found that the December 3, 1996 x-ray is positive for the existence of pneumoconiosis because it was only interpreted as positive by Dr. Myers. Decision and Order at 10. The administrative law judge then, however, found that Dr. Myers' interpretation is not entitled to great weight because he is neither a B-reader nor a Board-certified radiologist. Decision and Order at 10. The administrative law judge then found that the remaining films, dated April 18, 1997, June 9, 1997, June 24, 1997 and August 25, 1998 are negative for the existence of pneumoconiosis because they were either the result of uncontradicted interpretations by physicians who are either B-readers or who are dually qualified or, as in the case of the August 25, 1998 x-ray, the preponderance of the physicians with superior credentials read the film as negative. Decision and Order at 10-11.

The administrative law judge concluded that of the ten x-rays of record, six are positive for the existence of pneumoconiosis and that, even excluding Dr. Myers' interpretation, the preponderance of the x-ray evidence submitted by physicians with superior credentials is positive for the existence of pneumoconiosis. Decision and Order at 11. Contrary to the administrative law judge's findings, however, the record contains five x-rays which were read as positive by physicians with superior credentials and five x-rays which were read as negative by physicians with superior credentials. Director's Exhibits 13, 15, 16, 27, 29, 33-37, 40; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3. In making his findings regarding the x-ray evidence, the administrative law judge mistakenly stated that the April 18, 1997 x-ray was read as negative by Drs. Dahhan, Sargent, Wiot and Spitz. Decision and Order at 10. However, the April 18, 1997 x-ray was only read by Drs. Dahhan and Sargent, while Drs. Wiot and Spitz read an x-ray dated April 21, 1997 as negative for the existence of pneumoconiosis. Director's Exhibits 15, 16; Employer's Exhibits 2, 3. There is no other contradictory interpretation of the April 21, 1997 x-ray in the record. Inasmuch as the administrative law judge did not consider the April 21, 1997 x-ray in making his finding that the preponderance of the x-ray evidence is positive for the existence of pneumoconiosis, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and remand the case to the administrative law judge for further findings on this issue. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also contends that the administrative law judge erred in relying on the physicians' ILO classifications of the x-rays, while ignoring the additional diagnoses listed on the x-ray forms, and in relying on the x-rays of physicians who merely listed their qualifications by checking the appropriate boxes on the x-ray forms. Employer's Brief at 16-20. We disagree. While Drs. Vuskovich and Brandon indicated on their x-ray interpretations that they observed other abnormalities consistent with bulla and emphysema, respectively, both of these physicians made separate diagnoses which indicate the presence of pneumoconiosis under the ILO classification system and checked the form indicating the

abnormalities found are consistent with pneumoconiosis. *See* 20 C.F.R. §§718.102, 718.202(a)(1); Director's Exhibits 29, 36. Further, the administrative law judge properly relied on the physicians' qualifications as indicated on the x-ray form because the regulations require that the x-ray form contain the qualifications of the physician interpreting the film. *See* 20 C.F.R. §718.102. Consequently, we reject employer's contentions.

Employer also contends that the administrative law judge erred in failing to determine whether employer rebutted the Section 718.203(b) presumption that claimant's pneumoconiosis arose from his coal mine employment. Employer's Brief at 16-20. The administrative law judge properly found that claimant established invocation of the Section 718.203(b) presumption because claimant established the existence of more than ten years of coal mine employment. *See* 20 C.F.R. §718.203(b); Decision and Order at 11. In support of its argument that the administrative law judge did not consider rebuttal of this presumption, employer argues that Dr. Vuscovich diagnosed silicosis but did not explain why he related this condition to claimant's coal mine employment, that the physicians of record diagnosed conditions in addition to pneumoconiosis on their x-ray interpretation forms, and that the administrative law judge did not consider the discrepancies in the smoking histories relied upon by the physicians diagnosing pneumoconiosis. Employer's Brief at 16-20. Employer does not, however, provide any affirmative evidence to support its contention that claimant's pneumoconiosis was not related to his coal mine employment. Consequently, the administrative law judge properly found that employer did not submit rebuttal evidence pursuant to Section 718.203(b). However, inasmuch as we vacate the administrative law judge's finding that claimant established pneumoconiosis pursuant to Section 718.202(a)(1), we also vacate the administrative law judge's finding that claimant's pneumoconiosis arose from his coal mine employment pursuant to Section 718.203(b).

Employer next contends that the administrative law judge erred in failing to properly weigh the medical opinion evidence of record pursuant to Section 718.202(a)(4). Employer's Brief at 20-21. We agree. After finding the x-ray evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge found that the medical opinion evidence, specifically the opinions of Drs. Myers, Powell and Vuskovich, all of whom opined that claimant has pneumoconiosis, corroborate his finding regarding the x-ray evidence. Decision and Order at 11. The administrative law judge did not discuss the opinions of Drs. Dahhan and Broudy, both of whom opined that the miner does not have pneumoconiosis, and the administrative law judge did not weigh the opinions supporting a finding of pneumoconiosis against the opinions stating that claimant does not have pneumoconiosis. Consequently, if, on remand, the administrative law judge finds the x-ray evidence insufficient to support a finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge must weigh the relevant medical opinion evidence to determine if it is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Finally, employer contends that the administrative law judge erred in determining that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b). Employer's Brief at 21-25. In making his finding pursuant to Section 718.204(b), the administrative law judge assigned more weight to the opinions of Drs. Vuskovich and Myers that the miner's impairment is causally related to his coal mine employment.[3] Decision and Order at 14. Employer contends that the administrative law judge erred in assigning weight to these opinions because the coal mine employment histories upon which they relied, twenty-three and twenty-seven years respectively, are inaccurate. However, the administrative law judge acted within his discretion in stating that the finding that claimant has at least fifteen years of coal mine employment is sufficient to corroborate the physicians' determination that coal dust contributed to his disability. Decision and Order at 14; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The administrative law judge then assigned less weight to the opinions of Drs. Dahhan and Broudy solely because they did not diagnose the existence of pneumoconiosis. Decision and Order at 14. Because we have vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis, we must also vacate his finding that claimant established total disability due to pneumoconiosis, as well as the administrative law judge's weighing of the opinions of Drs. Dahhan and Broudy, pursuant to Section 718.204(b). If, on remand, the administrative law judge finds that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge must also weigh the relevant evidence of record pursuant to Section 718.204(b) to determine if pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment in light of the holding of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-203 (6th Cir. 1997); *Adams v. Director, OWCP*, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Additionally, the administrative law judge must make a finding regarding

[3]We reject employer's arguments that Dr. Myers did not relate claimant's impairment to his coal mine employment, but instead merely recommended that claimant avoid further dust, and that Dr. Vuskovich did not diagnose total respiratory disability. Employer's Brief at 22-23. The record indicates that Dr. Myers stated in his medical report that claimant's impairment is causally related to his coal mine employment and Dr. Vuschovich stated on his medical report form that claimant is unable, from a pulmonary standpoint, to perform his usual coal mine employment. Director's Exhibit 29.

the length of claimant's smoking history and determine if this finding affects his weighing of the medical opinion evidence pursuant to Section 718.204(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge