BRB No. 99-0711 BLA

MALVERN FREDERICK	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
OLD BEN COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Robert A. Kaplan, Jr. (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (94-BLA-2003) of Administrative Law Judge Donald W. Mosser rendered 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 accepted the parties' stipulation to twenty-two years of coal mine employment, and found that the medical evidence did not establish that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge made several errors in his analysis of the medical evidence pursuant to Sections 718.202(a)(1), (4) and Section 718.204. Employer responds, urging affirmance, and 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 incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge found that the weight of the x-ray evidence viewed in light of the readers' radiological qualifications did not establish the existence of pneumoconiosis. In so finding, the administrative law judge considered both quantitative and qualitative factors in weighing the x-ray readings, *see Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92, 2-100 (7th Cir. 1997), and thus claimant's contention that the administrative law judge merely "counted noses" lacks merit. However, claimant correctly notes that the administrative law judge omitted a positive reading of the November 1, 1993 x-ray rendered by Dr. Fisher, a Board-certified radiologist and B-reader. Director's Exhibit 23. In view of Dr. Fisher's radiological credentials, and because we must remand this case for the administrative law judge to reweigh other items of evidence relating to the existence of pneumoconiosis, *see* discussion, *infra*, we cannot be certain that the administrative law judge's omission of Dr. Fisher's reading was harmless, as employer urges. Therefore, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand the case for him to weigh all of the x-ray readings in light of the readers' radiological credentials. *See Kelley, supra*; *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

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[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(c)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the weight of the medical opinions did not establish the existence of pneumoconiosis. In so doing, the administrative law judge found flaws in the medical opinions submitted by claimant and accorded greater weight to the contrary opinions submitted by employer. Based on our review of the record in light of the contentions raised by claimant, we conclude that the reasons given by the administrative law judge for discounting claimant's medical evidence are either not supported by substantial evidence, are not in accordance with law, or are not adequately explained. Therefore, for the reasons that follow, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for him to reweigh the medical opinion evidence.

Review of the record indicates that, except for one of employer's physicians, the physicians agreed that claimant's pulmonary function studies demonstrate the presence of a restrictive ventilatory impairment. However, the physicians disagreed as to the etiology of that impairment. Claimant submitted the opinions of Drs. Cohen, Combs, Krantz, and Kumar, who attributed claimant's restrictive impairment in part to coal dust exposure. Director's Exhibits 12, 33; Claimant's Exhibits 1, 3. Employer responded with the opinions of Drs. Selby, Branscomb, and Fino, who attributed the restriction entirely to obesity, heart disease, and scarring resulting from three coronary artery bypass surgeries. Director's Exhibit 31; Employer's Exhibits 3, 5, 8-10. By contrast, Drs. Cohen and Combs concluded that although these non-pulmonary factors contributed to claimant's restrictive impairment, his coal dust exposure was nevertheless a significant etiological factor. Director's Exhibit 33 at 11, 207. Employer also submitted the opinion of Dr. Tuteur, who concluded that claimant has an obstructive impairment due to smoking. Employer's Exhibits 1, 7.

The administrative law judge accorded less weight to the opinion of Dr. Cohen, who is Board-certified in Internal Medicine and Pulmonary Disease, because he did not examine the miner and because the administrative law judge found that Dr. Cohen did not address whether claimant's restriction was related to his obesity, coronary artery disease, or three bypass surgeries. As claimant contends, however, substantial evidence does not support this finding. Dr. Cohen specifically addressed the impact of obesity, heart disease, and bypass surgeries in opining that, despite these non-pulmonary factors, claimant's coal dust exposure was "significantly contributory to [claimant's] moderate restrictive process." Director's Exhibit 33 at 11; Claimant's Exhibit 1. Additionally, the

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[2] Dr. Cohen attached a published medical study to his supplemental report to support his view that claimant's obesity does not account for the restrictive impairment. Claimant's Exhibit 1. Drs. Fino, Branscomb, and Tuteur responded that the limitations of the study cited by Dr. Cohen render it inapplicable to claimant's medical situation. Employer's Exhibits 7-10. The administrative law judge did not address this dispute between the experts and should do so on remand when analyzing their reasoning.

fact that Dr. Cohen did not examine claimant is not alone a sufficient basis for discounting his opinion. *See Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-49 (7th Cir. 1992).

The administrative law judge gave less weight to Dr. Combs' opinion because Dr. Combs relied on a positive x-ray reading and because the administrative law judge found that "no other objective medical data supports his diagnosis." Decision and Order at 11. The administrative law judge also faulted Dr. Combs for not addressing the effects of the miner's smoking history. *Id.* Again, as claimant contends, substantial evidence does not support this finding. Dr. Combs offered more than an x-ray reading as objective support for his diagnosis, pointing to the presence of restriction on claimant's pulmonary function studies and an impaired diffusing capacity. Director's Exhibit 33 at 207; *see Migliorini v. Director, OWCP*, 898 F.2d 1292, 1295, 13 BLR 2-418, 2-423 (7th Cir. 1990); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Additionally, Dr. Combs specifically explained that claimant's past smoking habit was likely not a significant etiological factor because smoking causes an obstructive impairment, not a restrictive impairment. Director's Exhibit 33 at 206.

The administrative law judge gave less weight to Dr. Krantz's examination report because the administrative law judge found it equivocal and because Dr. Krantz recorded a shorter smoking history than that recorded by other physicians. Although an administrative law judge may accord less weight to a medical opinion where the physician bases his or her conclusions upon an inaccurate smoking history, *see Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986), we agree with claimant that the administrative law judge did not adequately explain his rationale for doing so here. Specifically, no physician identified smoking as an etiology of claimant's restrictive impairment. Indeed, Drs. Cohen and Combs pointed to the restrictive nature of claimant's impairment as evidence against a causative role for smoking. Director's Exhibit 33 at 10, 206. On these facts, the administrative law judge has not explained how Dr. Krantz's diagnosis of restrictive lung disease due to coal dust exposure was undercut by her recording of a shorter smoking history than that recorded by other physicians. *See Trujillo, supra*.

Additionally, there is merit in claimant's argument that the administrative law judge should more carefully explain his finding that Dr. Krantz's diagnosis was equivocal. After examining and testing claimant, Dr. Krantz diagnosed, among other things, "Restrictive lung disease - probably coal workers' pneumoconiosis and/or silicosis based on history of coal mining and rock drilling without

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[3] If the administrative law judge on remand deems the smoking history relevant, he should resolve the conflicting evidence and make a specific finding regarding the length and intensity of claimant's smoking history.

respiratory protection, restrictive physiology on PFT, CXR." Director's Exhibit 33 at 27. In finding Dr. Krantz's diagnosis equivocal, the administrative law judge focused solely on Dr. Krantz's use of the word "probably," without considering it in the full context of her examination report, in which she pointed to specific medical evidence in support of her diagnosis. *See Beasley*, 957 F.2d at 328, 16 BLR at 2-49 (administrative law judge should not selectively analyze the record in determining whether a physician's opinion is equivocal). Although the administrative law judge as the trier of fact retains the discretion to evaluate the strength of Dr. Krantz's statement, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988), we believe that on this record a more thorough discussion of her opinion is required before labeling it equivocal. *See Beasley, supra*; *Justice, supra.*

The administrative law judge discounted the opinion of claimant's treating physician, Dr. Kumar, because Dr. Kumar offered "no basis or reasoning" for his diagnosis of pneumoconiosis. Decision and Order at 11. Contrary to this finding, however, Dr. Kumar offered at least some basis and reasoning for his diagnosis, citing claimant's restrictive impairment and twenty-one years of coal dust exposure. Claimant's Exhibit 3. Although the administrative law judge was correct in stating that Dr. Kumar's treatment notes do not record any breathing complaints prior to 1992, the administrative law judge did not explain what he made of the breathing complaints listed in Dr. Kumar's treatment notes after 1992. Director's Exhibit 33. Therefore, the administrative law judge on remand must reweigh Dr. Kumar's opinion to determine whether it is adequately documented and reasoned. *See Fields, supra*; *Migliorini, supra.*

Absent the foregoing, invalid reasons provided by the administrative law judge for according less weight to the opinions of claimant's physicians, it is not clear to us that the administrative law judge would still have accorded greater weight to the opinions of Drs. Selby, Fino, Branscomb, and Tuteur. Therefore, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for him to reweigh the medical opinions to determine whether they establish the existence of pneumoconiosis.

Pursuant to Section 718.204(c)(1), the administrative law judge found that the only valid pulmonary function study was non-qualifying. As claimant contends, substantial evidence does not

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[4] In assessing Dr. Krantz's diagnosis of pneumoconiosis, the administrative law judge should address the significance, if any, of Dr. Krantz's use of the words "possible" and "possibly" to modify some of her other diagnoses, compared to her use of the word "probably" to modify the diagnosis of pneumoconiosis. Director's Exhibit 33 at 27.

support this finding. The May 5, 1994 pulmonary function study was valid and qualifying. Director's Exhibit 31. Moreover, claimant correctly notes that the administrative law judge did not weigh and resolve the conflicting evidence regarding the validity of the other pulmonary function studies in the record. *See Zeigler Coal Co. v. Sieberg*, 839 F.2d 1280, 1283, 11 BLR 2-80, 2-85 (7th Cir. 1988). Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.204(c)(1) and remand the case for him to reweigh the pulmonary function study evidence.

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge improperly accorded less weight to the disability opinions of Drs. Combs, Cohen, and Kumar as based on invalid pulmonary function studies. Substantial evidence does not support this finding, as the September 24, 1993 and May 5, 1994 pulmonary function studies were valid and were interpreted by these physicians as demonstrating a restrictive impairment, a basis for their opinions. Additionally, the validity of the other two pulmonary function studies was not properly resolved. *See Sieberg, supra*. Therefore, we vacate the administrative law judge's finding pursuant to Section 718.204(c)(4) and instruct him on remand to reweigh the medical opinion evidence.

If on remand the administrative law judge determines that either the pulmonary function studies or medical opinions support a finding of total disability, he must then weigh all of the contrary probative evidence together 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), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Additionally, because the administrative law judge's one-sentence finding regarding disability causation pursuant to Section 718.204(b) rests upon his prior, non-affirmable

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[5] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

[6] There are four pulmonary function studies in the record, three of which are qualifying. Director's Exhibits 11, 31, 33. The validity of the March 11 and November 26, 1996 studies was contested. The administering physicians and Dr. Cohen found them to be valid tests, while Drs. Vest, Paul, Branscomb, Fino, and Tuteur declared them invalid.

findings, we vacate the administrative law judge's finding pursuant to Section 718.204(b) and instruct him on remand to reweigh all of the relevant evidence to determine whether pneumoconiosis is a contributing cause of claimant's total disability, if reached. *See Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge