BRB No. 06-0701 BLA

JAMES P. GRYGIEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTERS RESOURCES, INCORPORATED	)	DATE ISSUED: 04/26/2007
	)	
	)	
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 Awarding Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-5651) of Administrative Law Judge Janice K. Bullard on a claim[1] 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 credited the parties' stipulations that claimant worked in qualifying coal mine employment for thirty-four years and that claimant suffered from a totally disabling respiratory impairment.

[1] Claimant filed his application for benefits on January 30, 2004. Director's Exhibit 2.

Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded commencing as of January 1, 2004, the month in which the claim was filed.

On appeal, employer argues that the administrative law judge erred in finding the existence of pneumoconiosis and total disability due to pneumoconiosis (disability causation) established. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not participate in this 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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the critical issue in this case is whether claimant suffers from coal workers' pneumoconiosis or usual interstitial pneumonia (UIP) and that since the x-ray interpretations in this case contain a variety of findings regarding film quality and level of disease present,[3] the administrative law judge should have considered the comments accompanying the x-ray readings and compared the x-ray evidence with the CT scan and other evidence in the case to determine whether the existence of pneumoconiosis was established.

In finding the existence of pneumoconiosis established, the administrative law judge first considered the x-ray evidence at Section 718.202(a)(1). Considering the readings of the May 13, 2004 x-ray, the administrative law judge found the x-ray to be positive since it was read as positive by all the readers who interpreted the x-ray for the existence of pneumoconiosis. Director's Exhibits 9, 10; Claimant's Exhibits 1, 4. Regarding the August 25, 2004 x-ray, the administrative law judge found it to be positive as the administrative law judge credited the positive readings by Drs. Miller and Ahmed, dually-qualified physicians. The administrative law judge noted that the changes seen on

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as claimant's last coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Employer does not dispute that the chest x-ray interpretations and the CT scan report demonstrate evidence of an abnormality.

their readings were more consistent with the changes seen on the readings of the May 13, 2004 x-ray, than were the changes seen by Drs. Hasson and Wiot, who read the August 25, 2004 as negative for pneumoconiosis.[4] Accordingly, the administrative law judge found the existence of pneumoconiosis established at Section 718.202(a)(1) based on the x-ray evidence. The administrative law judge also found that the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4) and, stating that she was required to consider the relevant evidence together under *U.S. Steel Mining Co. v. Director OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004), found that, on weighing the x-ray, medical opinion, and CT scan evidence together, claimant had established the existence of pneumoconiosis based on the positive x-ray reports and the medical opinion of Dr. Hawkins. Decision and Order at 4, 10.[5]

At the outset, we note that *Jones* does not require the administrative law judge to weigh together all types of relevant evidence pursuant to 20 C.F.R. §718.202(a)(1)-(4) before determining whether the existence of pneumoconiosis has been established. *Jones*, 386 F.3d at 991, 23 BLR at 2-236.[6] Further, the Board has held that Section 718.202(a) provides four alternative methods of establishing the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(a)(4); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-395 (1985). In *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4-5 (1999)(*en banc recon.*), the Board held that Section 718.202(a)(1) permits an administrative law judge to find the existence of pneumoconiosis based on an x-ray that is classified as Category 1/0 or greater. 20 C.F.R. §§718.102(b), 718.202(a)(1). The Board also held that comments on an x-ray as to the source of the diagnosed pneumoconiosis are not relevant in determining whether the existence of pneumoconiosis has been established at Section 718.202(a)(1), but should be considered at Section 718.203. At the same time, however, the Board held that comments on the x-ray that call into question the diagnosis

[4] The administrative law judge noted that Drs. Miller and Ahmed found changes in all six zones of claimant's lungs on the August 25, 2004 x-ray, which was consistent with the readings of the May 13, 2004 x-ray, which found changes in all lung zones. The administrative law judge noted, however, that Drs. Hasson and Wiot found changes only in the peripheral areas or base of claimant's lung. Decision and Order at 6.

[5] The administrative law judge found that the existence of pneumoconiosis could not be established at 20 C.F.R. §718.202(a)(2) and (a)(3) as evidence relevant thereunder and the presumptions contained therein were not applicable. Decision and Order at 6.

[6] The court, however, affirmed the administrative law judge's finding of pneumoconiosis based on consideration of the x-ray and medical opinion evidence together, as that error was, in that case, deemed harmless. *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004).

of pneumoconiosis, *e.g.*, internal inconsistencies within the x-ray reading that detract from the credibility of the x-ray interpretation, should be considered at Section 718.202(a)(1).

In this case, the administrative law judge did not consider whether comments on the x-rays dealt with the source of the diagnosed pneumoconiosis or called into question the credibility of the x-ray. Review of the x-rays shows, however, that the comments addressed the source of the diagnosed pneumoconiosis, and are therefore relevant to the issue of disease causation at Section 718.203, rather that to the issue of pneumoconiosis at Section 718.202(a)(1).[7] The administrative law judge was not, therefore, required to address the comments in his analysis of the x-ray evidence at Section 718.202(a)(1). Moreover, as employer has not otherwise challenged the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1), that finding is affirmed.

However, the record contains conflicting evidence concerning the source of claimant's clinical pneumoconiosis,[8] *i.e.*, including the comments to the x-rays as well as medical opinion evidence and CT scan evidence, which attribute the changes seen on x-ray and CT scan to usual interstitial pneumonia, interstitial pulmonary fibrosis, chronic interstitial changes, interstitial lung disease of no specific etiology, and idiopathic pulmonary fibrosis,[9] we therefore, vacate the administrative law judge's finding that

[7] Dr. Ballard, a Board-certified radiologist, read the May 13, 2004 x-ray as positive, showing "1/1 p, s, all six zones," Director's Exhibit 9. The x-ray was also read as positive by Dr. Ahmed, a Board-certified radiologist and B reader, as showing ½ q, t, Claimant's Exhibit 5, and as positive by Dr. Pathak, a Board-certified radiologist and B reader, as showing "1/1 q, t." Claimant's Exhibit 1.

The August 25, 2004 x-ray was interpreted by Dr. Cappiello, a Board-certified radiologist and B reader as positive for pneumoconiosis 2/1 p, w, Claimant's Exhibit 3. Dr. Wiot, a Board-certified radiologist and B reader read it as showing no pneumoconiosis, 0/0, but showing probable UIP/IPF (usual interstitial pneumonia/interstitial pulmonary fibrosis). Employer's Exhibit 1. Dr. Hasson interpreted the August 25, 2004 film as showing no evidence of pneumoconiosis, 0/0, but evidence of chronic interstitial changes. Director's Exhibit 10.

[8] The evidence in this case was relevant solely to the existence of clinical pneumoconiosis. The existence of legal pneumoconiosis was not at issue.

[9] Employer asserts that there is ample evidence in this case, namely the opinions of Drs. Hasson and Fino, to establish that claimant's respiratory disease was the result of diffuse interstitial pulmonary fibrosis, not coal workers' pneumoconiosis. Employer also

claimant's pneumoconiosis arose out of coal mine employment at Section 718.203(b)[10] and we remand the case for further consideration of all the evidence relevant to rebuttal of that section, including comments made on x-rays and the CT scan, and the medical opinion evidence. Moreover, since the administrative law judge found disability causation at Section 718.204(c) established because Dr. Hawkins's opinion of disabling pneumoconiosis was more in line with the administrative law judge's findings that claimant's pneumoconiosis was due to coal mine employment, than the finding of the other physicians that claimant did not have clinical pneumoconiosis, we also vacate the administrative law judge's finding at Section 718.204(c) and remand the case for further consideration of all the evidence relevant to that section, if reached. *See* 20 C.F.R. §§718.201; 718.204(c); *see Black Diamond Coal Mining Co. v. Director, OWCP* [*Marcum*], 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); *see also Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

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contends that the administrative law judge erred when she relied on an administering radiologist's handwritten comments on the CT scan report that "possible dust exposure should be considered" to find clinical pneumoconiosis, rather than relying on the radiologist's actual interpretation of a pattern of interstitial lung disease of no specific etiology. Employer's Brief in Support of Petition for Review at 10. Employer further contends that the administrative law judge should have considered the CT scan radiologist's actual interpretation since Dr. Krishnamurthy, claimant's treating physician, also indicated that other forms of pulmonary fibrosis, aside from coal workers' pneumoconiosis, needed to be considered when assessing the etiology of claimant's chronic interstitial lung disease. Likewise, employer contends that comments on the x-rays should have been considered, *i.e.*, Dr. Wiot read the August 25, 2004 x-ray as showing usual interstitial pneumonia/interstitial pulmonary fibrosis instead of coal workers' pneumoconiosis and Dr. Hasson interpreted the x-ray as showing chronic interstitial changes, not coal workers' pneumoconiosis.

[10] The administrative law judge found that claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment based on his thirty four years of coal mine employment, 20 C.F.R. §718.203(b), and noted that "[t]here [was] no evidence in the record to rebut the presumption that his pneumoconiosis arose from his [thirty-four- years of coal mine employment." Decision and Order at 10.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded 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