BRB No. 05-0749 BLA

JEWEL R. GRACE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 05/23/2006
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6472) of Administrative Law Judge Daniel J. Roketenetz denying 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). This case involves a subsequent claim filed on September 6,

2001.[1] After crediting claimant with twenty-nine years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, however, found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1994 claim became final. Consequently, the administrative law judge considered claimant's 2001 claim on the merits. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), he found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer has filed a response brief, wherein it argues that the administrative law judge erred in finding that claimant's 2001 claim was timely filed. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on December 16, 1994. Director's Exhibit 1 The district director denied benefits on May 22, 1995. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

Claimant filed a second claim on September 6, 2001. Director's Exhibit 2.

[2]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§718.202(a)(1). The newly submitted x-ray evidence includes six interpretations of two x-rays taken on October 25, 2001, and October 16, 2002.[3] In considering the x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 10-11. In regard to the most recent x-ray evidence (*i.e.*, the interpretations of x-rays taken after 1995), the administrative law judge properly noted that there were two interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. Decision and Order at 10-11. Dr. Wiot, a physician dually qualified as a B reader and Board-certified radiologist, interpreted claimant's October 25, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 20. Dr. Brandon, an equally qualified physician, interpreted claimant's October 16, 2002 x-ray as positive for the disease. Claimant's Exhibit 1. Because the x-ray interpretations rendered by the best qualified physicians were equally divided as to the existence of pneumoconiosis, the administrative law judge found that the newly submitted x-ray evidence was "in equipoise" and, therefore, insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 11. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge did not consider the previously submitted x-ray evidence. However, because all of the previously submitted x-ray interpretations are

[3]Although Dr. Simpao, a physician without any special radiological qualifications, and Dr. Baker, a B reader, interpreted claimant's October 25, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 12; Claimant's Exhibit 2, Dr. Wiot, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease. Director's Exhibit 20. Although Dr. Spitz also rendered a negative interpretation of claimant's October 25, 2001 x-ray, the administrative law judge did not consider this x-ray interpretation because it was not listed on employer's evidence summary form. *See* Decision and Order at 11 n.5; Employer's Exhibit 3. Dr. Sargent interpreted claimant's October 25, 2001 x-ray for quality purposes only. *See* Director's Exhibit 12.

Although Dr. Powell, a B reader, interpreted claimant's October 16, 2002 x-ray as negative for pneumoconiosis, Employer's Exhibit 3, Dr. Brandon, a B reader and Board-certified radiologist, interpreted this x-ray as positive for the disease. Claimant's Exhibit 1.

negative for pneumoconiosis,[4] the administrative law judge's failure to address this evidence constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge committed numerous errors in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[5] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant argues that the administrative law judge erred in finding the opinions of Drs. Baker and Simpao insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In a report dated January 10, 2004, Dr. Baker diagnosed coal workers' pneumoconiosis. Claimant's Exhibit 2. The administrative law judge, however, properly discredited the diagnosis of coal workers' pneumoconiosis rendered by Dr. Baker because he found that it was merely a restatement of an x-ray opinion. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Decision and Order at 15.

In an October 25, 2001 report, Dr. Simpao diagnosed coal workers' pneumoconiosis based upon his positive interpretation of claimant's October 25, 2001 x-ray. The administrative law judge noted that the October 25, 2001 x-ray that Dr. Simpao interpreted as positive for pneumoconiosis was interpreted by Dr. Wiot, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of Dr. Simpao's opinion. *See Sheckler, supra; Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 16; Director's Exhibits 12, 20. Drs. Powell and Repsher opined that claimant does not suffer

[4]The record contains two previously submitted x-ray interpretations. Drs. Sargent and Traughber interpreted claimant's January 31, 1995 x-ray as negative for pneumoconiosis. Director's Exhibit 1.

[5]"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

from coal workers' pneumoconiosis.[6] Employer's Exhibits 2, 4. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). As previously noted, "legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). In addition to diagnosing coal workers' pneumoconiosis, Dr. Baker diagnosed (1) chronic bronchitis and (2) chronic obstructive pulmonary disease. Claimant's Exhibit 2. The administrative law judge separately considered whether either of these two additional diagnoses was sufficient to constitute a diagnosis of legal pneumoconiosis.[7]

Because Dr. Baker attributed claimant's chronic bronchitis to his coal dust exposure and cigarette smoking, the administrative law judge noted that this diagnosis constitutes a finding of legal pneumoconiosis. Decision and Order at 16. The administrative law judge, however, properly discredited Dr. Baker's diagnosis of chronic bronchitis because he found that it was not sufficiently reasoned.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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[6]The administrative law judge did not consider the previously submitted medical opinion evidence. The record contains only one previously submitted medical report: Dr. Traughber's January 31, 1995 report. Director's Exhibit 1. Because Dr. Traughber did not diagnose coal workers' pneumoconiosis, the administrative law judge's failure to address Dr. Traughber's opinion constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7]The administrative law judge found that Dr. Simpao diagnosed claimant "with a moderate degree of restrictive and a severe degree of obstructive airway disease." Decision and Order at 16; Director's Exhibit 12. However, because Dr. Simpao did not indicate that claimant's disease was "chronic," the administrative law judge found that Dr. Simpao's diagnosis did not constitute a finding of legal pneumoconiosis. *Id.* Because no party challenges this finding, it is affirmed. *Skrack, supra*.

[8]The administrative law judge properly noted that Dr. Baker relied solely upon history to diagnose claimant's chronic bronchitis. Decision and Order at 17; Claimant's Exhibit 2.

Dr. Baker attributed claimant's chronic obstructive pulmonary disease to claimant's coal dust exposure and cigarette smoking. Claimant's Exhibit 2. The administrative law judge found that this diagnosis was sufficient to constitute a finding of legal pneumoconiosis. Decision and Order at 17. Moreover, the administrative law judge found that Dr. Baker's diagnosis of legal pneumoconiosis was "well-reasoned and well-documented." *Id.*

Although the administrative law judge found that Dr. Baker's opinion of legal pneumoconiosis was outweighed by the opinions of Drs. Powell and Repsher,[9] he failed to provide any explanation for his finding. *See* Decision and Order at 17. Consequently, the administrative law judge's analysis of whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.

[9]Dr. Powell diagnosed pulmonary emphysema attributable to claimant's smoking. Employer's Exhibit 3. Dr. Powell opined that claimant's pulmonary emphysema was not due to his coal dust exposure. *Id.*

Dr. Repsher diagnosed chronic obstructive pulmonary disease and centrilobular emphysema attributable to his cigarette smoking. Employer's Exhibit 4. Dr. Repsher opined that claimant's chronic obstructive pulmonary disease was not related to his coal dust exposure. *Id.*

Because the administrative law judge must reevaluate whether the medical evidence is sufficient to establish the existence of legal pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c).[10]

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[10]We need not address employer's argument regarding the administrative law judge's finding that claimant's 2001 claim was not timely filed. In a response brief, a party is limited to raising arguments which either respond to arguments raised in petitioner's brief or support the decision below. 20 C.F.R. §802.212(b). Employer's argument regarding the timeliness of claimant's 2001 claim neither responds to arguments raised in claimant's brief nor supports the administrative law judge's decision. Consequently, this argument is not properly before the Board. *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994); *Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993); *King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983).