

BRB No. 08-0211 BLA

L.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EIGHTY FOUR MINING COMPANY	)	DATE ISSUED: 09/25/2008
	)	
Employer-Respondent	)	
	)	
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 L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-6097) of Administrative Law Judge Daniel L. Leland (the administrative law judge) 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). The administrative law judge accepted employer's concession of thirty years of coal mine employment,<sup>1</sup> and

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<sup>1</sup> The record indicates that claimant was employed in the coal mining industry in Pennsylvania. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director,*

adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further stated, “[a]lthough [claimant] is totally disabled I find that he does not have pneumoconiosis and that his total disability is not due to pneumoconiosis.” Decision and Order at 6. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge’s finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge’s finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, has declined to participate in this appeal.<sup>2</sup>

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 applicable 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).

In order to establish entitlement to benefits in a living miner’s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Claimant initially contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We agree. The record consists of eleven interpretations of five x-rays dated August 31, 2005,<sup>3</sup> February 14, 2006, March 8, 2006, June 15, 2006, and

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*OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>2</sup> Because the administrative law judge’s findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) and his finding that the evidence established total disability at 20 C.F.R. §718.204(b) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> Dr. Navani, who is dually qualified as a B reader and a Board-certified radiologist, read the August 31, 2005 x-ray for quality only. Director’s Exhibit 16.

November 8, 2006. Of these eleven x-ray interpretations, six readings were negative for pneumoconiosis, Director's Exhibits 15, 20; Employer's Exhibits 3, 5-7, and five readings were positive for pneumoconiosis. Claimant's Exhibits 1, 2, 5, 9, 10. Drs. Thomeier and Hayes, who are dually qualified as B readers and Board-certified radiologists, read the August 31, 2005 x-ray as negative for pneumoconiosis, Director's Exhibit 15; Employer's Exhibit 5, while Dr. Miller, who is also dually qualified, read this x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Similarly, Dr. Hayes, who is dually qualified, read the February 14, 2006 x-ray as negative for pneumoconiosis, Employer's Exhibit 7, while Dr. Ahmed, who is also dually qualified, read this x-ray as positive for pneumoconiosis. Claimant's Exhibit 5. Whereas Dr. Renn, who is a B reader, read the March 8, 2006 x-ray as negative for pneumoconiosis, Director's Exhibit 20, Dr. Miller, who is dually qualified, read this x-ray as positive for pneumoconiosis. Claimant's Exhibit 9. Further, whereas Dr. Hayes, who is dually qualified, read the June 15, 2006 x-ray as negative for pneumoconiosis, Employer's Exhibit 6, Schaaf, who is a B reader, read this x-ray as positive for pneumoconiosis. Claimant's Exhibit 2. Lastly, whereas Dr. Fino, who is a B reader, read the November 8, 2006 x-ray as negative for pneumoconiosis, Employer's Exhibit 3, Dr. Miller, who is dually qualified, read this x-ray as positive for pneumoconiosis. Claimant's Exhibit 10.

As required by Section 718.202(a)(1), the administrative law judge considered the B reader and Board-certified radiologist status of the readers of the x-rays. 20 C.F.R. §718.202(a)(1). In so doing, however, the administrative law judge focused on the x-ray readings by equally qualified physicians. The administrative law judge specifically stated:

The chest x-ray evidence is at best in equipoise. Although Dr. Miller, a [Board] certified radiologist and B reader, made some positive x-ray readings, Drs. Thomeier and Hayes, who are also dually qualified, found no evidence of pneumoconiosis on the x-rays they reviewed. Dr. Hayes reread Dr. Ahmed's positive reading as negative and *for the most part*, every positive x-ray reading is contradicted by a negative x-ray reading by an equally qualified physician.

Decision and Order at 6 (emphasis added).

The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge specifically considered each of the x-rays that were read as both positive and negative by equally qualified physicians. Decision and Order at 6. However, the administrative law

judge did not explain how he weighed the x-rays that were read as either positive or negative by dually qualified physicians, but were *not* contradicted by equally qualified physicians. *Wojtowicz*, 12 BLR at 1-165. As noted above, while the March 8, 2006 and November 8, 2006 x-rays were read as negative for pneumoconiosis by B readers, these x-rays were read as positive for pneumoconiosis by physicians who are dually qualified as B readers and Board-certified radiologists. Further, while the June 15, 2006 x-ray was read as positive for pneumoconiosis by a B reader, this x-ray was read as negative for pneumoconiosis by a physician who is dually qualified. The only x-rays that were read as both positive and negative by equally qualified physicians were the August 31, 2005 and February 14, 2006 x-rays. Thus, because the administrative law judge did not adequately explain why he found that “[t]he chest x-ray evidence is at best in equipoise,” Decision and Order at 6; *see Wojtowicz*, 12 BLR at 1-165, we vacate the administrative law judge’s finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for further consideration of the x-ray evidence in accordance with the APA.<sup>4</sup>

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, claimant asserts that substantial evidence does not support the administrative law judge’s characterization of the medical opinion evidence. The administrative law judge considered the reports of Drs. Schaaf, Begley, Cho, Renn, and Fino. Dr. Schaaf diagnosed coal workers’ pneumoconiosis, and opined that claimant has chronic bronchitis and chronic obstructive pulmonary disease related to coal dust exposure. Claimant’s Exhibits 2, 6. Similarly, Dr. Begley diagnosed coal workers’ pneumoconiosis, and opined that claimant has chronic bronchitis and chronic obstructive pulmonary disease related to coal dust exposure. Claimant’s Exhibits 3, 11. Dr. Cho diagnosed severe chronic obstructive pulmonary disease related to coal dust exposure. Director’s Exhibit 15. By contrast, Dr. Renn opined that claimant does not have pneumoconiosis or any other chronic lung disease related to coal dust exposure. Director’s Exhibit 20; Employer’s Exhibits 1, 2. Lastly, Dr. Fino opined that claimant does not have clinical or legal pneumoconiosis. Employer’s Exhibits 3, 4.

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<sup>4</sup> The administrative law judge did not indicate whether he gave greater weight to the x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists than to the readings by physicians who are B readers. While an administrative law judge may accord greater weight to the x-ray readings by physicians who are dually qualified radiologists, he is not required to do so. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff’d on recon.*, 24 BLR 1-1 (2007)(*en banc*). Nonetheless, the administrative law judge must clarify his consideration of the physicians’ radiological credentials on remand.

In finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis,<sup>5</sup> the administrative law judge stated:

The evidence clearly shows that [claimant's] severe obstructive impairment is solely the result of bullous emphysema caused by his long cigarette smoking history. This is verified by the CT scan readings and the well reasoned opinions of Dr. Renn and Dr. Fino. Dr. Schaaf and Dr. Begley did not make a convincing case for attributing [claimant's] bullous emphysema to coal dust exposure. They were unable to prove that [claimant's] bullous emphysema was due to coal dust exposure rather than his long smoking history. The more expert opinions of Drs. Renn and Fino establish that [claimant] has a totally disabling pulmonary impairment strictly due to cigarette smoking. Drs. Schaaf and Begley did not fully take into account [claimant's] cigarette smoking history and the fact that bullous emphysema is most commonly associated with cigarette smoking.

Decision and Order at 6.

Contrary to the administrative law judge's finding that "Drs. Schaaf and Begley did not fully take into account [claimant's] history and the fact that bullous emphysema is most commonly associated with cigarette smoking," Decision and Order at 6, Drs. Schaaf and Begley noted claimant's smoking and coal mine employment histories, as well as the opinions of Drs. Renn and Fino that claimant has bullous emphysema related to cigarette smoking. Claimant's Exhibit 6 (Dr. Schaaf's Deposition at 10-12, 24, 25, 29, 35); Claimant's Exhibit 11 (Dr. Begley's Deposition at 15-18). Dr. Schaaf opined that it is not true that bullous emphysema is only associated with cigarette smoking. Claimant's Exhibit 6 (Dr. Schaaf's Deposition at 35). Similarly, Dr. Begley indicated that he disagreed with Dr. Fino's view that bullous emphysema with bleb formation cannot be caused by coal dust inhalation. Claimant's Exhibit 11 (Dr. Begley's Deposition at 17). Thus, the administrative law judge mischaracterized the opinions of Drs. Schaaf and Begley regarding the existence of pneumoconiosis. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In addition, as discussed, *supra*, the APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). In this case, the administrative law judge did not explain why he found that the opinions of Drs. Renn and

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<sup>5</sup> 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).

Fino were well-reasoned or why he found that they were the best qualified physicians.<sup>6</sup> *Wojtowicz*, 12 BLR at 1-165. Further, the administrative law judge did not explain why he found that “Dr. Schaaf and Dr. Begley did not make a convincing case for attributing [claimant’s] bullous emphysema to coal dust exposure.” Decision and Order at 6; *see Wojtowicz*, 12 BLR at 1-165. Moreover, the administrative law judge did not explain why he found that Dr. Cho’s diagnosis of obstructive lung disease related to coal dust exposure was not reasoned. *Wojtowicz*, 12 BLR at 1-165.

In view of the forgoing, we vacate the administrative law judge’s finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the medical opinion evidence in accordance with the APA. On remand, the administrative law judge must consider whether the medical opinion evidence establishes clinical pneumoconiosis and/or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).<sup>7</sup>

Further, if reached on remand, the administrative law judge must consider whether the evidence establishes that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

Finally, because we vacate the administrative law judge’s finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), we also vacate the administrative law judge’s finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). If the issue of disability causation is again reached on remand, the administrative law judge must consider all the relevant evidence regarding whether claimant’s total respiratory disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), and fully explain the rationale for his conclusions, *Wojtowicz*, 12 BLR at 1-165.

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<sup>6</sup> Like Drs. Renn and Fino, Drs. Schaaf and Begley are Board-certified in internal medicine and pulmonary disease. Claimant’s Exhibits 2, 3; Employer’s Exhibits 2, 3.

<sup>7</sup> 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), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

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.

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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