BRB No. 87-2362 BLA

WILLIAM ARNOLDI)
)
Claimant-Respondent)
)
v.)
)
WYOMING FUEL COMPANY)
)
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 Alexander Karst, Administrative Law Judge, United States Department of Labor.

James R. Collins, Denver, Colorado, for claimant.

Mary Lou Smith, Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Before: SMITH, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and AMERY, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (86-BLA-4850) of Administrative Law Judge Alexander Karst on a claim filed pursuant to the

provisions of Title IV of the Federal

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with at least thirty years of qualifying coal mine employment as stipulated to by the parties. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1) and 718.302, and total disability due to pneumoconiosis under 20 C.F.R. §718.204. Accordingly, benefits were awarded.

Employer appeals, contending that this claim must be automatically denied under 20 C.F.R. §725.309(d). Employer further challenges the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1) and 718.204(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

[1] The administrative law judge's findings with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek

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 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 under 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Employer first contends that the instant claim, filed on October 21, 1985, must be dismissed under Section 725.309(d) on the basis of the prior denial of claimant's original claim filed on May 2, 1980, because the deputy commissioner's denial of the

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Coal Co., 6 BLR 1-710 (1983).

second claim was tantamount to a finding of no material change in conditions, a requisite element for consideration of this duplicate claim. Director's Exhibit 1; 20 C.F.R. §725.309(d). Following issuance of the administrative law judge's Decision and Order - Awarding Benefits, however, the United States Court of Appeals for the Tenth Circuit, wherein appellate jurisdiction of this claim lies, held that a claimant is entitled to a hearing before an administrative law judge to examine, de novo, whether there has been a material change in conditions and whether claimant is entitled to benefits. Lukman v. Director, OWCP, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); see also Dotson v. Director, OWCP, 14 BLR 1-10 (1990). A review of the record indicates that new evidence was submitted subsequent to the denial of the original claim which would, if fully credited, support a finding of claimant's entitlement to benefits. See Director's Exhibits 9, 10, 11, 25; Claimant's Exhibits 1, 2. Consequently, we hold that claimant has established a material change in conditions and that the administrative law judge properly considered the merits of the claim. See Lukman, supra; see generally Salyers v. Director, OWCP, 12 BLR 1-193 (1989); Spese v. Peabody Coal Co., 11 BLR 1-174 (1988).

Next, employer contends that the administrative law judge mechanically applied the latest evidence rule and erred in his analysis of the x-ray evidence of record under Section 718.202(a)(1). In finding the x-ray evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge accorded

greatest weight to Dr. Karrer's, a Board-certified radiologist, positive interpretation of the most recent film taken on August 14, 1986, noting that the next most recent x-ray of June 9, 1986 supported that finding and further noting that a 1981 interpretation by Dr. Sargent, a Board-certified radiologist and B-reader, was also positive. However, employer correctly contends that the administrative law judge did not address the negative interpretation of the June 9, 1986 film by Dr. Repsher, a B-reader, and thus failed to consider relevant evidence. See Director's Exhibit 28; Hearing Transcript at 43; Tucker v. Director, OWCP, 10 BLR 1-35, 1-42 (1987); see generally Amorose v. Director, OWCP, 7 BLR 1-899 (1985). Employer also correctly contends that in characterizing Dr. Sargent's x-ray and noting that the doctor found subpleural fat shadows and minimal film quality, the administrative law judge failed to note that the doctor clearly checked "no" to the questions inquiring as to any parenchymal or pleural abnormalities consistent with pneumoconiosis. See Director's Exhibit 12. Consequently, we vacate the administrative law judge's findings under Section 718.202(a)(1) and we remand this case for an evaluation of all of the relevant x-ray evidence. On remand, the administrative law judge should also provide some explanation for his determination that Dr. White's interpretation of probable minor scarring is supportive of a positive diagnosis for pneumoconiosis. See Employer's Exhibit 1; see Dunlap v. Director, OWCP, 8 BLR 1-375 (1985).

Next, employer contends that the administrative law judge's analysis of the

evidence regarding total disability under 20 U.S.C. §718.204(c) is flawed. We agree.

The administrative law judge found that, although all of the pulmonary function study evidence was non-qualifying[2] under 20 C.F.R. §718.204(c)(1), two of the five blood gas study results of record were qualifying under 20 C.F.R. §718.204(c)(2) and these qualifying results, combined with the lay testimony, the x-ray evidence, and the opinions of Drs. Villalon and VanAs, outweighed the biased opinions of Drs. Repsher and Neff. Decision and Order at 3-6. However, employer correctly notes that the administrative law judge failed to explain why the qualifying blood gas study results outweighed the non-qualifying blood gas study and pulmonary function study results, which constitute contrary probative evidence.[3] See Fields v. Island Creek Coal Co.,

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[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

[3] Employer correctly maintains that x-ray evidence is not indicative of impairment and thus is not properly considered under Section 718.204(c). See Arnoni v. Director, OWCP, 6 BLR 1-423 (1983). Employer also argues that Dr. VanAs' equivocal opinion is insufficient in itself to establish total disability; and that the lay testimony, standing alone, is likewise insufficient. See 20 C.F.R. §718.204(d)(2); see generally Salyers v. Director, OWCP, 12 BLR 1-192, 1-196 (1989); Trent v. Director, OWCP, 11 BLR 1-26, 1-28 (1987). While we agree that this evidence standing alone is insufficient to establish total disability, we find no error in the administrative law judge's treatment thereof. See Fields, supra. Employer further contends that the administrative law judge cannot rely on Dr. Villalon's opinion to support a finding of total disability. A review of the record, however, indicates that Dr. Villalon diagnosed mild to moderate chronic obstructive pulmonary disease and listed limitations under the Medical Assessment portion of his report from which the administrative law judge could infer disability by comparing the limitations to the

10 BLR 1-19 (1987); Rafferty v. Jones & Laughlin Steel Corp., 9 BLR 1-231 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986).

Additionally, employer contends that the administrative law judge provided an invalid reason for finding the opinions of Drs. Repsher and Neff were biased in favor of employers. We agree. The administrative law judge based his finding of bias on the fact that both physicians always testified on behalf of employers; they both characterized qualifying blood gas study results as being within the lower of limits of normal; and Dr. Repsher disagreed with the positive x-ray interpretation of Dr. Sargent as well as Dr. White's x-ray findings. While the administrative law judge has wide discretion in determining the weight and credibility of a medical opinion, and may properly consider the underlying documentation in determining whether to accept a physician's conclusions, see Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985), Cooper v. United States Steel Corp., 7 BLR 1-842, 1-844 (1985), the mere fact that these physicians testify consistently on behalf of employers cannot support a finding of bias. See generally Brown v. Director, OWCP, 7 BLR 1-730 (1985); Chancey v. Consolidation Coal Co., 7 BLR 1-240 (1984). To the extent that

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exertional requirements of claimant's usual coal mine employment. See Jordan v. Benefits Review Board, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989); Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986).

the administrative law judge's findings may have been improperly influenced by the physicians' histories of testifying on behalf of employers, we cannot affirm his finding of bias. Consequently, we vacate the administrative law judge's findings under Section 718.204(c) and his finding of bias on the part of Drs. Repsher and Neff, and remand for the administrative law judge to reconsider all probative evidence thereunder on the issue of total disability pursuant to Fields, supra.

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

SO ORDERED.

ROY P. SMITH, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT S. AMERY
Administrative Law Judge