BRB No. 87-3158 BLA

ANDREW PERANICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Elbert D. Gadsden, Administrative Law Judge, United States Department of Labor.

James A. Sposito, Scranton, Pennsylvania, for claimant.

Patricia Anne Schwab (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (85-BLA-5099) of Administrative Law Judge Elbert D. Gadsden 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 credited

claimant with thirteen years of qualifying coal mine employment, but found

*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).

that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202 and 718.203, or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. Claimant appeals, contending that the evidence is sufficient to establish entitlement to benefits under 20 C.F.R. Part 718. The Director, Office of Workers' Compensation Programs (the Director), responds, urging a remand for reconsideration of the evidence under Part 718.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed 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).

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).

Claimant and the Director first contend that the administrative law judge erred in finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge properly assessed the relative qualifications of the readers, and noted that Drs. Sargent and Greene were both Board-certified radiologists and B-readers, whereas Drs. Sundheim and Gill, although Board-certified radiologists, were not B-readers. The administrative law judge then acted within his discretion in crediting Dr. Sargent's negative re-reading over Dr. Sundheim's positive interpretation, and Dr. Greene's conclusion that the most recent x-ray was of unreadable film quality over Dr. Gill's positive interpretation of that film, based on the superior qualifications of Drs. Sargent and Greene.[1] See Roberts v. Bethlehem

[1] The Director has also challenged the administrative law judge's statement that Dr. Gill's x-ray interpretion of "pneumoconiosis, 1, p" on August 20, 1986 was "non-qualifying under the regulations." See Decision and Order at 5; Claimant's Exhibit 1. We agree with the Director that Dr. Gill provided a properly classified positive interpretation pursuant to 20 C.F.R. §718.102. However, inasmuch as the

Mines Corp., 8 BLR 1-211 (1985); Casey v. Director,OWCP, 7 BLR 1-873 (1985). We therefore affirm the administrative law judge's findings under Section 718.202(a)(1), as they are based on substantial evidence.

The Director next contends that the administrative law judge erred in failing to render findings under 20 C.F.R. §718.202(a)(4). We agree. Although the administrative law judge discredited the opinion of Dr. Aquilina on the issue of total disability, he did not address the opinion of Dr. Aquilina, that claimant suffers from coal workers' pneumoconiosis, or the opinion of Dr. Levinson, finding that claimant had chronic obstructive pulmonary disease related to coal mine employment, under Section 718.202(a)(4). See Director's Exhibit 4; Claimant's Exhibit 4 at 8. Consequently, we remand this case for the administrative law judge to weigh these opinions with all relevant medical evidence and determine whether claimant has established the existence of pneumoconiosis under Section 718.202(a)(4). See Perry v. Director, OWCP, 9 BLR 1-1 (1986).

We also agree with claimant and the Director that if, on remand, the

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administrative law judge provided a proper reason for according greater weight to Dr. Greene's re-reading of the film, i.e. Dr. Greene possessed superior qualifications, any mischaracterization of Dr. Gill's interpretation was harmless error. See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984); Kozele v. Rochester and Pittsburgh Coal Co., 6 BLR 1-378 (1983).

administrative law judge finds the existence of pneumoconiosis established, claimant is entitled to invocation of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). We therefore vacate the administrative law judge's findings under Section 718.203 for reconsideration of the evidence thereunder on remand.

Finally, both claimant and the Director challenge the administrative law judge's analysis of the evidence regarding total disability under 20 C.F.R. §718.204(c). In assessing the objective evidence, the administrative law judge noted a conflict between the two pulmonary function studies of record under 20 C.F.R. §718.204(c)(1)[2], and a conflict between the two blood gas studies of record under 20 C.F.R. §718.204(c)(2), yet failed to resolve the conflicts. See Decision and Order at 7. Moreover, in evaluating the medical opinions of record under 20 C.F.R. §718.204(c)(4), the administrative law judge discussed Dr. Levinson's pulmonary

[2] Claimant contends that the administrative law judge misinterpreted Dr. Aquilina's deposition testimony with regard to the two ventilatory studies of record, and argues that there was only a minimal discrepancy between the studies. We note that the administrative law judge listed Dr. Aquilina's FEV1 value as .84 rather than 3.66, and then concluded that Dr. Aquilina's values were more abnormal than Dr. Levinson's. On remand the administrative law judge should reconsider those test values. See Decision and Order at 6, 7.

function study findings of minimal impairment, but failed to address his qualifying blood gas study results. The administrative law judge also did not address the physical limitations set forth in the Medical Assessment portion of Dr. Levinson's report, which should have been compared with the exertional requirements of claimant's usual coal mine employment. See Director's Exhibit 4; Jordan v. Benefits Review Board, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 19898); Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986). Consequently, we vacate the administrative law judge's findings under Section 718.204(c), and remand this case for the administrative law judge to weigh all probative evidence together, like and unlike, in determining whether claimant has established a totally disabling respiratory or pulmonary impairment under Section 718.204(c). See Fields v. Island Creek Coal Co., 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). If on remand the administrative law judge finds total disability established under Section 718.204(c), he must then separately determine whether the miner's disability was due to pneumoconiosis pursuant to the standard enunciated in Scott v. Mason Coal Co., 14 BLR 1-37 (1990)(en banc).

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge