BRB No. 03-0728 BLA

LEROY BOWMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	
	)	DATE ISSUED: 04/30/2004
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 - Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

William B. Talty, Tazewell, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Castro & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2002-BLA-5414) of Administrative Law Judge Mollie W. Neal 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).[1] Based upon claimant's July 3, 2001 filing date, the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726

administrative law judge considered the claim pursuant to 20 C.F.R. Part 718 and credited claimant with at least twenty-eight years and eight months of coal mine employment based on a stipulation entered into by the parties at the formal hearing. Decision and Order at 3; Hearing Transcript at 13-14. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, she denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish the existence of pneumoconiosis. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis. Claimant argues that the administrative law judge erred in her recitation of the x-ray evidence of record, as well as her analysis of this

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-eight years and eight months of coal mine employment, or her findings under 20 C.F.R. §718.202(a)(2) and (3). We, therefore, affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

evidence. Specifically, claimant contends that the administrative law judge failed to consider all of the relevant x-ray evidence and also misidentified the x-ray interpretation of Dr. Patel.

Initially, we reject claimant's contention that the administrative law judge erred in her interpretation of the December 16, 1999 decision by the West Virginia Occupational Pneumoconiosis Board (WVOPB), as the record does not contain the specific x-ray interpretation by the WVOPB. *See* Director's Exhibit 7. Rather, the WVOPB report contains the statement that the "CHEST views of the current examination is compared to 01-13-88" but does not elaborate on the specifics of the x-ray film being interpreted.[3] The WVOPB report does not contain the actual x-ray interpretation, nor is that interpretation specifically identified in the record. *See* Director's Exhibit 7. Therefore, we reject claimant's contention that the administrative law judge erred in failing to include this report in her consideration of the x-ray evidence.

However, as claimant correctly contends, the administrative law judge misidentified the positive x-ray reading provided by Dr. Patel. Within her recitation of the x-ray evidence, the administrative law judge stated that Dr. Patel provided a positive x-ray interpretation of the film dated September 26, 2001, as set forth in Dr. Rasmussen's medical report dated April 26, 2000. Decision and Order at 4, n.4; Claimant's Exhibit 3. A review of the record, however, does not show the date of the x-ray film that Dr. Patel reviewed for Dr. Rasmussen. Rather, Dr. Rasmussen's report merely states that Dr. Patel interpreted a chest x-ray as indicating pneumoconiosis, s/s with a profusion of 1/0. Claimant's Exhibit 3 at 2. The record contains no specific report authored by Dr. Patel, nor does it contain any other reference to Dr. Patel's x-ray interpretation. Therefore, as the administrative law judge's recitation of the relevant evidence does not accurately reflect the medical record, we remand the case to the administrative law judge for further consideration of the x-ray evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Moreover, on remand, the administrative law judge must also more fully explain her finding that Dr. Navani's interpretation "put into issue the quality of the reading of the third chest film" without explaining the effect that such a reading had on the evidence.[4] Decision and

[3] The December 16, 1999 decision by the West Virginia Occupational Pneumoconiosis Board contains the statement that the medical examination of claimant took place at Tug River on May 13, 1999. Director's Exhibit 7.

[4] Dr. Navani provided an interpretation dated October 24, 2001 of the September 26, 2001 x-ray, which was provided for the purpose of determining the quality of the x-ray film. Director's Exhibit 14. Specifically, Dr. Navani determined the film to be of "Quality 2" noting that there was "imperfect pleural detail" and "suboptimal parenchymal resolution." *Id*. Additionally, Dr. Navani noted that the film showed previous cardiac

Order at 4; Director's Exhibit 14; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Claimant also challenges the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, claimant argues that the administrative law judge erred in according less weight to the medical opinions of Drs. Mullins and Rasmussen, each of which included diagnoses of pneumoconiosis, because these opinions were based on positive x-rays, which was contrary to the administrative law judge's findings at Section 718.202(a)(1). Claimant's Brief at 8-9. Claimant also contends that the administrative law judge erred in crediting the medical opinions of Drs. Forehand and Castle, arguing that these opinions were based solely on negative x-ray interpretations and that a review of the x-ray evidence will show that the administrative law judge erred in finding the x-ray evidence to be negative and, thus, these medical opinions are not credible. Claimant's Brief at 9-10.

In light of the holding to remand the case for further consideration of the x-ray evidence of record, we also vacate the administrative law judge's findings at Section 718.202(a)(4), as these findings were based on her reliance on the concomitant findings under Section 718.202(a)(1) to determine the credibility of the medical opinion evidence. *See* Decision and Order at 7. Specifically, the administrative law judge found that the medical opinions of Drs. Mullins and Rasmussen were entitled to little weight because they were based upon positive x-ray readings that were contrary to her findings at Section 718.202(a)(1). Decision and Order at 7. Likewise, the administrative law judge credited the opinion of Dr. Forehand, that claimant is not suffering from coal workers' pneumoconiosis, as he relied upon his negative x-ray interpretation, which was in keeping with the weight of the x-ray evidence. *Id.* As we have vacated the administrative law judge's findings regarding the weight of the x-ray evidence, we further vacate the administrative law judge's findings at Section 718.202(a)(4) and remand the case for the administrative law judge to reconsider the medical opinion evidence in light of her findings on remand regarding the x-ray evidence. *See Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Finally, if on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), she must then determine whether the evidence establishes the existence of a totally disabling respiratory

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surgery. *Id.* This interpretation does not otherwise provide an opinion regarding the presence or absence of pneumoconiosis.

or pulmonary impairment due to pneumoconiosis pursuant to Section 718.204(b), (c). 20 C.F.R. §718.204(b), (c); *see Hicks*, 138 F.3d 524, 21 BLR 2-323.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, 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