BRB No. 04-0649 BLA

STEPHEN BARUKA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY, INCORPORATED	)	DATE ISSUED: 04/29/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

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

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5880) of Administrative Law Judge Paul H. Teitler (the administrative law judge) 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] This case involves a subsequent

[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

claim filed January 22, 2002.[2] Director's Exhibit 3; *see* 20 C.F.R. §725.309(d). The administrative law judge found that the new evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, benefits were denied. Claimant appeals, arguing that the administrative law judge erred in finding, at 20 C.F.R. §718.202(a)(1), that Dr. Barrett interpreted the March 20, 2002 x-ray as negative, when he read the x-ray for quality purposes only. Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer responds that claimant has not provided sufficient reason to disturb the administrative law judge's findings or, alternatively, that the administrative law judge's Decision and Order is "amply supported and reasoned." Employer's Brief at 8. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000). Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim shall be denied unless the claimant demonstrates that at least one of the applicable conditions of entitlement has changed since the denial of the prior claim. 20 C.F.R. §725.309(d). In the instant case, claimant's prior claim was denied because the evidence failed to

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

[2] Claimant filed a claim on August 25, 1986. Director's Exhibit 1. Following a hearing, Administrative Law Judge Ralph A. Romano denied benefits on January 8, 1989, finding that claimant failed to establish any element of entitlement. *Id.* Claimant filed a second claim on February 21, 1989, which Administrative Law Judge Ainsworth H. Brown denied on February 25, 1991, finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *Id.*

establish any element of entitlement. Director's Exhibit 1. Consequently, the new evidence must establish a change in any applicable condition of entitlement in order to meet the requirements of 20 C.F.R. §725.309(d).

Claimant contends that the administrative law judge erred in finding that Dr. Barrett interpreted the March 20, 2002 x-ray as negative, when he read it for quality purposes only.[3] Employer urges the Board to find that the administrative law judge permissibly inferred that this x-ray was negative. The record contains four readings of the x-ray dated March 20, 2002: Dr. Rashid read the x-ray as positive, but he had no special radiological qualifications, Director's Exhibit 19; Dr. Smith, dually qualified as a B reader and Board-certified radiologist, read the x-ray as positive, Claimant's Exhibit 3; Dr. Duncan, dually qualified, read the x-ray as negative, Employer's Exhibit 18; and Dr. Barrett, dually qualified, reread the March 20, 2002 x-ray for quality purposes only, finding it of Film Quality 2.[4] Director's Exhibit 20.

Claimant's contention has merit. The administrative law judge acknowledged that Dr. Barrett's interpretation was on a Roentgenographic Quality Rereading form and indicated:

> Where section 2A of the form asked if "any other abnormalities" were present, Dr. Barrett indicated that none were. If Dr. Barrett had indicated that other abnormalities were present, the form directed him to select the type of the abnormality observed from a provided list. This list included pneumoconiosis. Because Dr. Barrett did not indicate the presence of "any other abnormalities" on the [x]-ray he therefore interpreted the [x]-ray as being negative for pneumoconiosis.

Decision and Order at 7, n.5. The administrative law judge thereby mischaracterized as negative Dr. Barrett's rereading of the March 20, 2002 x-ray, which was read for quality purposes only. *See* Director's Exhibit 20. Because the administrative law judge accorded the most weight to the readings rendered by the dually qualified physicians,

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[3] Claimant alleges no error in the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3). We thus affirm these findings. *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

[4] The Roentgenographic Quality Rereading form used by Dr. Barrett to review the March 20, 2002 x-ray, defines Film Quality 2 as "Acceptable, with no technical defect likely to impair classification of the radiograph for pneumoconiosis." Director's Exhibit 20.

including Dr. Barrett, to find that the March 20, 2002 x-ray was negative, *see* Decision and Order at 6, his error in characterizing Dr. Barrett's reading as negative was not harmless. We thus vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) and remand the case. On remand, the administrative law judge must redetermine the sufficiency of the x-ray evidence at 20 C.F.R §718.202(a)(1), based on an accurate analysis of the record. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Claimant also contends that the administrative law judge erred in weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4). The administrative law judge acknowledged that Dr. Tavaria had treated claimant since January 9, 1998. Decision and Order at 10. Addressing the newly submitted medical opinions by Drs. Rashid, Levinson, Fino, and Tavaria, the administrative law judge characterized Dr. Tavaria as the only physician who opined that claimant had pneumoconiosis. *Id.* at 10. The administrative law judge accorded less weight to the October 24, 2003 report of Dr. Tavaria because he found it to be outweighed by the contrary reports, including those of Drs. Levinson and Fino. *Id.* at 11. The administrative law judge also found that Dr. Tavaria was not "credentialed in pulmonary disease," *Id.*, as were Drs. Levinson and Fino. Claimant argues that the administrative law judge erred by not according greatest weight to Dr. Tavaria's opinion based on his status as claimant's treating physician.

While the administrative law judge acknowledged Dr. Tavaria's status as claimant's treating physician, *see* Decision and Order at 10, he did not consider the physician's October 24, 2003 opinion pursuant to the factors provided for the administrative law judge's consideration of such opinions at 20 C.F.R. §718.104(d)(1)-(5).[5] Additionally, the administrative law judge issued his Decision and Order on April 20, 2004 and thus did not have the benefit of the decision of the United States Court of Appeals for the Third Circuit in *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(additional deference is due the opinion of a miner's treating physician), which issued on April 30, 2004. Based on the foregoing, we vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(4) regarding the weight and credibility of the new medical opinion evidence, and further remand the case. On remand, the administrative law judge must reconsider the new medical opinion evidence at Section 718.202(a)(4) pursuant to 20 C.F.R. §718.104 and *Soubik*.

[5] Dr. Tavaria's October 24, 2003 opinion is dated after the effective date of the new regulations, namely January 19, 2001 and is, therefore, subject to consideration pursuant to 20 C.F.R. §718.104.

Claimant also notes that Dr. Rashid interpreted as positive, the March 20, 2002 x-ray, which was taken in conjunction with his examination of claimant. Claimant's Brief at 2; *see* Director's Exhibit 19. Dr. Rashid, however, in his corresponding narrative report, did not address the issue of whether claimant had pneumoconiosis, *see* Director's Exhibit 13, and while he referenced the March 20, 2002 x-ray, he did not address his positive interpretation of it. *Id.* The administrative law judge thus further erred when he indicated, at 20 C.F.R. §718.202(a)(4), that three of the four physicians who rendered newly submitted opinions, found that claimant did not have pneumoconiosis. *See* Decision and Order at 10. Therefore, the administrative law judge on remand must consider the deficiencies in Dr. Rashid's opinion in redetermining whether the new medical opinion evidence establishes pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Further, because the prior claim was denied based on claimant's failure to establish any element of entitlement, the administrative law judge should have considered whether the new evidence establishes a change in any one of the applicable conditions of entitlement. 20 C.F.R. §725.309(d). If, on remand, the administrative law judge finds the new evidence sufficient to establish a change in any one of the applicable conditions of entitlement at 20 C.F.R. §725.309(d), then he must determine claimant's entitlement to benefits on the merits based on all the evidence of record. If reached, the administrative law judge must determine whether the record evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) pursuant to the Third Circuit's holding in *Williams*, that all types of relevant evidence must be weighed together to determine whether claimant has met his burden to establish the existence of pneumoconiosis. *Williams*, 114 F.3d at 24, 21 BLR at 2-111.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is vacated in part and affirmed 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

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring:

I concur with the majority's decision to vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and (a)(4) and remand the case for further findings thereunder. I would, however, additionally instruct the administrative law judge to determine whether the Director, Office of Workers' Compensation Programs (the Director), fulfilled his statutory duty to provide claimant with a complete, credible pulmonary evaluation. The Director has a statutory duty to arrange and pay for a complete pulmonary evaluation of the miner, sufficient to constitute an opportunity to substantiate a claim under the Act. 30 U.S.C. §923(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *accord Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990). Such an evaluation must, of necessity, address each of the elements of entitlement. *See Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*).

In the instant case, the Director provided claimant with a pulmonary evaluation by Dr. Rashid. *See* Director's Exhibits 13, 19. Dr. Rashid, however, did not address the existence of pneumoconiosis in his narrative report, although he read as positive the underlying March 20, 2002 x-ray. Director's Exhibits 13, 19. Dr. Rashid thus failed to address the issue of whether claimant had pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.202. Consequently, I would instruct the administrative law judge on remand to determine whether the Director has met his statutory obligation to provide claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim, as required by Section 413(b) of the Act. 30 U.S.C. § 923(b); *see* 20 C.F.R. §§718.101, 725.405(b).

BETTY JEAN HALL
Administrative Appeals Judge