BRB No. 05-0585 BLA

DUARD BROWNING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 04/25/2006
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-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (03-BLA-6195) of Administrative Law Judge Robert L. Hillyard rendered on a subsequent 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] The administrative law judge

[1] Claimant's first claim, filed on October 8, 1991, was denied by the district director on April 3, 1992 because claimant did not establish any element of entitlement. Director's Exhibit 2. Claimant's second claim, filed on June 3, 1994, was denied by Administrative Law Judge Donald W. Mosser on June 20, 1997 because claimant did not establish that he was totally disabled due to pneumoconiosis. The Board affirmed the

accepted the parties' stipulation to twenty-six years of coal mine employment,[2] and found that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings under Sections 718.202(a)(1), (4) and 718.204(b)(2)(i), (iv). Employer responds, arguing that the administrative law judge's denial of benefits is supported by substantial evidence, but that the administrative law judge erred in not considering Dr. Fino's opinion. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response to this appeal.[3]

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 pursuant to 20 C.F.R. Part 718, claimant must establish 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. Failure to establish any one of these

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denial of benefits. *Browning v. Peabody Coal Co.*, BRB No. 97-1428 BLA (Jun. 23, 1998)(unpub.); Director's Exhibit 2. Claimant's third claim, filed on January 3, 2000, was denied by the district director on April 17, 2000 because claimant did not establish any element of entitlement. Director's Exhibit 3. Claimant filed another claim on March 16, 2001, but withdrew it on March 31, 2001. *Id.* Claimant filed his current claim on May 31, 2001. Director's Exhibit 4.

[2] The administrative law judge properly found that because claimant's last employment occurred in Kentucky, the law of the United States Court of Appeals for the Sixth Circuit is controlling. Decision and Order at 4; *Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

[3] We affirm as unchallenged on appeal the administrative law judge's decision to credit claimant with twenty-six years of coal mine employment and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), and 718.204(b)(2)(ii)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge considered seven interpretations of four new x-rays in light of the readers' radiological qualifications. Giving greater weight to the dually qualified Board-certified radiologists and B readers, the administrative law judge found that two x-rays were negative, one was positive, and one was not ILO-classified. Decision and Order at 12. "Noting" that the most recent x-ray was negative, the administrative law judge gave greater weight to the two negative x-rays read by dually qualified readers over the one positive film and found that the existence of pneumoconiosis was not established under Section 718.202(a)(1). *Id.*

Claimant contends that the administrative law judge did not consider Dr. Chavda's "1/0" reading of the August 26, 2002 x-ray. Claimant's Brief at 9; Director's Exhibit 20. Claimant's contention has merit. The record reflects that the August 26, 2002 x-ray was a replacement x-ray that the Department of Labor (DOL) provided to claimant because the initial DOL x-ray taken on August 24, 2001 was not ILO-classified by Dr. Gandy and did not comply with the applicable quality standards. Director's Exhibits 11, 12. The administrative law judge considered and discounted Dr. Gandy's non-complying reading of the August 24, 2001 x-ray, but did not consider the August 26, 2002 x-ray. Director's Exhibits 20, 21; *see* 20 C.F.R. §725.406. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand the case for him to consider the August 26, 2002 x-ray. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Because employer is entitled to rebut the August 26, 2002 x-ray interpretation, 20 C.F.R. §725.414(a)(3)(ii), the administrative law judge on remand should admit and consider Dr. Wiot's negative rebuttal reading of the August 26, 2002 x-ray.[4] Employer's Exhibit 1 (excluded).

Claimant also contends that the administrative law judge erred in not considering Dr. Hansbrough's deposition at Director's Exhibit 28, in which Dr. Hansbrough interpreted the August 24, 2001 x-ray as positive for pneumoconiosis. Claimant is correct that the administrative law judge did not discuss Dr. Hansbrough's deposition testimony.[5] However, review of the record reflects that Dr. Hansbrough, like Dr. Gandy,

[4] The administrative law judge incorrectly excluded Dr. Wiot's negative reading of the August 26, 2002 x-ray because he found that this x-ray was not designated by claimant as one of his affirmative case x-rays. Decision and Order at 5 n.4. As discussed, the August 26, 2002 x-ray reading was submitted by the Director pursuant to 20 C.F.R. §725.406, not by claimant.

[5] Employer submitted Dr. Hansbrough's deposition to the district director on January 15, 2003. Director's Exhibit 28. Because Dr. Hansbrough conducted the

did not ILO-classify the August 24, 2001 x-ray as required by 20 C.F.R. §718.102(b). At his deposition, Dr. Hansbrough testified that because he was not a B-reader or Board-certified radiologist, he did not classify the x-ray. Director's Exhibit 28 at 8. Because Dr. Hansbrough did not classify the August 24, 2001 x-ray under the ILO-UICC classification system as required to constitute x-ray evidence of pneumoconiosis pursuant to 20 C.F.R. §718.102(b), the administrative law judge need not consider Dr. Hansbrough's testimony under Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Baker, O'Bryan, and Hansbrough, that diagnosed pneumoconiosis, and the contrary opinions of Drs. Repsher and Fino. The administrative law judge gave no weight to Dr. Fino's opinion, finding it "inextricably tied" to inadmissible evidence, and found the remaining opinions inadequately reasoned or documented. Decision and Order 14-17.

Dr. Baker diagnosed claimant with coal workers' pneumoconiosis 1/2 due to coal dust exposure, along with COPD, and chronic bronchitis all due to coal dust exposure and cigarette smoking. Claimant's Exhibits 2, 4. Contrary to claimant's assertion, the administrative law judge properly found that Dr. Baker's diagnosis of coal workers' pneumoconiosis was not well reasoned or documented because Dr. Baker gave no basis for his diagnosis beyond his own positive x-ray reading and a reference to claimant's coal mine employment history. *Eastover Mining Co. v.* Williams, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (2002). Additionally, the administrative law judge reasonably found that Dr. Baker provided no support for his opinion that both coal dust exposure and cigarette smoking caused claimant's COPD based on a non-qualifying pulmonary function study. *See Rowe,* 710 F2d. at 255, 5 BLR at 2-103; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85-89 and n.4 (1993). The administrative law judge also permissibly chose to give less weight to Dr. Baker's diagnosis of chronic bronchitis because it was based solely on claimant's self reported symptoms. *See Rowe,* 710 F.2d at 255, 5 BLR at 2-103. Similarly, the administrative law judge permissibly gave less weight to the opinion of Dr. O'Bryan, because his opinion was based on a positive x-ray that was refuted by a more highly qualified physician and because he failed to explain how the underlying documentation support his diagnosis. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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complete pulmonary evaluation for the Department of Labor, employer requested that his deposition to be considered part of the Director's evidence. *Id*. The district director included Dr. Hansbrough's deposition as "RO deposition of Dr. Hansbrough" in the list of Director's Exhibits transmitted to the Office of Administrative Law Judges. Dr. Hansbrough's deposition was admitted into evidence as Director's Exhibit 28 without objection. Hearing Tr. at 6.

The administrative law judge gave "little weight" to Dr. Hansbrough's diagnosis of pneumoconiosis because Dr. Hansbrough lacked pulmonary credentials, because Dr. Hansbrough relied on a non-conforming chest x-ray, and because he relied on a pulmonary function study that another doctor stated was invalid. Decision and Order at 17. Claimant, however, correctly argues that the administrative law judge did not consider Dr. Hansbrough's testimony that he is Board-certified in Internal Medicine and Pulmonary Diseases, and that he read an x-ray as showing changes consistent with pneumoconiosis. Claimant's Brief at 11. Additionally, review of the transcript of Dr. Hansbrough's deposition reveals testimony relevant to the validity of Dr. Hansbrough's pulmonary function study. Director's Exhibit 28 at 28. We must therefore vacate the administrative law judge's finding under Section 718.202(a)(4) and remand this case for him to consider Dr. Hansbrough's opinion in conjunction with his deposition. *See Rowe*, 710 F2d. at 255, 5 BLR at 2-103.

Additionally, on remand, the administrative law judge should reconsider Dr. Fino's opinion. As employer points out, in a subsequent claim, evidence from prior federal claims is part of the subsequent claim record, except for any evidence that was excluded in the prior claims. 20 C.F.R. §725.309(d)(1); Employer's Brief at 3 n.3. From a review of the record, it appears that Dr. Fino reviewed evidence from this claim and from claimant's prior federal claims. Employer's Exhibits 3, 4. Thus, the administrative law judge should reconsider Dr. Fino's opinion and explain his finding that Dr. Fino's opinion was inextricably linked to inadmissible evidence. Finally, we reject as meritless claimant's contention that the administrative law judge erred in considering a CT scan reading because "the Regulations do not recognize this type of test . . . ." Claimant's Brief at 12. The regulations permit the consideration of other types of evidence. *See* 20 C.F.R. §718.107; *Dempsey*, 23 BLR at 1-59.

Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered four new pulmonary function studies. The administrative law judge found that one study was invalid, two were non-qualifying,[6] and another was qualifying only in its post-bronchodilator values. Based on these findings, the administrative law judge determined that the pulmonary function study evidence did not support a finding of total disability. Claimant "note[s] that the FEV1" value was qualifying on the two studies that the administrative law judge found non-qualifying, and claimant therefore asserts that "those tests are of some probative value." Claimant's Brief at 12. Whether a pulmonary function study is qualifying depends upon more than its FEV1 value. *See* 20 C.F.R.

[6] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

§718.204(b)(2)(i). Claimant does not otherwise attempt to specify any errors made by the administrative law judge in his evaluation of the pulmonary function study evidence.

Similarly, under Section 718.204(b)(2)(iv), claimant generally asserts that the reports of Drs. O'Bryan, Baker, and Hansbrough established that claimant is totally disabled. Claimant's Brief at 13. Because claimant, who is represented by counsel, has failed to adequately raise or brief any issue arising from the administrative law judge's weighing of the pulmonary function study and medical opinion evidence under Sections 718.204(b)(2)(i),(iv), the Board has no basis upon which to review those findings. *See* 20 C.F.R. §§802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director*, OWCP¸10 BLR 1-119 (1987). Those findings are therefore affirmed.

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