BRB No. 06-0585 BLA

ROBERT O. HOOD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 04/26/2007
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest		

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

Patrick K. Nakamura (Nakamura, Quinn & Walls, LLP), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-6045) of Administrative Law Judge Paul H. Teitler awarding 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 found twenty-four and one-half years of coal mine employment. Decision and Order at 2; Hearing Transcript at 5. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. After determining that the claim before him was a subsequent claim, the administrative law judge found that the newly submitted x-

ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, thus, sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[1] Decision and Order at 2, 4-5; Director's Exhibits 1, 2, 4. The administrative law judge further concluded that the newly submitted evidence of record was sufficient to establish that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2) and §718.204(c). Decision and Order at 5-8. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge did not properly weigh the evidence under Sections 718.202(a), 718.204(b)(2), and 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in the instant appeal.[2]

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, 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 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 in a living miner's claim filed pursuant to 20 C.F.R. 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements

[1] Claimant's initial claim for benefits, filed with the Department of Labor on August 1, 1994, was denied by the district director on January 17, 1995, because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on September 13, 2000, which was denied by the district director on December 20, 2000 because claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant took no further action until he filed the present claim on September 30, 2004, which was denied by the district director on May 5, 2005. Director's Exhibits 4, 24. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 25.

[2] The administrative law judge's length of coal mine employment determination as well as his findings that the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because claimant failed to establish any element of entitlement. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing that he suffers from pneumoconiosis or that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §725.309(d)(2), (3); *United States Steel Mining Co. v. Director, OWCP, [Jones]*, 386 F.3d 977, 988-989, 23 BLR 2-213, 2-229 (11th Cir. 2004).[3]

Pursuant to Section 718.202(a)(1), the administrative law judge considered the six x-ray readings of the two newly submitted films taken on October 29, 2004 and January 11, 2005. Decision and Order at 3-5; Director's Exhibits 13-16; Claimant's Exhibit 1; Employer's Exhibit 1. The October 29, 2004 x-ray film was read as positive by Drs. Nath and Cappiello and as negative by Dr. Wiot. Director's Exhibits 13, 15, 16. The January 11, 2005 x-ray[4] was read as negative by Drs. Wheeler and Hasson. Employer's Exhibit 1; Director's Exhibit 14. Dr. Ahmed found the film overexposed. Claimant's Exhibit 1.

The administrative law judge relied on the interpretations of the physicians who possessed superior radiological qualifications to resolve the conflict in the x-ray evidence.[5] Decision and Order at 4. The administrative law judge found, with respect to

[3] The record indicates that claimant was last employed in the coal mine industry in Alabama. Director's Exhibits 1, 2, 5, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] In the Decision and Order, the administrative law judge correctly charted the January 11, 2005 x-ray interpretations; however, during his discussion of the x-ray evidence, he mistakenly refers to this x-ray as the November 11, 2005 x-ray. Decision and Order at 4.

[5] The record indicates that Drs. Nath, Wheeler, Ahmed, Cappiello and Wiot are B readers and Board-certified radiologists. Director's Exhibits 13, 15, 16; Employer's

the October 29, 2004 film, that there were two positive interpretations and one negative interpretation read by "[B]oard-certified B-readers." Decision and Order at 4; Director's Exhibits 13, 15, 16. Considering the January 11, 2005 x-ray, the administrative law judge noted that while Drs. Wheeler and Hasson provided two negative interpretations, "Dr. Hasson's reading will be given little weight because he is neither a [B]oard[-] certified radiologist nor a B-reader." Decision and Order at 4. The administrative law judge acknowledged that Drs. Ahmed and Wheeler had identical credentials but accorded Dr. Wheeler's negative interpretation less weight because Dr. Ahmed concluded that "the film was not optimal for evaluating small pneumoconiotic opacities" and the physician further marked the film as being "overexposed." Decision and Order at 4; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge concluded that "[d]ue to the two positive readings for pneumoconiosis on the October 29, 2004 chest x-ray and the qualifications of the readers, I find that the Claimant has established the presence of pneumoconiosis by x-ray evidence." Decision and Order at 4. Consequently, the administrative law judge determined that because claimant established that he suffered from pneumoconiosis, he had established a change in an applicable condition of entitlement pursuant to Section 725.309(d). Decision and Order at 5.

Employer initially argues that the administrative law judge's findings pursuant to Section 718.202(a)(1) violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).[6] Employer specifically contends that in finding the evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge failed to fully consider the newly submitted x-ray evidence and did not offer a valid reason for assigning greater weight to the interpretation of Dr. Ahmed and discounting the negative interpretation of Dr. Wheeler. We agree.

The record indicates that Drs. Wheeler and Ahmed rated the film quality of the January 11, 2005 x-ray as "1" on the interpretation forms developed by the National Institute for Occupational Safety and Health (NIOSH) and used by the Department of

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Exhibit 1; Claimant's Exhibit 1. Dr. Hasson has no specialized credentials for the interpretation of x-rays. Director's Exhibit 14.

[6] The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Labor.[7] Claimant's Exhibit 1; Employer's Exhibit 1. Dr. Wheeler interpreted this x-ray as negative for the existence of pneumoconiosis on the NIOSH form. Employer's Exhibit 1. Dr. Ahmed checked a box on the form indicating that the film was "overexposed" and in a narrative report, stated that the x-ray was "not optimal for evaluating small pneumoconiotic opacities." Claimant's Exhibit 1. Dr. Ahmed further noted on both documents that there were pleural abnormalities consistent with pneumoconiosis, indications of emphysema and the thickening of a minor fissure. *Id*.

The administrative law judge discussed this evidence but did not explain how Dr. Ahmed's quality rating of "1" on the x-ray interpretation form and his additional comments cast doubt on the interpretation by Dr. Wheeler, who is also dually qualified as a Board-certified radiologist and a B reader. Decision and Order at 4. Although the administrative law judge is empowered to weigh the evidence, because he did not comply with the APA and provide an adequate rationale for his decision to accord more weight to Dr. Ahmed's interpretation than to Dr. Wheeler's interpretation, the basis for the administrative law judge's credibility determination in this particular case cannot be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We therefore vacate the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and remand the case to the administrative law judge for reconsideration of this issue.

Employer also argues that the administrative law judge erred by failing to consider whether the medical opinions established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). This contention is without merit. The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, treats Section 718.202(a) as setting forth four alternative methods for establishing the existence of pneumoconiosis. 20 C.F.R.§718.202(a). *See Jones*, 86 F.3d at 991, 23 BLR at 2-236-238 (Court did not adopt the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that requires the weighing of all evidence relevant to the existence of pneumoconiosis together). Because the administrative law judge found that the x-ray evidence established that claimant suffered from pneumoconiosis pursuant to Section 718.202(a)(1), he was not required to consider the remaining methods at Section 718.202(a)(2)-(4). *Id*. On remand, however, if the administrative law judge finds that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis, he must consider the remaining methods.

[7]A rating of "1" is the highest rating for film quality that appears on the x-ray interpretation form.

In light of the fact that we have vacated the administrative law judge's pneumoconiosis finding, we must also vacate his finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203.

With respect to the issue of total disability pursuant to Section 718.204(b)(2), the record contains two newly submitted pulmonary function studies, one of which yielded qualifying results, and two non-qualifying blood gas studies.[8] Director's Exhibits 13, 14. The record also contains three newly submitted medical opinions. Dr. Khan examined claimant on October 29, 2004 and stated that claimant would be "significantly impaired in performance based on his last coal mine job as a beltman." Director's Exhibit 13. Dr Hasson examined claimant on January 11, 2005 and diagnosed asthmatic bronchitis by history. Director's Exhibit 14. Dr. Renn performed an independent medical review and determined that the claimant did not have pneumoconiosis but suffered from chronic obstructive pulmonary disease (COPD) due to tobacco smoking and possible restrictive ventilatory defect. Dr. Renn further stated that based on the "invalid and only fairly performed ventilatory function studies" he could not determine whether claimant retains the ventilatory function to perform his coal mining jobs. Employer's Exhibit 2.

Regarding the issue of total disability causation under Section 718.204(c), Dr. Khan stated that claimant's pneumoconiosis and ischemic heart disease significantly contribute to his impairment. Director's Exhibit 13. Dr. Hasson indicated that that there was no evidence of pneumoconiosis and no evidence of pulmonary impairment that could be related to coal dust exposure. Director's Exhibit 14.

The administrative law judge considered this evidence and acknowledged that one of the two newly submitted pulmonary function studies yielded qualifying results, and that all of the newly submitted arterial blood gas studies were non-qualifying, and concluded that this evidence did not establish that claimant was totally disabled pursuant to Section 718.204(b)(2)(i-ii). Decision and Order at 6-7. In addressing the medical opinion evidence, the administrative law judge combined his analysis of total disability with his analysis of totally disability causation and found that the opinions of Drs. Hasson and Renn "carry less weight, since neither doctor found either clinical or legal pneumoconiosis," which was contrary to the administrative law judge's findings. Decision and Order at 7. The administrative law judge further stated that:

[8]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 exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

> Dr. Khan' opinion, coupled with Dr. Renn's finding of obstructive pulmonary disease and Dr. Hasson's finding of asthmatic bronchitis, is enough to satisfy claimant's burden under the Act. Accordingly, I find that Mr. Hood has shown total disability due to pneumoconiosis on the basis of medical opinion.

Decision and Order at 8.

Employer asserts that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability and total disability causation, as the administrative law judge failed to properly consider the newly submitted evidence pursuant to the applicable regulations. This contention has merit. As an initial matter, however, we hold because we have vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis, we must also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). *See* 20 C.F.R. §718.204(c); Decision and Order at 7-8.

With respect to employer's specific contention, the Eleventh Circuit has stated that Section 718.204 embodies two essential elements which a claimant must establish in order to qualify for benefits under the Act: (1) the claimant must establish that he has a total pulmonary disability according to the criteria of the regulations and (2) the claimant must establish that that his total disability is caused by or "due to" his pneumoconiosis. *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1263, 13 BLR 2-277, 2-280 (11th Cir. 1990). In weighing the newly submitted medical opinion evidence in this case, the administrative law judge combined the two elements of entitlement and, thus, did not provide the necessary findings with respect to each separate element.[9] *Id*. Therefore, in addition to vacating that the administrative law judge's determination that the newly submitted evidence was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), we also vacate the administrative law judge's finding that the newly submitted evidence was sufficient to establish that claimant is totally disabled under Section 718.204(b)(2).

In light of our holdings concerning the administrative law judge's weighing of the newly submitted evidence, we also vacate the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to

[9] Employer acknowledges that Dr. Hasson did not definitively state whether claimant was totally disabled and that Dr. Renn could not determine if claimant retained the pulmonary function to perform his last coal mine work. Employer's Brief at 15.

20 C.F.R. §725.309(d). *See* Decision and Order at 5; *White*, 23 BLR 1-1, 1-3. If the administrative law judge finds, on remand, that the newly submitted evidence establishes one of the elements of entitlement previously adjudicated against claimant, then the administrative law judge must consider the entire record *de novo* to determine if claimant has established entitlement to benefits. *White*, 23 BLR 1-1, 1-3.

If, upon considering the merits of entitlement, the administrative law judge finds that the evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), he must determine if claimant has established, by a preponderance of the relevant evidence, that he is totally disabled at Section 718.204(b)(2)(i)-(iv). If the administrative law judge finds that claimant has established these elements of entitlement, he must then consider whether claimant has proven that his pneumoconiosis is at least a contributing cause of his totally disabling respiratory impairment pursuant to Section 718.204(c). *See Lollar*, 893 F.2d 1258, 1263, 13 BLR 2-277, 2-280.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge