BRB No. 08-0552 BLA

C.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/23/2009
	)	
UNITED STATES STEEL CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits (07-BLA-5533) of Administrative Law Judge Kenneth A. Krantz 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). Claimant filed two previous claims for benefits on April 4, 1995 and February 8, 1998, and they were finally denied on August 10, 1995 and January 19, 1999, respectively, because claimant did not

establish any element of entitlement.[1] Director's Exhibit 1. Claimant filed this subsequent claim for benefits on May 30, 2006. Director's Exhibit 3.

In his decision, the administrative law judge credited claimant with at least thirty-three years of coal mine employment, as stipulated.[2] The administrative law judge excluded, as excess evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii), Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray submitted by employer. The administrative law judge found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d), because claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) with new evidence. In considering the claim on the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's exclusion of Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray. Employer also contends that the administrative law judge erred in finding that the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis pursuant Section 718.204(b)(2), (c) were established. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant also filed a claim on February 15, 2001, but it was denied by the district director on February 20, 2002, and later withdrawn by claimant on March 6, 2002, before the denial became effective. Thus, claimant's withdrawn claim is considered not to have been filed, and is not contained in the record. *See* 20 C.F.R. §725.306(b); Decision and Order at 3 n.3.

[2] The record indicates that claimant's coal mine employment was in Virginia and West Virginia. Decision and Order at 8 n.9; Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where 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.*, 23 BLR 1-1, 1-3 (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 he did not establish any element of entitlement. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any element of entitlement. 20 C.F.R. §725.309(d)(2),(3).

Employer first argues that the administrative law judge erred in excluding Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray from consideration pursuant to Section 725.414(a)(3)(ii). We agree.

The administrative law judge excluded Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray, proffered by employer in rebuttal to the positive interpretation of this x-ray that was submitted by the Director as part of the complete pulmonary evaluation provided to claimant pursuant to 20 C.F.R. §725.406. The administrative law judge found that this reading exceeded the evidentiary limitations because only one rebuttal interpretation is allowed per x-ray interpretation, and employer had already submitted its only allowed rebuttal interpretation of the July 13, 2006 x-ray by Dr. Smith, designated as Employer's Exhibit 2. Decision and Order at 4.

Section 725.414(a)(3)(ii) provides, in pertinent part, that "[t]he responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray, . . . submitted by the claimant . . . and by the Director pursuant to [20 C.F.R.] §725.406." 20 C.F.R. §725.414(a)(3)(ii). Contrary to the administrative law judge's characterization of employer's x-ray evidence, employer's evidence summary form indicates that employer offered Dr. Smith's negative reading of the July 13, 2006 x-ray as one of its two affirmative x-rays, and Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray as its only rebuttal to the Director's reading of that x-ray. Employer's Evidence Summary Form, July 23, 2007, at 2. Thus, Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray is not excess evidence. Consequently, the administrative law judge erred in excluding Dr. Al-Asbahi's negative reading, as it was properly admissible as employer's rebuttal to the Director's reading of the July 13, 2006 x-ray. *See Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155 (2006). We must therefore vacate the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis

pursuant to 20 C.F.R. §718.202(a)(1), and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must admit and weigh Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray with the other x-ray readings of record before determining whether the new x-rays establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Employer next argues that the administrative law judge erred in finding that the existence of pneumoconiosis was established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Employer asserts that the administrative law judge erred in discounting Dr. Hippensteel's opinion, that claimant does not have pneumoconiosis, because it was based in part on Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray, which the administrative law judge improperly excluded.

The administrative law judge considered the three new medical reports by Drs. Rasmussen, Forehand, and Hippensteel. Dr. Rasmussen diagnosed claimant with both clinical pneumoconiosis, based on a positive x-ray and a history of thirty-one years of coal mine employment, and legal pneumoconiosis[3] in the form of chronic bronchitis due to coal mine dust exposure. Claimant's Exhibit 1. Dr. Forehand diagnosed clinical pneumoconiosis based on a positive chest x-ray, claimant's occupational history, physical examination, and a blood gas study. Director's Exhibit 13 at 4. The administrative law judge found that the opinions of Drs. Rasmussen and Forehand were well-documented and well-reasoned because they relied in part on positive x-ray evidence. Decision and Order at 11-12. By reports dated January 26 and November 1, 2007, Dr. Hippensteel stated that claimant did not have pneumoconiosis, based on his physical examination of claimant, a negative x-ray, and a blood gas study, as well as a review of the reports of Drs. Forehand and Rasmussen, the negative readings of the July 13, 2006 x-ray by Drs. Smith and Al-Asbahi, and the negative and positive readings of the May 10, 2001 x-ray by Drs. Al-Asbahi and DePonte, respectively. Employer's Exhibits 1, 4. The administrative law judge discounted Dr. Hippensteel's opinion, in part, because it was based on Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray. Decision and Order at 12 n.11. Because the administrative law judge's findings were based in part on his erroneous exclusion of Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray, and on his finding that the x-rays were positive for pneumoconiosis pursuant to Section 718.202(a)(1), which we have vacated, we also vacate the administrative law judge's finding pursuant to Section 718.202(a)(4).

Based on the foregoing, we also vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

based on an overall weighing together of the relevant evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); Decision and Order at 13. Further, because we vacate the administrative law judge's finding pursuant to Section 718.202(a), we also vacate the administrative law judge's finding that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d). Consequently, the administrative law judge must reconsider his findings pursuant to Sections 718.202(a), 725.309(d) on remand.

Employer next argues that the administrative law judge erred in finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found that the non-qualifying[4] pulmonary function studies did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge chose to accord greater weight to the July 13, 2006 blood gas study conducted by Dr. Forehand, which was qualifying both at rest and with exercise, than to the non-qualifying, December 6, 2006 blood gas study conducted by Dr. Hippensteel, because Dr. Hippensteel's study was performed at rest only.[5] On appeal, employer asserts that Dr. Forehand's study was "barely qualifying," but alleges no specific error in the administrative law judge's evaluation of the blood gas study evidence. Employer's Brief at 8. We decline to address employer's argument pursuant to 20 C.F.R. §718.204(b)(2)(ii) as it fails to allege any specific error with regard to the blood gas study evidence. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Employer argues further that the administrative law judge erred in crediting Dr. Forehand's opinion over that of Dr. Hippensteel to find that total disability was established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Forehand stated that claimant is totally disabled due to his "significant respiratory impairment" since claimant has "insufficient residual oxygen[-]carrying ventilatory capacity." Director's Exhibit 13 at 4. Dr. Hippensteel stated that claimant is totally disabled due to heart problems, and thus

[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, in Appendices B and C of Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The administrative law judge gave less weight to Dr. Rasmussen's May 10, 2001, non-qualifying blood gas study because it was five years older than the blood gas studies performed by Drs. Forehand and Hippensteel. The administrative law judge also gave less weight to the non-qualifying 1995 and 1998 blood gas studies in view of the progressive nature of pneumoconiosis. No party has challenged these findings. They are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

could not return to work from a whole-man standpoint, but is not totally disabled by a pulmonary impairment. Employer's Exhibit 4. In weighing the opinions of Drs. Hippensteel and Forehand, the administrative law judge noted that he was "influenced" by the fact that Dr. Hippensteel relied on Dr. Al-Asbahi's excluded negative reading of the July 13, 2006 x-ray, which, as discussed above, the administrative law judge improperly excluded from the record. Decision and Order at 16 n.20. Because we have held that the administrative law judge erred in excluding that x-ray from the record, we also vacate the administrative law judge's weighing of the medical opinions at total disability pursuant to Section 718.204(b)(2)(iv).[6] On remand, the administrative law judge must reweigh the medical opinions, taking into account that Dr. Al-Asbahi's negative reading of the July 13, 2006 x-ray is part of the record. After reconsidering the medical opinions, the administrative law judge must weigh together all the relevant probative evidence to determine whether total disability is established. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Employer lastly argues that the administrative law judge erred in crediting Dr. Forehand's opinion over that of Dr. Hippensteel to find that total disability due to pneumoconiosis was established pursuant to Section 718.204(c). Because we have vacated the findings that the existence of pneumoconiosis and total disability were established, we also vacate the administrative law judge's disability causation finding. On remand, the administrative law judge must reconsider disability causation pursuant to Section 718.204(c), if reached, in accordance with the proper legal standard in the Fourth Circuit. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990).

[6] We note that the administrative law judge did not explain the relevance of Dr. Hippensteel's review of x-rays to his opinion on whether claimant has a totally disabling respiratory impairment.

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for reconsideration 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