

BRB No. 99-1158 BLA

GEORGE FIELDS)
)
 Claimant-)
 Petitioner)
) DATE ISSUED: _____)
 v.)
)
 DIRECTOR, OFFICE OF)
 WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT) DECISION AND ORDER
 OF LABOR)

Respondent

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Tracey E. Burkett (Appalachian Research & Defense Fund of Kentucky, Inc.), Hazard, Kentucky, for claimant.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-1000) of Administrative Law Judge Rudolf L. Jansen with respect to 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 accepted the parties' stipulation to 10.37 years of coal mine

employment and considered the claim, filed on April 19, 1991, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge further found, however, that claimant did not demonstrate that he is totally disabled pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Section 718.204(c)(2) and (c)(4). The Director, Office of Workers' Compensation Programs (the Director), has responded and maintains that although the administrative law judge's findings under Section 718.204(c) do not contain any errors, claimant has not been provided with a complete and credible pulmonary evaluation with respect to the issue of total disability. The Director urges the Board to vacate the administrative law judge's findings regarding the existence of pneumoconiosis and remand the case to the administrative law judge for initial reconsideration of Section 718.202(a)(1) and (a)(4) rather than to the district director. The Director asserts that only if the administrative law judge finds the existence of pneumoconiosis established on remand must the case be returned to the district director so that claimant can be given a complete and credible pulmonary evaluation.

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).

When considering the evidence relevant to Section 718.204(c)(4), the administrative law judge discredited the opinion in which Dr. Wicker, the physician who examined claimant at the request of the Department of Labor, stated that claimant does not "appear at this time to have the respiratory capacity to perform his previous occupation."¹ Decision and Order at 12; Director's

¹Dr. Wicker examined claimant at the request of the Department of Labor on May 15, 1991 and March 15, 1994. In his first report, Dr. Wicker concluded that claimant was not totally disabled. Director's Exhibit 8. Based upon the results of the 1994 examination, Dr. Wicker determined that claimant could not perform his usual coal mine employment. Director's Exhibit 18. In both reports, Dr. Wicker recorded, without elaboration, that claimant last worked in the mining industry as a driver.

Exhibit 18. The administrative law judge determined that Dr. Wicker's diagnosis of total respiratory disability was entitled to little weight, as Dr. Wicker, who noted only that claimant was a "driver," was not sufficiently aware of the exertional requirements of claimant's usual coal mine work as a truck driver. *Id.* The Director has conceded that inasmuch as the administrative law judge's finding with respect to Dr. Wicker's opinion is rational, the Director has not provided claimant with a complete and credible pulmonary evaluation as is required under the Act and the implementing regulations. See 30 U.S.C. §923(b), 20 C.F.R. §§718.101, 718.401, 718.405(b). In light of the Director's concession that he has not fulfilled his statutory duty, and in order to avoid piecemeal litigation, we hereby vacate the administrative law judge's findings under both Sections 718.202(a) and 718.204(c) and the denial of benefits. The case is remanded to the district director so that a complete and credible pulmonary evaluation of claimant can be obtained. See *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*).

In order to further promote judicial economy, we will also address the allegations of error raised by the Director and claimant. With respect to Section 718.202(a)(1), the Director is correct in contending that in considering only the readings of the most recent films, the administrative law judge did not make the requisite determination that the earlier x-rays of record were read as negative for pneumoconiosis. See *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); see also *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). In addition, the administrative law judge also did not accurately characterize Dr. Sargent's qualifications when setting forth his reading of the film dated November 15, 1996 and did not specifically address the fact that the radiological qualifications of the physicians offering interpretations varied, with Drs. Sargent, Barrett, and Gordonson being Board-certified radiologists in addition to B readers.² Decision and Order at 5, 9; Director's Exhibits 10, 11, 18,

²Contrary to the Director's allegations, however, the administrative law judge is not required to treat x-ray readings which diagnosed conditions unrelated to pneumoconiosis or which noted that claimant's lungs were clear as evidence that claimant does not have pneumoconiosis nor is the administrative law judge required to determine whether each individual film is positive or negative for pneumoconiosis. The case cited by the Director in support of the latter contention was not published by the United States Court of Appeals for the Fourth Circuit and, therefore, does not constitute binding precedent even assuming that the present case arises within the jurisdiction of the Fourth Circuit. *Copley v. Arch of West Virginia, Inc.*, No. 96-2234 (4th Cir. Feb. 17, 1998).

20; see *Woodward, supra*; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Regarding the administrative law judge's consideration of the medical opinions of record under Section 718.202(a)(4), the Director is correct in stating that the administrative law judge did not make a finding as to whether the diagnoses of pneumoconiosis made by Drs. Sundaram and Armstrong are adequately reasoned. Decision and Order at 10; Director's Exhibits 18, 20. The weighing of the x-ray evidence on remand could alter the weight attributed to Dr. Sundaram's opinion, as the doctor appeared to rely heavily on his positive x-ray readings. It is unclear whether Dr. Armstrong offered an independent diagnosis of pneumoconiosis, as he appeared to repeat the findings made by Dr. Sundaram.

With respect to the administrative law judge's consideration of total disability under Section 718.204(c)(2), as claimant asserts, the administrative law judge did not accurately summarize the blood gas study evidence. Contrary to the administrative law judge's finding, the qualifying blood gas study obtained by Dr. Wicker on March 15, 1994 was not invalidated by any physician. Decision and Order at 11; Director's Exhibit 18.

Finally, if the earlier films of record are determined to be negative for pneumoconiosis, the administrative law judge could accord greater weight to the positive films obtained in 1996 and 1997 based upon the two to three year gap between those readings and the negative x-rays obtained in 1993 and 1994. See generally *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192, 2-197 (6th Cir. 1986); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983).

Concerning the administrative law judge's weighing of the medical reports relevant to Section 718.204(c)(4), however, the administrative law judge acted within his discretion in finding that Dr. Sundaram's opinion that claimant cannot perform heavy manual labor did not support a finding of total disability because the record did not support a determination that claimant's job as a truck driver required heavy labor. Decision and Order at 12; see *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); see also *Cregger v. United States Steel Corp.*, 6 BLR 1-1219 (1984). Claimant did not contest the administrative law judge's finding that his usual coal mine work was as a truck driver and presented no evidence establishing that the job required heavy manual labor. Claimant cites to the hearing transcript in his Brief In Support of Petition for Review but the referenced pages do not contain statements indicating that claimant engaged in heavy labor. See Hearing Transcript at 8-12, 21-22, 26-27. Finally, the administrative law judge rationally determined that Dr. Wicker's diagnosis of a totally disabling respiratory impairment was entitled to little weight, as Dr. Wicker was not aware of the exertional requirements of claimant's usual coal mine employment.³ Decision and Order at 12; Director's Exhibits 8, 18; see *Onderko, supra*.

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded to the district director for further development of the evidence and for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

³Claimant is incorrect in maintaining that the administrative law judge was required to accord determinative weight to Dr. Sundaram's most recent opinion because it is uncontradicted and because Dr. Sundaram is a treating physician. The administrative law judge performed his duty as fact-finder in assessing whether Dr. Sundaram's diagnosis of a totally disabling impairment is reasoned and documented. See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge