BRB No. 07-0985 BLA

C.V.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/19/2008
POWELL MOUNTAIN COAL COMPANY	)	
	)	
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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

C.V.C., Pennington Gap, Virginia, *pro se.*

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2006-BLA-06192) of Administrative Law Judge Linda S. Chapman 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] The administrative law judge credited claimant with thirty years of coal mine employment,

[1] Claimant filed his claim for benefits on June 27, 2005. Director's Exhibit 2.

but found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[2] Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in denying his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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, 363 (1965).

After reviewing the administrative law judge's Decision and Order, the hearing transcript, and the evidence of record, we are compelled to vacate the administrative law judge's denial of benefits because she erred in failing to properly apply the evidentiary limitations pursuant to 20 C.F.R. §725.414. The evidentiary submissions are summarized below.

Claimant and employer each proffered two x-ray readings as affirmative evidence. Director's Exhibits 11, 14; Claimant's Exhibit 3; Employer's Exhibit 3. In rebuttal of employer's affirmative evidence, claimant submitted two x-ray readings. Director's Exhibit 18; Claimant's Exhibit 1. Employer also submitted two rebuttal readings in response to claimant's affirmative evidence. Director's Exhibit 17; Employer's Exhibit 6.

The record reflects that claimant underwent a complete pulmonary evaluation at the request of the Department of Labor (DOL) on August 16, 2005, at which time an x-ray was obtained and read as positive for pneumoconiosis by Dr. Baker, a B-reader.

---

[2] To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled by pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*).

[3] Because claimant's coal mining employment was in Virginia, 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*).

Pursuant to Section 725.414(a)(2)(ii), claimant submitted a positive reading of the DOL evaluation x-ray by Dr. Miller, a Board-certified radiologist and B reader. Director's Exhibit 16. Pursuant to Section 725.414(a)(3)(ii), employer submitted two negative readings of the DOL evaluation x-ray by Drs. Scott and Scatarige. Director's Exhibits 15, 17.

At the hearing on March 14, 2007, employer challenged the admission of Dr. Miller's positive reading of the DOL evaluation x-ray. Hearing Transcript (HT) at 6. Employer asserted that since the DOL evaluation x-ray was interpreted as positive for pneumoconiosis, claimant was not entitled to submit, under the rebuttal provisions of Section 725.414(a)(2)(ii), Dr. Miller's positive reading of that film. HT at 6-7. Claimant, who was represented by a lay representative at the hearing, in turn, challenged the admission of Dr. Scatarige's negative reading of the DOL evaluation x-ray since employer had already submitted one negative reading by Dr. Scott under Section 725.414(a)(3)(ii). HT at 17. In response to claimant's challenge, employer argued that it was entitled to submit Dr. Scott's negative reading in rebuttal to the original positive reading by Dr. Baker of the DOL evaluation x-ray, and to also submit Dr. Scatarige's negative reading in rebuttal of claimant's submission of Dr. Miller's positive reading of that x-ray. HT at 16-17. Employer, however, agreed to withdraw Dr. Scatarige's reading if Dr. Miller's reading was excluded. *Id*.

The administrative law judge ruled at the hearing that Dr. Miller's positive reading of the August 16, 2005 x-ray was inadmissible because it did not constitute "rebuttal" evidence, given that the DOL evaluation x-ray had been read as positive by Dr. Baker. HT at 17. The administrative law judge further agreed to exclude Dr. Scatarige's reading. *Id*.

In her Decision and Order issued on August 13, 2007, the administrative law judge, without further explanation, considered both the readings by Dr. Miller and Dr. Scatarige in her analysis of whether claimant established the existence of pneumoconiosis at Section 718.202(a)(1). We note that the administrative law judge properly admitted and considered Dr. Miller's positive reading of the DOL evaluation x-ray. *See* 20 C.F.R. §725.414(a)(2)(ii); *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, BLR , BRB Nos. 07-0812 BLA and 07-0812 BLA-A, slip op. at 4-5 n.5 (July 30, 2008) (unpub.). However, we conclude that the administrative law judge erred in admitting Dr. Scatarige's negative reading of the DOL evaluation x-ray into the record, as that reading exceeds the evidentiary limitations. The regulation at Section 725.414(a)(3)(ii) specifically provides:

> The [employer] "shall be entitled to submit, in rebuttal of the case presented by claimant, *no more than one physician's interpretation of each chest x-ray . . .submitted* by the claimant [as affirmative evidence] under

> paragraph](a)(2)(i) of this section and *by the Director pursuant to [20 C.F.R. §]725.406.*

20 C.F.R. §725.414(a)(3)(ii) (emphasis added). In this case, because employer had submitted its full complement of affirmative case x-ray readings pursuant to Section 725.414(a)(3)(i), and since employer had already submitted two rebuttal readings in response to claimant's affirmative evidence and one rebuttal reading of the DOL evaluation x-ray by Dr. Scott pursuant to Section 725.414(a)(3)(ii), employer was not entitled to submit a *second* rebuttal reading of the DOL evaluation x-ray by Dr. Scatarige. *Id*. Furthermore, contrary to employer's assertion at the hearing, Dr. Scaterige's reading is not alternatively admissible as rebuttal to Dr. Miller's reading since claimant did not proffer Dr. Miller's reading as affirmative evidence under Section 725.414(a)(2)(i). Thus, we hold that the administrative law judge erred in her decision to admit Dr. Scatarige's x-ray reading into the record.

Furthermore, the administrative law judge erred in her consideration of the x-ray evidence at Section 718.202(a)(1) because she relied, in part, on Dr. Scatarige's reading to find that claimant did not establish the existence of pneumoconiosis. The administrative law judge weighed thirteen readings of five x-rays dated May 9, 2005, August 6, 2005, March 29, 2006, January 18, 2007 and January 24, 2007. Decision and Order at 9. She found the May 9, 2005, January 18, 2007 and January 24, 2007 x-rays to be in equipoise because each x-ray had one positive and one negative reading by a Board-certified radiologist and B reader (a dually qualified radiologist). Director's Exhibits 14, 17; Claimant's Exhibits 1, 3; Employer's Exhibits 3, 6. The administrative law judge found that the DOL evaluation x-ray had one positive reading by Dr. Baker, a B-reader, one positive reading by Dr. Miller, a dually qualified radiologist, and two negative readings by Drs. Scott and Scatarige, both of whom are dually qualified. Given the preponderance of the negative readings by dually qualified radiologists of the DOL evaluation x-ray, the administrative law judge found that it was negative for pneumoconiosis. Decision and Order at 9; Director's Exhibit 10, 15-17. The administrative law judge also found that the March 29, 2006 x-ray was read as positive for pneumoconiosis, crediting the positive reading by Dr. Alexander, a dually qualified radiologist, over the negative reading by Dr. Hippensteel, a B reader, based on Dr. Alexander's superior radiological qualifications. Decision and Order at 9; Director's Exhibits 11, 18. The administrative law judge then stated:

> The only x-ray that I have found to be positive for pneumoconiosis is the March 29, 2006 x-ray, which was interpreted as positive by Dr. Alexander. As the remaining x-rays, performed both before and after that, do not establish the existence of pneumoconiosis, I find that [claimant] has not met his burden to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence.

Decision and Order at 10-11.

Because it is unclear whether the administrative law judge would still find the x-ray evidence to be negative for pneumoconiosis, if Dr. Scatarige's reading was properly excluded from the record, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(1), and remand the case for further consideration as to whether claimant established the existence pneumoconiosis based on the x-ray evidence. Additionally, because the administrative law judge relied on her findings at Section 718.202(a)(1) in determining the weight to accord the conflicting medical opinions as to the existence of clinical pneumoconiosis, Decision and Order at 10-12, we also vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

On remand, the administrative law judge must determine whether employer has demonstrated good cause for the admission of Dr. Scatarige's x-ray reading,[4] and if not, she must exclude that reading from the record pursuant to Section 725.414(a)(2)(ii). *See* 20 C.F.R. §§725.414(d); 725.456(b)(1). Thereafter, she must reconsider whether the x-ray or medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4).[5] *See Sharpe v. Director, OWCP*, 495 F.3d 125, 134 n.16, 24 BLR 2-56, 2-70, 2-71 n.16 (4th Cir. 2007); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-442, 21 BLR 2-269, 2-274-2-276 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). If so, she must weigh all of the evidence together under Section 718.202(a) in order to determine whether claimant has established the existence of pneumoconiosis by a preponderance of the evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If the administrative law judge finds that claimant has pneumoconiosis, she must consider whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203, and whether he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c).

---

[4] Employer argued at the hearing that Dr. Scatarige's reading should be admitted to "level the playing field." Hearing Transcript at 7.

[5] We affirm the administrative law judge's finding that claimant is unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), since there is no biopsy evidence for pneumoconiosis in the record. Decision and Order at 10. Furthermore, since the administrative law judge properly determined that claimant is ineligible for the presumptions described at 20 C.F.R. §§ 718.304, 718.305, or 718.306, we affirm her finding that claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). *Id.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge