BRB No. 06-0440 BLA

ROBERT C. CATON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLASCHAK COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 12/29/2006
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order On Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Christopher L. Wildfire (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (03-BLA-0171) of Administrative Law Judge Ralph A. Romano rendered 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 instant case is governed by the regulations in effect prior to January 19, 2001 as it is a modification of a claim filed on July 22, 1998. This case is before the Board for the second time with respect to claimant's modification request dated October 31, 2002. Director's Exhibit 65. The administrative law judge awarded benefits on modification on March 1, 2004. On February 28, 2005, the Board vacated the administrative law judge's award on modification, and remanded the case to the administrative law judge for reconsideration of all evidence to determine whether claimant established a basis for modification at 20 C.F.R. §725.310 (2000), complicated pneumoconiosis at 20 C.F.R. §718.304, and the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Caton v. Blaschak Coal Co.*, BRB No. 04-0533 BLA (Feb. 28, 2005)(unpub.).

On remand, the administrative law judge again awarded benefits. The administrative law judge credited claimant with fifteen years of coal mine employment, and found that the x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Furthermore, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In weighing the x-ray and medical opinion evidence together, the administrative law judge found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge additionally found that claimant established that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that claimant established that he is totally disabled due to pneumoconiosis based on his invocation of the irrebuttable presumption pursuant to Section 718.304, after noting that employer did not contest claimant's total disability. Accordingly, the administrative law judge awarded benefits commencing from October 2002, the date of claimant's modification request. On appeal, employer challenges the administrative law judge's findings at Section 718.202(a). The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, responding to one of employer's arguments at Section 718.304. Employer filed a reply brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 &*

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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

Employer first argues that the administrative law judge erred in finding that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Employer asserts that the administrative law judge irrationally found that the opinions of Drs. Ahmed, Cappiello, and Miller establish complicated pneumoconiosis because the administrative law judge additionally found that these physicians were not able to positively attribute the large opacities they saw on x-ray to pneumoconiosis. 20 C.F.R. §718.202(a)(3) permits a claimant to establish pneumoconiosis if the presumption at 20 C.F.R. §718.304 is invoked. Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows at least one opacity greater than one centimeter in diameter and is classified as category A, B, or C; . . . . 20 C.F.R. §718.304(a). In determining that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge relied on the opinions of Drs. Ahmed, Cappiello, and Miller. Dr. Ahmed categorized claimant's large opacity as "A", but commented that a neoplastic process could not be excluded. Claimant's Exhibit 5. Dr. Cappiello categorized claimant's large opacity as "A", but provided three alternative theories that the opacity may represent a cancer, a conglomerate mass, or a granulomatous scar. Claimant's Exhibit 5. Dr. Miller equivocally categorized claimant's large opacity as both "O" and "B," and qualified his categorization further by commenting that the opacity was more suggestive of tuberculosis than of complicated pneumoconiosis, although the latter could not be entirely excluded. Claimant's Exhibit 5. The administrative law judge relied on the opinions of Drs. Ahmed, Cappiello, and Miller to find that complicated pneumoconiosis was established despite also finding that these "physicians were not able to positively attribute the large opacities to pneumoconiosis." Decision and Order on Remand at 9.

We agree with employer that the administrative law judge irrationally found claimant entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304 by relying on the opinions of Drs. Ahmed, Cappiello, and Miller, after finding that they did not positively attribute the large opacities they saw on x-ray to pneumoconiosis. In *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*), the Board held that the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. Rather, the administrative law judge must examine all the evidence presented, resolve the conflicts, and make a finding of fact. *See Melnick, supra; see also Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). Based on the holding in *Melnick, supra*, the Board previously vacated the administrative law judge's Section 718.304 finding. *Caton*, BRB No. 04-0533 BLA, slip op. at 5-6. The Board remanded the case to the administrative law judge for reconsideration of the Section 718.304 issue, specifically instructing him to

consider the accompanying narratives by Drs. Ahmed, Cappiello, and Miller explaining their diagnoses, after holding that the administrative law judge erred in not considering them. *Id*. The Board further held that the administrative law judge erred by not addressing how the narrative statements of Drs. Ahmed, Cappiello, and Miller affected the credibility of their interpretations. *Id*. On remand, the administrative law judge considered the accompanying narratives of Drs. Ahmed, Cappiello, and Miller, Decision and Order on Remand at 8, but did not address how their statements affected the credibility of their determinations, as he was instructed. Ultimately, the administrative law judge did not resolve the conflicts in all of the evidence before finding that claimant established the existence of complicated pneumoconiosis based on the opinions of Drs. Ahmed, Cappiello, and Miller, because the administrative law judge additionally found that these physicians could not positively attribute the large opacities they saw on x-ray to pneumoconiosis. In light of the foregoing, we must reverse the administrative law judge's invocation of the irrebuttable presumption at Section 718.304. The administrative law judge's finding that Drs. Ahmed, Cappiello, and Miller did not positively attribute the large opacities to pneumoconiosis precludes claimant's entitlement to the Section 718.304 presumption as a matter of law.[2]

Employer next argues that the administrative law judge committed numerous errors in finding the existence of simple pneumoconiosis by x-ray at Section 718.202(a)(1). The x-ray evidence consists of many readings of eight x-rays taken on November 22, 1996, January 27, 1997, April 20, 1998, June 9, 1998, August 12, 1998, July 7, 1999, September 1, 1999, and May 1, 2003. The administrative law judge found the existence of simple pneumoconiosis by x-ray at Section 718.202(a)(1) after discussing and weighing the x-rays, and relying on the most recent x-rays since August 1998. Decision and Order on Remand at 6-7. We hold that the administrative law judge did not consider Dr. Ahluwalia's reading of the June 9, 1998, x-ray. However, the administrative law judge's failure to consider this x-ray reading is harmless since the reading is not properly classified according to the ILO classification system. *See* 20 C.F.R. §718.102(b); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order on Remand at 6-7; Director's Exhibit 43. In discussing and weighing the July 7, 1999 x-ray, the administrative law judge found that the readings by the B readers were in equipoise. Decision and Order on Remand at 6. The administrative law judge incorrectly stated that Dr. Renn, a B reader, interpreted the July 1999 x-ray first as positive and then as negative for pneumoconiosis, when, in fact, Dr. Renn only read it as negative. Moreover, the administrative law judge erred in not considering the positive reading of the July 1999 x-ray by Dr. Galgon, another B reader. Any error is harmless, however, as the administrative law judge found that the readings by B readers of the July 1999 x-ray were in equipoise, and this is still true, even if the negative and positive x-ray readings of Drs. Renn

[2] Based on our disposition of this case, we need not address employer's remaining arguments at Section 718.304.

and Galgon, respectively, both B readers, are considered.[3] *See Larioni, supra;* Decision and Order on Remand at 6; Director's Exhibits 43, 46, 47.

In discussing and weighing the September 1, 1999 x-ray, the administrative law judge relied on the weight of the readings rendered by physicians qualified as Board-certified radiologists and B readers to find this x-ray positive for pneumoconiosis. Decision and Order on Remand at 7. The administrative law judge incorrectly considered the 0/1 interpretation of the September 1999 x-ray by Dr. Simone, a Board-certified radiologist and B reader, to be positive for pneumoconiosis. A 0/1 reading is considered negative for pneumoconiosis. *See* 20 C.F.R. §718.102(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). However, any error is harmless as the administrative law judge relied on the weight of the readings by Board-certified radiologists and B readers to find this x-ray positive for pneumoconiosis, and the weight of this x-ray by dually qualified readers is still positive when including Dr. Simone's negative interpretation. *See Larioni, supra;* Decision and Order on Remand at 7; Employer's Exhibit 6.

Lastly, at Section 718.202(a)(1), the administrative law judge gave more weight to the positive readings of the May 1, 2003 x-ray by dually qualified readers, after finding that the clear majority of Board-certified radiologists and B readers found this x-ray positive for pneumoconiosis. Decision and Order on Remand at 7. In considering the 2003 x-ray, the administrative law judge inaccurately included the 0/1 reading by Dr. Kaplan, a B reader, in his count of positive readings by B readers. *See* 20 C.F.R. §718.102(b); *Trent, supra*. Since the administrative law judge gave more weight to the readings by dually qualified readers, and Dr. Kaplan is not a dually qualified reader, any error in the administrative law judge's consideration of Dr. Kaplan's reading is harmless. *See Larioni, supra;* Decision and Order on Remand at 7; Employer's Exhibit 4. Because the administrative law judge's errors at Section 718.202(a)(1) are harmless, we affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer additionally argues that the administrative law judge erred in finding that pneumoconiosis was established at Section 718.202(a) because the administrative law judge failed to provide a rationale for this finding. Employer asserts that the administrative law judge merely found, without explanation, that the weight of the x-ray evidence was sufficient to establish the existence of pneumoconiosis, while his prior holding that the medical opinion

[3] Employer's argument that Dr. Galgon's 1/0 reading with the notation of "old tb" is a negative interpretation is incorrect, since Dr. Galgon's comment of "old tb" is appropriately considered at 20 C.F.R. §718.203, not at 20 C.F.R. §718.202(a)(1). *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*).

evidence was insufficient to establish the existence of pneumoconiosis, remained unchanged. In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, agreed with the Director that "although section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease." *Williams*, 114 F.3d at 25, 21 BLR at 2-111.

In finding the existence of pneumoconiosis established at Section 718.202(a), the administrative law judge summarily stated that:

> In my decision and order of March 1, 2004, I found the medical opinions did not support a finding of pneumoconiosis. However, I found that when weighing the X-ray evidence, regulatory presumption evidence and medical opinions together, Claimant has established the existence of pneumoconiosis. (D&O on Modification at 12). This finding remains unchanged.

Decision and Order on Remand at 10. In his Decision and Order on Remand, the administrative law judge did not explain why his prior findings remained unchanged. Moreover, the administrative law judge erred in relying on his prior 2004 findings, where he had not properly considered all of the relevant evidence. Specifically, in 2004, the administrative law judge did not consider the evidence submitted prior to claimant's modification request[4] and erred in his consideration of the x-ray evidence submitted on modification. The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). An administrative law judge's failure to address all relevant evidence, explain his rationale, or clearly indicate the specific statutory or regulatory provisions involved in his decision, requires remand. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, we vacate the administrative law judge's finding that claimant established pneumoconiosis at Section 718.202(a), and remand this case to the administrative law judge for reconsideration. On remand, after discussing and weighing all of the relevant x-ray and medical opinion evidence, the administrative law judge

[4] In 2004, the administrative law judge did not consider the medical opinion evidence submitted prior to claimant's request for modification, namely, the opinions of Drs. Galgon, Kaplan, Raymond Kraynak, Rashid, Renn, Patel, and Ahluwalia. Director's Exhibits 12, 32, 34, 43, 46, 47, 52.

must determine whether claimant has established the existence of pneumoconiosis at Section 718.202(a). If the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis on remand, he must determine whether the evidence is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Bonessa v. U.S. Steel Corp.* 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). If the administrative law judge awards benefits on modification, he must determine the grounds for modification, either a mistake in a determination of fact, or change in conditions.[5] Moreover, whether modification is based on a mistake in a determination of fact or a change in conditions determines the date of the commencement of benefits.[6]

Accordingly, the administrative law judge's Decision and Order on Remand is reversed in part, affirmed in part, and 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

[5] Modification based on a mistake in a determination of fact vests the administrative law judge "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). In determining whether modification is based on a change in conditions, an administrative law judge must perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

[6] Whether modification is based on a mistake in a determination of fact or change in conditions, benefits are payable to claimant beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, except that no benefits shall be payable for any month prior to the effective date of the most recent denial by the administrative law judge, if modification is granted based on a change in conditions. 20 C.F.R. §725.503(d)(1), (2). Where the evidence does not establish the month of onset and modification is granted based on a mistake in a determination of fact, benefits shall be payable to claimant beginning with the month during which the claim was filed. 20 C.F.R. §725.503(b), (d)(1). Where the evidence does not establish the month of onset and modification is granted based on a change in conditions, benefits shall be payable to claimant from the month in which claimant requested modification. 20 C.F.R. §725.503(d)(2).

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge