BRB No. 07-0291 BLA

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| S.D. | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| U.S. STEEL MINING COMPANY, LLC | ) | DATE ISSUED: 12/19/2007 |
| 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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.D., Uniontown, Pennsylvania, *pro se*.

Christopher Pierson (Burns, White & Hickton, LLC), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (05-BLA-6081) of Administrative Law Judge Daniel L. Leland rendered on a claim filed on March 24, 2004, 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). After the district director awarded benefits in this claim, employer requested a hearing, at which the parties stipulated to twenty-eight years of coal mine employment. Director's Exhibit 31. In his Decision and Order, the administrative law judge found that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge also found that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or that claimant was totally

disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has declined to issue a substantive response, unless specifically requested to do so.[1]

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 Co.*, 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 law. 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 and the evidence of record, we conclude that the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b), and 718.204(c) must be vacated, and the case remanded to the administrative law judge for further consideration.

The evidence relevant to the existence of pneumoconiosis at Section 718.202(a)(1) consists of four readings of three x-rays. Dr. Kearney, a Board-certified radiologist, and Dr. Wolfe, a dually qualified Board-certified radiologist and B reader, read the film dated August 14, 2004 as positive for pneumoconiosis. Director's Exhibits 16, 17, 19. Dr. Fino, a B reader, read the x-ray dated January 27, 2005 as negative for pneumoconiosis. Employer's Exhibit 1. Dr. Kaplan, also a B reader, interpreted the film dated January 27, 2006 as negative for pneumoconiosis. Employer's Exhibit 2.

Prior to reviewing the x-ray evidence, the administrative law judge noted that pursuant to the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23, 21 BLR 2-104, 2-108 (3d Cir. 1997), he was required to weigh all types of relevant evidence together to determine if claimant has pneumoconiosis.[2] Decision and Order at 5. The administrative law judge

[1] Employer does not raise any allegations of error regarding the administrative law judge's finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). This finding is affirmed, therefore, as it is not adverse to claimant and is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983)

[2] The law of the United States Court of Appeals for the Third Circuit is properly applied in this case, as claimant was last employed in the coal mine industry in

then summarized the x-ray interpretations of record without rendering a finding as to whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Subsequent to his review of the medical opinions under Section 718.202(a)(4), the administrative law judge stated that "after considering the relevant evidence, I find that the miner does not have clinical or legal pneumoconiosis."[3] Decision and Order at 5.

The administrative law judge's treatment of the x-ray evidence does not comport with the Administrative Procedure Act (APA), which requires that the administrative law judge set forth the specific basis for his findings, and the rationale underlying his conclusions. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). The administrative law judge did not explain why he apparently determined that the two positive interpretations of the August 14, 2004 film, rendered by a Board-certified radiologist and a dually-qualified physician, were outweighed by, or in equipoise with, the negative interpretations of the x-rays dated January 27, 2005 and January 27, 2006, rendered by two B readers.

The administrative law judge's treatment of the medical opinion evidence pursuant to Section 718.202(a)(4) also fails to satisfy the requirements of the APA. The relevant evidence of record at Section 718.202(a)(4) consists of the medical reports and opinions of Drs. Setty, Fino, and Kaplan. Director's Exhibits 11, 12, 13; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 4, 5. The administrative law judge accorded greater weight to Dr. Fino's opinion, that claimant did not have pneumoconiosis, finding it better reasoned and documented than the conflicting opinion of Dr. Setty, and found that Dr. Kaplan's opinion supported that of Dr. Fino. Decision and Order at 5. In considering the conflicting evidence, the administrative law judge summarized Dr. Setty's medical opinion as follows:

> Dr. Setty concluded that claimant has a progressive pulmonary impairment "most likely" related to his coal dust exposure but he did not explain how he reached that determination. Moreover, Dr. Setty recorded a cigarette smoking history of over sixty years but did not mention claimant's cigarette

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Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

[3] Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge accurately determined that there were no biopsy or autopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) were applicable in this claim filed by a living miner after January 1, 1982. Decision and Order at 5. We affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2), (3), as they are supported by the record and in accordance with law.

> smoking history in concluding that claimant's pulmonary impairment is due to his coal dust exposure.

Decision and Order at 5. The administrative law judge's characterization of Dr. Setty's written opinion is accurate. However, in his deposition testimony, Dr. Setty explained that he attributed claimant's impairment to coal dust exposure because claimant's pulmonary function studies showed both obstructive and restrictive components to his impairment, and that the obstructive component of his impairment, which was due to claimant's significant smoking history, was not predominant. Director's Exhibit 11; Claimant's Exhibit 1 at 10, 25-26. The restrictive component was due to coal dust exposure, the doctor opined. Claimant's Exhibit 1 at 10, 26.

Similarly, the administrative law judge did not discuss all aspects of Dr. Fino's opinion, and did not adequately explain his rationale for finding that Dr. Fino's opinion was better reasoned and documented. In weighing the medical opinion evidence, the administrative law judge contrasted the conflicting opinions of Drs. Fino and Setty, stating that:

> Dr. Fino determined that claimant does not have a coal dust related lung disease based on his negative reading of a chest x-ray and a CT chest scan. Dr. Fino concluded that claimant's pulmonary impairment is caused by cigarette smoking. Dr. Setty did not review a CT scan, a sophisticated diagnostic tool for determining the existence of pneumoconiosis. He also did not measure claimant's lung volumes or diffusing capacity as Dr. Fino did. Dr. Fino relied on the lack of a significant diffusing capacity abnormality and the presence of hypercarbia and hypoxemia as being indicative of a smoking related-lung disease rather than coal worker's pneumoconiosis.

Decision and Order at 5. Although the administrative law judge appears to have credited Dr. Fino's opinion over that of Dr. Setty based on the fact that Dr. Fino reviewed additional and more sophisticated clinical testing, the administrative law judge did not address Dr. Fino's statement that the spirometry testing he conducted was invalid, as were the lung volumes. Employer's Exhibits 1, 4 at 17. In addition, the administrative law judge credited Dr. Fino's reliance "on the lack of a significant diffusing capacity abnormality . . . as being indicative of a smoking related-lung disease rather than coal worker's pneumoconiosis," Decision and Order at 5, but did not consider Dr. Fino's statement that this conclusion, expressed in his written report, reflected a typographical error, and that he actually found that claimant's diffusing capacity was reduced. Employer's Exhibit 4 at 17-18.

The administrative law judge also did not provide the rationale for his finding regarding the significance of Dr. Setty's failure to review a CT scan. CT scans are "other medical evidence" under the provisions of 20 C.F.R. §718.107. Under Section 718.107(b), the party submitting the test or procedure must demonstrate that "the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). Thus, when a party seeks to admit a CT scan, the issue for an administrative law judge to consider, on a case-by-case basis, is whether that party has met these requirements. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006), *aff'd on recon.*, -- BLR --, BRB No. 05-0335 BLA (Mar. 15, 2007)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, -- BLR --, BRB No. 04-0812 (June 27, 2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). Although Dr. Fino's deposition testimony, that a CT scan is much more sensitive than an x-ray in diagnosing pneumoconiosis, could establish the admissibility of his reading of the scan dated January 27, 2005, the administrative law judge did not render a finding as to whether Dr. Fino's testimony satisfied the provisions of Section 718.107(b). Employer's Exhibit 4 at 34-35.

Moreover, the administrative law judge did not discuss whether Dr. Fino's opinion regarding the presence of fibrosis and a restrictive defect is internally consistent. In his report, Dr. Fino indicated that claimant's FVC "was not reduced and this rules out the presence of restrictive lung disease," but in his deposition testimony, Dr. Fino explains that claimant had a "combined obstructive and restrictive like ventilatory problem." Employer's Exhibits 1 at 7, 4 at 21. Dr. Fino later stated that he did not "believe that the restriction is secondary to pneumoconiosis, and that is because I don't see fibrosis, which must be present to cause restriction." *Id*. However, Dr. Fino noted the presence of "fibrotic change," and testified that the CT scan revealed chronic fibrosis in the lower portion of the right lung. Employer's Exhibits 1, 4 at 12-13, 14-16, 21.

In light of the fact that the administrative law judge's treatment of the x-ray evidence and medical opinions of record was not in compliance with the APA, we vacate his determination that claimant did not establish the existence of clinical or legal pneumoconiosis under Section 718.202(a) and remand this case to the administrative law judge for reconsideration of whether claimant has proven that he is suffering from pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

On remand, the administrative should first weigh the x-ray evidence and determine whether it supports a finding of pneumoconiosis under Section 718.202(a)(1). The administrative law judge should then conduct the same inquiry with respect to the medical opinion evidence pursuant to Section 718.202(a)(4) and must consider whether

Dr. Fino's CT scan reading is admissible under Section 718.107(b). If the administrative law judge determines that the existence of clinical or legal pneumoconiosis, or both, has been demonstrated under either subsection, he must then determine whether the evidence, when considered as a whole, is sufficient to establish the existence of the disease. *Williams*, 114 F.3d at 23, 21 BLR at 2-108. In addressing these issues, the administrative law judge must weigh all of the relevant evidence of record and set forth his findings, including the underlying rationale, as required by the APA. *Wojtowicz*, 12 BLR at 1-165.

We also vacate the administrative law judge's findings under 20 C.F.R. §§718.203(b) and 718.204(c), because they were contingent upon his determination that the existence of pneumoconiosis was not established. If, on remand, the administrative law judge concludes that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a), the administrative law judge must then reconsider the elements of entitlement set forth in Sections 718.203 and 718.204(c). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is 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.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge