BRB No. 08-0304 BLA

D.L., Jr.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERRY & HYLTON, INCORPORATED	)	DATE ISSUED: 12/09/2008
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5410) of Administrative Law Judge Ralph A. Romano on a claim[1] 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 credited claimant with twenty-seven years of qualifying coal mine employment. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), but failed to establish pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

[1] Claimant filed an application for benefits on January 21, 2005. Director's Exhibit 2.

§§718.202(a) and 718.203(b) and that total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the x-ray and the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). Employer responds, urging affirmance of the denial of benefits. The Director, Office Workers' Compensation Programs Director, is not participating in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

First, claimant contends that the administrative law judge's finding that the x-ray evidence did not establish pneumoconiosis at Section 718.202(a)(1) is not supported by substantial evidence. Specifically, claimant contends that the administrative law judge erred in not according determinative weight to an x-ray which was interpreted as positive for pneumoconiosis by a majority of well-qualified readers, because it was followed by an x-ray that resulted in an equal number of positive and negative readings by equally qualified readers. Claimant contends that because the preponderance of the x-ray

[2] We affirm the administrative law judge's determinations that claimant established twenty-seven years of coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b), as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 6, 16-20.

[3] The law of the United States Court of Appeals for the Fourth Circuit applies because the miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

readings by the best-qualified readers was positive, the administrative law judge should have found that the x-ray evidence established pneumoconiosis.

In analyzing the x-ray evidence, the administrative law judge found that the May 4, 2005 x-ray was positive for pneumoconiosis based on the positive readings by Dr. Baek, a Board-certified radiologist and B reader, and Dr. Rasmussen, a B reader. The administrative law judge noted that the x-ray was read as negative for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B reader. The administrative law judge found that the August 10, 2005 x-ray did not support a finding of pneumoconiosis because the readings of that x-ray were in equipoise, *i.e.*, Dr. Ahmed, a Board-certified radiologist and B reader, and Dr. Rasmussen, a B reader, read it as positive for pneumoconiosis, while Dr. Wiot, a Board-certified radiologist and B reader, and Dr. Zaldivar, a B reader, read it as negative for pneumoconiosis. Considering the x-ray evidence together, the administrative law judge concluded that it failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).[4]

We agree with claimant that the administrative law judge's finding that the x-ray evidence fails to establish pneumoconiosis is not, on its face, supported by substantial evidence. The administrative law judge does not explain why he found that the x-ray evidence did not establish pneumoconiosis, after stating that the May 4, 2005 x-ray was positive and the readings of the August 10, 2005 x-ray were in equipoise. Consequently, we vacate the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis, as the administrative law judge failed to provide reasons for his finding. We, therefore, remand the case to the administrative law judge to further explain his finding at Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Next, claimant argues that the administrative law judge's faulty analysis of the x-ray evidence at Section 718.202(a)(1) affected his weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), and resulted in his erroneous conclusion that the medical opinion evidence failed to establish pneumoconiosis thereunder. Claimant avers that the administrative law judge erred in discounting Dr. Rasmussen's finding of pneumoconiosis on the basis that Dr. Rasmussen relied on positive x-ray interpretations, when the x-ray evidence failed to establish pneumoconiosis. Similarly, claimant contends that the administrative law judge erred in crediting Dr. Castle's opinion, that claimant did not have pneumoconiosis, because Dr. Castle found that a majority of radiologists and B readers failed to find pneumoconiosis by x-ray evidence. Thus,

[4] The administrative law judge did not consider x-rays contained in claimant's treatment records as they were not interpreted under the ILO classification system. *See* 20 C.F.R. §718.102.

claimant contends that the administrative law judge's use of the x-ray evidence as a reason to discredit the opinion of Dr. Rasmussen and to credit the opinion of Dr. Castle is erroneous since the administrative law judge's analysis of the x-ray evidence was flawed. We agree.

Although Dr. Rasmussen and Dr. Castle examined other evidence in making their findings on pneumoconiosis, we cannot discern how much the administrative law judge relied on his flawed characterization of the x-ray evidence in evaluating the medical opinion evidence. Consequently, we vacate the administrative law judge's determination that the medical opinion evidence failed to establish the existence of pneumoconiosis under Section 718.202(a)(4), and remand the case for reconsideration of the evidence thereunder. *See Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

Further, claimant's contention that the administrative law judge erred in discrediting Dr. Rasmussen's opinion because he failed to assess the degree to which coal mine employment, as opposed to smoking, caused claimant's lung disease has merit. As claimant contends, the regulations provide only that a miner's pulmonary impairment be "significantly related to" or "substantially aggravated by" exposure to coal dust to establish the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201. Claimant is not required to demonstrate that his coal mine dust exposure was a more substantial cause of his chronic respiratory impairment than cigarette smoking in order to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §718.201. Thus, as claimant contends, even though a doctor cannot establish the precise percentage of lung obstruction attributable to cigarette smoke and coal mine dust exposure, such exact findings are not required for claimant to establish that his chronic respiratory impairment arose, in part, out of coal mine employment. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006).

In his discussion of the medical opinions, the administrative law judge required that the doctors assess the "degree of affect" claimant's coal dust exposure had on his lung disease as compared to his cigarette smoking history. In so doing, the administrative law judge found that Dr. Rasmussen's opinion, that claimant's lung disease was attributable to both his coal mine dust exposure and previous cigarette smoking, was critically flawed because Dr. Rasmussen's attribution of claimant's lung disease to both conditions failed to satisfy claimant's burden of proving that his chronic obstructive pulmonary disease was "*significantly* related to, or *substantially* aggravated by dust exposure in coal mine employment." Decision and Order at 14 [emphasis in original]. Consistent with *Williams*, however, Dr. Rasmussen's failure to apportion claimant's lung disease between cigarette smoking and coal mine dust exposure was not a proper basis upon which to discredit his report. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372; *see*

also Cornett v. Benham Coal, Inc., 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000) (miner is not required to demonstrate that coal dust is the *only* cause of his respiratory problems). Consequently, on remand, the administrative law judge must reassess the medical opinions and determine whether they establish pneumoconiosis pursuant to Sections 718.201 and 718.202(a)(4) in light of *Williams*.

Finally, because the administrative law judge erred in his consideration of the x-ray and medical opinion evidence, we also vacate his finding that this evidence, when weighed together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). On remand, if reached, the administrative law judge must again weigh this evidence together pursuant to *Compton*.

If the administrative law judge finds pneumoconiosis established pursuant to Section 718.202(a) on remand, he must then consider whether the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and whether pneumoconiosis was a substantially contributing cause to claimant's total disability pursuant to Section 718.204(c).[5]

[5] The administrative law judge found that because claimant did not establish pneumoconiosis at Section 718.202(a), he could not establish that pneumoconiosis arose out of coal mine employment pursuant to Section 718.203. Further, the administrative law judge found that because claimant did not establish pneumoconiosis at Section 718.202(a), analysis of the evidence relevant to disability causation at Section 718.204(c) was not necessary. *See* Decision and Order at 16, 20.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for further proceedings 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