BRB No. 03-0333 BLA

JOHN PERON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/12/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen Koschoff, Wilburton, Pennsylvania, for claimant.

Jennifer U. Toth (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits of Administrative Law Judge Robert D. Kaplan 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.*.[1] Claimant filed an application for benefits on April 4, 1996. Director's Exhibit

[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). The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. §725.310, do not apply to requests for modification of claims filed before January 19, 2001. 20 C.F.R. §725.2.

20. This claim was denied by the district director on July 26, 1996 on the ground that claimant did not establish any of the elements of entitlement. *Id*. Claimant took no further action until filing a second claim on October 19, 2000. Director's Exhibit 1. In a letter dated March 7, 2001, the district director denied the duplicate claim. Director's Exhibit 13. Claimant filed a request for modification on June 6, 2001. Director's Exhibit 14.

Subsequent to the district director's denial of the petition for modification, the case was transferred to the Office of Administrative Law Judges for a hearing at claimant's request. The administrative law judge issued a prehearing order limiting the parties to three B readings of each film in the record. At the hearing, the administrative law judge sustained the objection raised by the Director, Office of Workers' Compensation Programs (the Director), regarding the admission of B readings of a film that was obtained while the first claim was pending and declined to sustain claimant's objection to the admission of readings that the Director submitted just prior to the 20-day deadline. The administrative law judge also allowed the Director to withdraw the reading of the x-ray dated May 16, 2002, performed by a physician who is not a B reader. The administrative law judge instructed each party to submit one B reading of this film.

In his Decision and Order, the administrative law judge determined that claimant waived the issue of mistake of fact and addressed the issue of change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis. He further determined, however, that the newly submitted evidence supported a finding that claimant is now totally disabled. The administrative law judge found, therefore, that claimant established a change in conditions. On the merits, the administrative law judge found that claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge erred in admitting certain x-ray readings into the record, excluding certain other x-ray readings from the record, and in declining to allow claimant additional time to obtain evidence in response to x-ray interpretations that the Director submitted just prior to the 20-day deadline set forth in 20 C.F.R. §725.456(b). Claimant also maintains that the administrative law judge did not properly weigh the x-ray evidence and medical opinion evidence. The

[2] The amended regulation pertaining to requests for modification does not apply to claims, like the present one, that were pending on January 19, 2001. 20 C.F.R. §725.2.

Director has responded and agrees with claimant concerning the administrative law judge's weighing of the x-ray evidence and the medical opinion of Dr. Simelaro.[3]

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).

Claimant argues initially that the administrative law judge erred in limiting the parties to three B readings of each, newly submitted film, with the exception of the film dated May 16, 2002. With respect to this film, the Director was allowed to withdraw the reading performed by a physician who is not a B reader and each party was instructed to submit one B reading. Claimant also argues that the administrative law judge erred in sustaining the Director's objection to the admission of readings of a film obtained when the first claim was pending and in failing to grant claimant's request that he be given time to obtain evidence rebutting the readings by Dr. Barrett that the Director submitted six days prior to the 20-day deadline.

These contentions are without merit. The administrative law judge acted within his discretion, and in accordance with the provisions of the Administrative Procedure Act, 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 30 U.S.C. §932(a), in mandating the number and type of readings of each film that he would admit into the record. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 1-69 (1997). The administrative law judge's decision to sustain the Director's objection to the admission of interpretations of a film obtained while the first claim was pending was also within the administrative law judge's discretion, because this case presented a request for modification premised upon a change in conditions.[4] The administrative law judge also acted within his discretion in declining to grant claimant's request that he be permitted to respond to Dr. Barrett's readings, as each party was able to submit an equal number of readings of those films.

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[3] The administrative law judge's findings under 20 C.F.R. §§718.202(a)(2), (a)(3), 718.204(b), and 725.310 (2000) are affirmed, as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] As the administrative law judge noted in his Decision and Order, he informed the parties at the hearing that in order to raise the issue of mistake of fact, explicit arguments had to be made in the post-hearing briefs. Decision and Order at 7. Neither of the parties did so.

Turning to the administrative law judge's consideration of the x-ray evidence pursuant to Section 718.202(a)(1), both claimant and the Director assert correctly that the administrative law judge did not properly weigh the x-ray interpretations that he admitted into the record. The administrative law judge determined that because the number of readings of the films dated January 11, 2001 and May 16, 2002 by dually qualified readers were equally divided between positive and negative, these films were neither positive nor negative for pneumoconiosis. Decision and Order at 12; Director's Exhibits 9, 25, 36, 37; Claimant's Exhibits 15-17, 47. Based upon the preponderance of positive readings by dually qualified readers, the administrative law judge found that the film dated November 27, 2000 was positive for pneumoconiosis. *Id*.; Director's Exhibit 11, 24, 38; Claimant's Exhibits 12-14. The administrative law judge concluded that "considering the x-rays together, there is one x-ray that is positive for pneumoconiosis and two x-rays that are negative." Decision and Order at 12. Based upon this finding, the administrative law judge determined that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis. *Id*. Upon weighing all of the x-ray evidence of record, the administrative relied upon his finding with respect to the newly submitted evidence and the "later evidence" rule to determine that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1). Decision and Order at 21.

Claimant and the Director assert correctly that the administrative law judge's statement that two of the newly submitted x-ray readings are negative conflicts with his prior determination that the x-rays, dated January 11, 2001 and May 16, 2002, were neither positive or negative. In light of this discrepancy in the administrative law judge's findings, we must vacate his determination, pursuant to Section 718.202(a)(1), that the x-ray evidence is insufficient to establish the existence of pneumoconiosis and remand the case to the administrative law judge for reconsideration of the x-ray evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). On remand, the administrative law judge cannot rely upon the "later evidence" rule if he determines that the most recent x-ray evidence is negative for pneumoconiosis. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987); *see also Adkins v. Director, OWCP*, 948 F.2d 49 (4th Cir. 1992). In addition, as the Director has indicated, the administrative law judge should consider only one of Dr. Barrett's readings of the November 27, 2000 and January 11, 2001 films.

Regarding the medical opinions of record, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the medical opinions of Drs. Ahluwalia, Simelaro, Rashid, Mariglio, Kraynak, and Kruk. The administrative law judge discredited the diagnoses of pneumoconiosis made by Drs. Simelaro, Kraynak, and Kruk, because these physicians relied upon an inaccurate smoking history. Decision and Order at 14-15. The administrative law judge determined, based upon claimant's testimony at a state workers'

compensation hearing in 1993 and his statements to the physicians who examined him in 2002, that claimant had a smoking history of approximately 14.5 pack years. *Id*. at 14.

Claimant argues that contrary to the administrative law judge's finding, Dr. Kraynak was aware of the various smoking histories reported by claimant and rendered his opinion based upon the lengthiest history. Claimant also asserts that even assuming that Drs. Kraynak, Kruk, and Mariglio relied upon a flawed smoking history, this factor does not affect the credibility of their diagnoses of clinical pneumoconiosis. Claimant also alleges that the administrative law judge did not accurately characterize Dr. Simelaro's opinion. The Director agrees with the latter assertion and maintains that the administrative law judge did not properly address all of the evidence regarding claimant's use of cigarettes.

These contentions have merit, in part. Regarding Dr. Kruk's opinion, the administrative law judge acted within his discretion in finding that Dr. Kruk's diagnosis of obstructive lung disease due primarily to coal dust exposure was entitled to little weight, as the physician did not identify the smoking history upon which he relied. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Concerning the administrative law judge's discrediting of the opinions in which Drs. Kraynak, Simelaro, and Mariglio diagnosed coal workers' pneumoconiosis, however, claimant's allegation of error has merit. These findings of clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), appear to have been based upon x-ray evidence, as corroborated by claimant's history of coal dust exposure, medical history, and symptoms, without reference to claimant's use of cigarettes. The physicians addressed the latter factor in the context of identifying the cause of claimant's totally disabling respiratory and/or pulmonary impairments. Because the administrative law judge did not address this aspect of the opinions of Drs. Kraynak, Simelaro, and Mariglio, his findings with respect to these opinions are vacated. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). On remand, the administrative must reconsider whether these physicians have rendered reasoned and documented diagnoses of clinical pneumoconiosis.

Regarding the administrative law judge's discrediting of the diagnoses of legal pneumoconiosis that also appear in the opinions of Drs. Kraynak and Mariglio, the administrative law judge did not consider all of the relevant evidence in finding that claimant's smoking history totaled approximately 14.5 pack years. The administrative law judge relied upon claimant's testimony at a state workers' compensation hearing but did not refer to doctors' reports and other evidence addressed in the state claim that suggested a much longer smoking history nor did he consider the smoking histories recorded by Drs. Rashid, Simelaro, and Ahluwalia, that also support a finding of more extensive cigarette use. Director's Exhibits 20, 27; Claimant's Exhibit 47.

In addition, as claimant argues, although Dr. Kraynak recorded a smoking history shorter than that found by the administrative law judge, the doctor based his opinion upon a history that approximated that found by the administrative law judge. Claimant's Exhibits 24, 28 at 13. The administrative law judge did not acknowledge this aspect of Dr. Kraynak's opinion when he discredited Dr. Kraynak's diagnoses due to the discrepancy between Dr. Kraynak's written report, in which the doctor indicated that claimant told him that he quit smoking in 1987, and Dr. Kraynak's deposition testimony, in which he indicated that claimant currently smoked four to five cigarettes on occasion. Decision and Order at 14. Similarly, the administrative law judge noted that Dr. Mariglio recorded that claimant was still smoking as of the date of his examination in 2002 and that claimant indicated that he smoked between one and two cigarettes per day and one-half of a package of cigarettes per day. The administrative law judge did not acknowledge, however, that Dr. Mariglio stated that claimant's smoking history totaled approximately ten to fifteen pack years. Director's Exhibit 6. Accordingly, we vacate the administrative law judge's finding with respect to the length of claimant's smoking history and his discrediting of the opinions of Drs. Kraynak and Mariglio. *See Stark*, 9 BLR 1-36; *Maypray*, 7 BLR 1-683. On remand, the administrative law judge must consider all of the evidence relevant to claimant's use of cigarettes and render a finding based upon his weighing of this evidence. The administrative law judge must then reconsider the medical opinions of Drs. Kraynak and Mariglio pursuant to Section 718.202(a)(4).

Both claimant and the Director are correct in asserting that contrary to the administrative law judge's finding, Dr. Simelaro did not refer solely to an abnormal pulmonary function study when identifying the source of claimant's pulmonary impairment. Decision and Order at 15; Claimant's Exhibit 47. The doctor relied upon his review of the x-ray evidence, claimant's work and smoking histories, claimant's symptoms, and other objective evidence of record in rendering his diagnosis of severe obstructive lung disease caused by "anthracosilicosis and a small amount of cigarette smoking." Claimant's Exhibit 47. Because the administrative law judge did not accurately characterize Dr. Simelaro's opinion, we must vacate his finding that it was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge must reconsider this opinion on remand.

Finally, because we have vacated the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), we must also vacate the administrative law judge's finding that claimant did not establish the requisite causal connection between pneumoconiosis and coal dust exposure, pursuant to 20 C.F.R. §718.203, and pneumoconiosis and his totally disabling respiratory impairment under 20 C.F.R. §718.204(c). The administrative law

judge must reconsider these issues if he determines that claimant has established the existence of pneumoconiosis on remand.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part and this case is remanded to the administrative law judge 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