BRB No. 04-0533 BLA

ROBERT C. CATON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLASCHAK COAL COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 02/28/2005
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

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

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-0171) of Administrative Law Judge Ralph A. Romano 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] This case involves a request for modification and has been before the Board previously.[2] Upon considering the newly submitted evidence, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), 718.304(a). Accordingly, benefits were awarded. The administrative law judge found that the date of onset of total disability could not be determined and therefore, benefits were payable as of October 2002, the month in which claimant filed his request for modification.

On appeal, employer contends that the administrative law judge failed to compare the old evidence with the newly submitted evidence. Employer also contends that the administrative law judge erred in his consideration of the x-ray evidence and the evidence of complicated pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds that the administrative law judge erred in refusing to consider whether there is a mistake in fact and in ignoring the pre-modification evidence. Claimant has not responded to this appeal.

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 applicable law, they are binding upon this Board and

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[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.

[2] In its previous decision in this case, the Board affirmed the administrative law judge's finding of fifteen years of coal mine employment and that claimant is totally disabled by a respiratory or pulmonary impairment. The Board remanded the case for the administrative law judge to consider claimant's request to submit evidence in response to Dr. Renn's report, as well as a July 7, 1999 chest x-ray and pulmonary function study, and all relevant evidence regarding the existence of pneumoconiosis. *Caton v. Blaschak Coal Company*, BRB No. 00-0784 BLA (Aug. 30, 2001)(unpub.).

may not be disturbed. 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 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, employer contends that the administrative law judge was required to consider the pre-modification evidence to determine whether claimant demonstrated a worsening of his condition. Employer's Brief at 5–7. The standard employer articulates applies to duplicate claims under 20 C.F.R. §725.309 (2000) arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, *see Tennessee v. Consolidated Coal Corp. v. Kirk*, 264 F.3d 602, 22 BLR 2-291 (6th Cir. 2001), not to a request for modification arising within the jurisdiction of the United States Court of Appeals for the Third Circuit, as is the case here. However, we agree that the administrative law judge erred by failing to consider the pre-modification evidence. When a modification request is filed, the administrative law judge "must review all evidence of record . . . and 'further reflect' on whether any mistakes [of] fact were made in the previous adjudication of the case." *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-63 (3d Cir. 1995). The administrative law judge declined to do so.[3] As we discuss below, his decision to limit his review to the new evidence caused him to not consider all relevant evidence on the existence of complicated pneumoconiosis, contrary to *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Consequently, we must vacate the administrative law judge's Decision and Order and remand the case for him to consider all of the relevant evidence.

Employer next contends that the administrative law judge erred in his consideration of the x-ray evidence. We agree. The administrative law judge found that

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[3] The administrative law judge stated that because claimant did not point to a specific mistake in the prior decision, he waived the issue. Contrary to the administrative law judge's analysis, claimant was not required to allege a specific mistake in order to raise the issue for decision. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53. The administrative law judge stated further that, "[a]lthough I do not rehash the evidence considered in my prior decision and order, I consider it in conjunction with the new evidence . . . ." Decision and Order at 4. A review of the Decision and Order reveals no discussion of the previously submitted evidence.

the current record contains thirty-three x-ray interpretations of four x-rays taken on August 12, 1998, July 7, 1999, September 1, 1999, and May 1, 2003. Decision and Order at 10. The administrative law judge first found that the August 12, 1998 x-ray was read as positive by all four physicians who read it.[4] Decision and Order at 10; Claimant's Exhibit 4. The administrative law judge next found that the July 7, 1999 x-ray was read positive by five out of nine physicians, three of whom were dually qualified as board-certified radiologists and B-readers. Decision and Order at 10. The administrative law judge found that of the negative interpretations, only one was by a dually qualified physician, Dr. Wolfe. This finding is erroneous, however, as Dr. Duncan, who read the July 7, 1999 x-ray as negative, is also a dually qualified physician and not merely a B-reader, as stated by the administrative law judge. Employer's Exhibit 7; Director's Exhibit 41.

Regarding the September 1, 1999 x-ray, the administrative law judge found that five physicians read the x-ray as positive, three of whom are board-certified radiologists and B-readers, and five physicians read the x-ray as negative, two of whom are dually qualified. The administrative law judge found that because the majority of well-qualified physicians agree that the x-ray is positive, their opinions are entitled to greater weight over the B-readers. However, the administrative law judge again failed to recognize Dr. Duncan, who read the x-ray as negative, as a dually qualified physician. The administrative law judge also found that the May 1, 2003 x-ray was interpreted as positive by three board-certified B-readers, negative by six other physicians, including Dr. Duncan, who either had no special credentials or were B-readers, and accorded greater weight to the interpretations by the better qualified physicians without acknowledging Dr. Duncan's dual qualifications. Decision and Order at 10.

The administrative law judge relied upon the numerical weight of the x-ray interpretations by better qualified physicians in determining that each x-ray is positive, with the exception of the August 12, 1998 x-ray, which was read as positive by all physicians, and in concluding that the newly submitted x-ray evidence establishes that claimant suffers from complicated pneumoconiosis. However, as the administrative law judge erroneously believed that Dr. Duncan is only a B-reader, instead of a board-certified radiologist and B-reader, we vacate his findings regarding the post-modification x-ray evidence and remand the case for him to reconsider his findings. Moreover, on remand the administrative law judge should also consider negative interpretations of x-rays on November 22, 1996, January 27, 1997, and April 20, 1998 by Dr. Levinson reported in his September 1, 2003 medical opinion, Employer's Exhibit 5, as well as the

[4] Drs. Miller, Ahmed, and Cappiello are board-certified radiologists and B-readers. Dr. Pathak is a B-reader. Claimant's Exhibit 4.

pre-modification x-ray evidence which contains prior interpretations of the August 12, 1998, July 7, 1999, and September 1, 1999 x-rays, as well as other interpretations. *Melnick*, 16 BLR at 1-33.

Employer next contends that the administrative law judge erred in finding that claimant was entitled to the irrebuttable presumption set out at 20 C.F.R. §718.304. We agree. The administrative law judge found that three physicians who are Board-certified B-readers, Drs. Cappiello, Ahmed, and Miller, found evidence of complicated pneumoconiosis, while Dr. Renn, who is board-certified in internal medicine and pulmonary diseases, found that these three physicians were in error because they interpreted the marked cicatrization of the upper right lobe area as being consistent with complicated pneumoconiosis.[5] Decision and Order at 11; Claimant's Exhibit 5; Employer's Exhibit 7. In making this determination, however, the administrative law judge did not consider additional comments made by Drs. Cappiello, Ahmed and Miller in their reports diagnosing complicated pneumoconiosis.[6] Section 718.304 provides in relevant part that there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter, or (c) when diagnosed by other means the condition could reasonably be expected to reveal a result equivalent to (a).[7] 20 C.F.R. §718.304(a), (c). The introduction of legally sufficient evidence of complicated pneumoconiosis does not

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[5] Dr. Duncan, a Board-certified B-reader, also read the x-ray as negative. Employer's Exhibit 7.

[6] Dr. Miller states in his report that there are no large opacities, although he has marked that there are on the form. He indicated in his impressions that there is a right apical abnormality with an appearance more suggestive of tuberculosis than of complicated pneumoconiosis, although the latter could not entirely be excluded. He further found that the complicated pneumoconiosis category is B. Claimant's Exhibit 5. Dr. Cappiello states that a 1.2 cm right upper lobe density/opacity could be carcinoma, a conglomerate mass or a granulomatous scar. Id. Dr. Ahmed indicates that claimant very likely has collapse of the right upper lobe with loss of volume and deformity of the trachea which is pulled towards the right side with scarring and opacity right upper lung. Dr. Ahmed further states that neoplastic process in the area cannot be excluded, claimant's personal physician should be informed, and that CT scan is indicated for further evaluation and comparison of old films if available is necessary. Claimant's Exhibit 5.

[7] The administrative law judge found that the record contains no biopsy or autopsy evidence. Thus, 20 C.F.R. §718.304(b) is inapplicable in this case.

automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must examine all the evidence presented, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *Melnick*, 16 BLR at 1-33; *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). In this case, the administrative law judge did not consider the doctors' accompanying narrative statements explaining their respective diagnoses, or address how those statements may have affected the credibility of each interpretation. *Melnick*, 16 BLR at 1-37 (remanding for consideration of doctors' comments arguably calling into question their x-ray diagnoses of complicated pneumoconiosis). Because the administrative law judge failed to consider all of the relevant evidence regarding complicated pneumoconiosis, we vacate his determination that claimant established entitlement to the irrebuttable presumption pursuant to Section 718.304 and remand the case for him to discuss the additional comments made by Drs. Cappiello, Ahmed, and Miller regarding their x-ray diagnoses of complicated pneumoconiosis. *Melnick*, 16 BLR at 1-33.

Employer alleges several errors in the administrative law judge's discussion and characterization of Dr. Raymond Kraynak's deposition testimony. Employer's Brief at 13-15. The administrative law judge expressly did not rely on Dr. Kraynak's opinion in his decision. Consequently, we need not address employer's arguments concerning Dr. Kraynak's opinion.

Thus, we vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case for him to consider all of the evidence to determine whether claimant has established a basis for modification, *Keating* 71 F.3d at 1123, 20 BLR at 2-63, and to consider all relevant evidence on the issue of complicated pneumoconiosis. *Melnick*, 16 BLR at 1-33, 1-37. We note that the administrative law judge found that the medical opinion evidence did not support a finding of the existence of pneumoconiosis. On remand, the administrative law judge must weigh together all types of relevant evidence pursuant to Section 718.202(a) to determine whether claimant suffers from pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge