BRB No. 05-0430 BLA

FRANKLIN D. STEVENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 02/16/2006
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Franklin D. Stevenson, Grundy, Virginia, *pro se*.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5322) of Administrative Law Judge Daniel F. Solomon denying benefits 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). The administrative law judge credited claimant with 33.20 years of coal mine employment[1] pursuant to the parties' stipulation, and found that employer is

[1] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

the responsible operator. Decision and Order at 4-5; Hearing Transcript at 6-7. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. After determining that this claim is a subsequent claim,[2] the administrative law judge found that the newly submitted evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b) and thus demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Decision and Order at 2-3, 17-18; Director's Exhibit 1. Considering the record *de novo*, the administrative law judge found that the evidence did not establish either the existence of pneumoconiosis or that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c)(1). Decision and Order at 19-23. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response in this appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

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[2] Claimant's initial claim for benefits filed on September 8, 1993, was finally denied by the district director on May 19, 1994 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed this claim on October 3, 2002. Director's Exhibit 3.

[3] We affirm as unchallenged on appeal the administrative law judge's finding of 33.20 years of coal mine employment, and his findings pursuant to 20 C.F.R. §§725.309(d) and 718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten readings of six x-rays in light of the readers' radiological credentials. Decision and Order at 19-20. Because the March 19, 1990 x-ray was read only positive for pneumoconiosis by Dr. Sutherland, who possesses no radiological credentials, the administrative law judge found the March 19, 1990 x-ray positive for pneumoconiosis. Additionally, since the March 6, 1993 x-ray was read as only negative both by Dr. Shahan, a Board-certified radiologist, and by Dr. Sargent, a Board-certified radiologist and B-reader, the administrative law judge found that x-ray negative for pneumoconiosis.

The administrative law judge next considered that Dr. West, a Board-certified radiologist and B-reader, read the November 21, 2002 x-ray as positive for pneumoconiosis, but also noted that Dr. West's reading was countered by the negative reading of Dr. Wheeler, who is also a Board-certified radiologist and B-reader. The administrative law judge permissibly took into account Dr. Wheeler's "extensive academic experience in the field of radiology," to find his credentials "superior" to those of Dr. West. Decision and Order at 20; *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003). On this basis, the administrative law judge reasonably found Dr. West's positive reading outweighed and determined that the November 21, 2002 x-ray was negative for pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Similarly, the administrative law judge found that although Drs. Aycoth and Capiello, who are Board-certified radiologists and B-readers, read claimant's June 2, 2003 x-ray as positive for pneumoconiosis, their readings were "matched by contrary interpretation by Dr. Wiot, [a] dually qualified reader who possess[es] far more extensive academic credentials." Decision and Order at 20. The administrative law judge therefore permissibly found that the June 2, 2003 x-ray was negative for pneumoconiosis. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66. Alternatively, the administrative law judge found that, at best, the conflicting readings of the November 21, 2002 and June 2, 2003 x-rays were "equally probative," and thus did not meet claimant's burden to establish the existence of pneumoconiosis. Decision and Order at 20; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Finally, the administrative law judge accurately noted that the April 29, 2003 and March 3, 2004 x-rays received only negative readings. Weighing all of the x-rays together in light of the readers' credentials, the administrative law judge found that although the March 19, 1990 x-ray was positive for pneumoconiosis, the preponderance of the x-ray evidence overall did not establish the existence of pneumoconiosis. Substantial evidence supports the administrative law judge's finding, which is in accordance with applicable law concerning the weighing of x-rays. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *McMath*, 12 BLR at 1-177.

Claimant, however, states in his letter to the Board that he "disagrees with the number of company X-rays presented" and alleges that employer submitted x-rays in excess of the "guidelines . . . all parties must abide by." Claimant's Letter at 13. Revised 20 C.F.R. §725.414, in conjunction with 20 C.F.R. §725.456(b)(1), sets limits on the quantity of specific types of medical evidence that the parties can submit into the record.[4] 20 C.F.R. §§725.414; 725.456(b)(1). The applicable provision in this case permitted the parties to each submit "no more than two chest X-ray interpretations" as part of their affirmative case, and, "no more than one physician's interpretation of each X-ray . . ." submitted by the opposing party or by the Director as part of the complete pulmonary evaluation provided to claimant. 20 C.F.R. §725.414(a)(2)(i)(ii), (a)(3)(i)(ii).

As claimant alleges, employer did submit x-ray readings in excess of these limits. However, the administrative law judge refused to consider the additional x-ray readings because he found that they were not allowed under Section 725.414. Decision and Order at 19-20. Thus, although the administrative law judge listed in his Decision and Order all of the x-rays submitted by employer, Decision and Order at 5-6, he considered only these readings submitted by employer in the current claim: two affirmative case readings, one of the April 29, 2003 x-ray and the other of the March 3, 2004 x-ray, at Employer's Exhibits 1, 4; a rebuttal reading of the Director's November 21, 2002 x-ray, at Director's Exhibit 27; and a rebuttal reading of claimant's June 2, 2003 x-ray, at Employer's Exhibit 2. Additionally, the three x-ray readings contained in claimant's prior claim record were admissible in this claim under Section 725.309(d)(1). Thus, the administrative law judge applied the evidentiary limitations and considered only admissible x-ray evidence. We therefore conclude that his finding at Section 718.202(a)(1) is supported by substantial evidence and is in accordance with law. *McMath*, 12 BLR at 1-177. It is therefore affirmed.

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge correctly found that there was no biopsy or autopsy evidence to consider, and pursuant to 20 C.F.R. §718.202(a)(3), correctly found that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 for establishing the existence of pneumoconiosis in certain claims were not applicable to this claim.[5] We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis by these methods.

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[4] Revised 20 C.F.R. §725.414 applies to this claim because it was filed on October 3, 2002, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

[5] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 3. Lastly, because this claim is a living

Pursuant to 20 C.F.R. §§718.202(a)(4), the administrative law judge considered the opinions of Drs. Mettu, Patel, Bulle, Castle, and Dahhan, along with the office notes of Dr. Sutherland.[6] Decision and Order at 9-16, 20-22. The administrative law judge considered that Drs. Patel, Bulle, and Sutherland are claimant's treating physicians, but acted within his discretion in discounting their opinions because Drs. Patel and Bulle submitted letters that did "not offer detailed analyses" of whether claimant suffers from pneumoconiosis, and because Dr. Sutherland's office notes were not sufficiently documented and reasoned. Decision and Order at 20-21; *see* 20 C.F.R. §718.104(d)(5); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-88, 22 BLR 2-564, 2-571 (4th Cir. 2002); *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999). The administrative law judge considered Dr. Mettu's physical examination report diagnosing claimant with chronic bronchitis due to his coal mine employment. Director's Exhibit 15 at 4, 5. The administrative law judge found that Dr. Mettu's opinion was reasoned, and noted Dr. Mettu's "credentials as a board certified internist and pulmonologist . . . ." Decision and Order at 21. The administrative law judge found, however, that Dr. Mettu's opinion was outweighed by or was, at best, equally probative with, the contrary opinions of Drs. Castle and Dahhan, which the administrative law judge found to be well-reasoned and persuasive, and supported by more extensive documentation. Decision and Order at 21-22.

Upon review of the administrative law judge's Decision and Order at, we are unable to determine whether this latter finding is supported by substantial evidence and in accordance with law. *McMath*, 12 BLR at 1-177. Specifically, Section 725.414(a)(3)(i) provides, in relevant part, that "[a]ny chest X-ray interpretations . . . that appear in a medical report must each be admissible under this paragraph . . . ." 20 C.F.R. §725.414(a)(3)(i). Review of the record reflects that Drs. Castle and Dahhan reviewed and referenced x-rays that the administrative law judge found were not admissible pursuant to Section 725.414. The Board has recently held that, because Section 725.414 does not specify what action an administrative law judge should take when medical reports reference inadmissible evidence, the disposition of this issue is left in the administrative law judge's discretion. *Harris v. Old Ben Coal Co.*, --- BLR ---, BRB No. 04-0812 BLA (Jan. 27, 2006). Because the administrative law judge in this case did not

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miner's claim filed after June 30, 1982, the presumption at 20 C.F.R. §718.306 is inapplicable.

[6] The administrative law judge summarized Dr. Forehand's October 6, 1993 medical opinion, but did not discuss it when weighing the medical opinions. Decision and Order at 9-10, 20-22; Director's Exhibit 1. The administrative law judge's oversight was harmless because Dr. Forehand did not diagnose pneumoconiosis. Director's Exhibit 1; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

address the physicians' reference to inadmissible evidence when he analyzed their medical opinions, we vacate his finding pursuant to Section 718.202(a)(4) and remand this case for him to consider the issue consistent with *Harris*.[7] *See also Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004)(*en banc*).

Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4) based on his decision that the opinions of Drs. Castle and Dahhan either outweighed or were of equal weight to that of Dr. Mettu, we also vacate his finding, pursuant to Section 718.204(c)(1), that the opinions of Drs. Castle and Dahhan also established that claimant's total disability is not due to pneumoconiosis. The administrative law judge should reconsider the cause of claimant's total disability after he has reassessed the medical opinion evidence regarding the existence of pneumoconiosis, in light of *Harris*.

[7] Among the non-admitted x-rays reviewed by Dr. Castle was Dr. Scatarige's negative reading of claimant's June 2, 2003 x-ray, a reading submitted by employer as one of two readings in rebuttal of claimant's two affirmative case readings of the June 2, 2003 x-ray. Administrative Law Judge Exhibit 2 (Evidence Summary Form). Review of the administrative law judge's Decision and Order does not disclose why he found Dr. Scatarige's negative reading of the June 2, 2003 x-ray to be inadmissible, considering that claimant submitted two affirmative case readings of that x-ray. *See* 20 C.F.R. §725.414(a)(3)(ii). The administrative law judge should reconsider this issue on remand when assessing the physicians' reference to inadmissible evidence in their medical reports.

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 decision.

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