BRB No. 05-0503 BLA

DANNIE ISAACS	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN HILLS MINING 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 – Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5011) of Administrative Law Judge Stephen L. Purcell (the administrative law judge) on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant filed his first claim on February 6, 1995. Director's Exhibit 1. By Decision and Order Denying Benefits dated February 26, 1998, Administrative Law Judge Thomas F. Phalen, Jr. found that claimant established fifteen years of coal mine employment and the existence of legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) (2000) and 718.203(b) (2000). *Id.* Judge

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] The administrative law judge initially noted the Board's affirmance of the findings by Administrative Law Judge Thomas F. Phalen, Jr., made in connection with the prior claim, that claimant established fifteen years of coal mine employment and the existence of pneumoconiosis arising therefrom. Decision and Order at 2. The administrative law judge also noted Judge Phalen's denial of the prior claim on the basis that the evidence did not establish total disability at 20 C.F.R. §718.204(c) (2000). *Id.* The administrative law judge found that the new evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(iv), and under 20 C.F.R. §718.204(b)(2). The administrative law judge determined that claimant thereby established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 since the denial of the prior claim. Considering the evidence of record on the merits of the instant claim, the administrative law judge found that it is insufficient to establish the existence of pneumoconiosis at 20

Phalen also found, however, that the record did not establish total disability at 20 C.F.R. §718.204(c)(1)-(4) (2000) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). *Id.* Accordingly, benefits were denied. Considering claimant's appeal in *Isaacs v. Southern Hill Mining Co., Inc.*, BRB No. 98-0888 BLA (Mar. 23, 1999)(unpublished), the Board affirmed, as unchallenged, Judge Phalen's findings that claimant established fifteen years of coal mine employment and the existence of pneumoconiosis arising therefrom. *Isaacs*, slip op. at 2 n.2. The Board further affirmed Judge Phalen's finding that the evidence did not establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(3) (2000). *Id.* at 3. The Board, however, vacated Judge Phalen's findings at 20 C.F.R. §§718.204(c)(2), (c)(4) (2000) and 718.204(b) (2000), and remanded the case for further consideration. *Id.* at 3, 4. By Decision and Order on Remand – Denying Benefits dated August 31, 1999, Judge Phalen found that the relevant evidence did not establish total disability at 20 C.F.R. §718.204(c)(2) and (c)(4) (2000) and denied benefits on that basis. Director's Exhibit 1. Claimant did not appeal from Judge Phalen's 1999 Decision and Order. Claimant filed the instant subsequent claim on May 15, 2002. Director's Exhibit 3.

[2] 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.

C.F.R. §718.202(a)(1)–(4) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[3] Accordingly, benefits were denied.

On appeal, claimant alleges error in the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also asserts that the administrative law judge did not properly analyze the evidence in finding that the evidence does not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, and urges the Board to affirm the decision below as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

The Board's scope of review is defined by statute. 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987);

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[3] The administrative law judge determined that claimant is entitled to have the instant subsequent claim considered on its merits since he met the requirements of 20 C.F.R. §725.309. With regard to the claim's consideration on its merits, the administrative law judge recognized that Judge Phalen had found, in connection with the prior claim, the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 7-8. Citing to 20 C.F.R §725.309(d)(4), the administrative law judge indicated, however, that "the regulations provide that no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsection [sic] claim." *Id.* The administrative law judge found that employer consistently contested the issue of the existence of pneumoconiosis, and thus, the administrative law judge determined that claimant must establish in the instant subsequent claim, the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id.* at 8. Claimant does not contest the administrative law judge's finding in this regard, and indicates that the existence of pneumoconiosis was among the issues "preserved for hearing." Claimant's Brief at 2.

Perry v. Director, OWCP, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

Claimant contends that the administrative law judge erred in finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[4] There are eight substantive interpretations of four new x-rays. Dr. Baker, a B reader, interpreted the July 13, 2002 x-ray as positive for pneumoconiosis, while both Dr. Dahhan, a B reader, and Dr. Poulos, dually qualified as a B reader and Board-certified radiologist, reread it as negative.[5] Director's Exhibits 11, 13; Employer's Exhibit 2. Dr. Kelly, who has no special radiological qualifications, read the October 31, 2002 x-ray as 1/2 ss positive for pneumoconiosis, and Dr. Alexander, a dually qualified physician, reread it as 1/1 pp positive. Claimant's Exhibit 4; Director's Exhibit 15. Dr. Broudy, a B reader, read the October 21, 2003 x-ray as negative. Employer's Exhibit 1. Dr. Dahhan, a B reader, interpreted the May 11, 2004 x-ray as negative, and Dr. Alexander, a dually qualified physician, reread it as positive for pneumoconiosis 1/1 ps. Employer's Exhibit 3; Claimant's Exhibit 5. The administrative law judge noted the fact that the new x-ray evidence contains both negative and positive x-ray readings rendered by physicians who are either B readers and/or Board-certified radiologists. Citing to *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the administrative law judge stated:

> The newly submitted x-ray readings include negative readings of the July 13, 2002, October 21, 2003 and May 11, 2004 films by physicians highly qualified as B-readers, one of whom was also highly qualified as a board certified radiologist. The newly submitted x-ray readings also include positive readings of the October 31, 2002 and May 11, 2004 x-ray reports by Dr. Alexander who is highly qualified as a board certified radiologist and B reader. Under such circumstances, I find the positive and negative readings evenly balanced. When the evidence is evenly balanced, the benefits claimant must lose since he bears the burden of persuasion.

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[4] Claimant asserts no error in the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4). We, therefore, affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Dr. Goldstein read the July 13, 2002 x-ray for quality purposes only, rating it Grade 2. Director's Exhibit 11.

Decision and Order at 8-9.[6] The administrative law judge also noted that the "vast majority" of the x-ray evidence that was of record when Judge Phalen denied benefits in the prior claim, was negative for pneumoconiosis. Decision and Order at 9 n.3. Accordingly, the administrative law judge determined that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant argues that the administrative law judge failed to note that Dr. Baker is a B reader who interpreted the July 13, 2002 x-ray as positive for pneumoconiosis, *see* Director's Exhibit 11. Claimant submits that the error may not be harmless, given the administrative law judge's preference for readings rendered by physicians qualified as B readers and/or Board-certified radiologists.

The record supports claimant's contention that the administrative law judge did not note Dr. Baker's radiological credentials as a B reader or take into account that Dr. Baker rendered a positive reading of the July 13, 2002 x-ray. Decision and Order at 8-9; *see* Director's Exhibit 11. Because the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) is based, in part, on the physicians' relative radiological credentials, and the administrative law judge failed to note that Dr. Baker is a B reader, we vacate that finding and remand the case. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). On remand, the administrative law judge must redetermine the weight and credibility of the x-ray evidence at 20 C.F.R. §718.202(a)(1) based on an accurate characterization of the x-ray evidence of record.[7]

Claimant argues that the administrative law judge's reasoning in finding that the x-ray readings are "evenly balanced" is not discernible. Claimant challenges the administrative law judge's statement that, "When the evidence is evenly balanced, *the*

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[6] In characterizing the nature of the new x-ray evidence and the credentials of the physicians rendering readings thereof, the administrative law judge did not recognize that Dr. Baker is a B reader who interpreted the July 13, 2002 as positive for pneumoconiosis. Director's Exhibit 11; *see* Decision and Order at 8.

[7] The administrative law judge alternatively indicated that Dr. Kelly read the October 31, 2002 x-ray as showing "coalworker's [sic] pneumoconiosis, 1/2, s, s" or as showing "interstitial fibrosis." Decision and Order at 6, 8. The record shows that Dr. Kelly classified this x-ray as "S/S with 1/2 profusion" in his October 31, 2002 narrative report, and indicated in his chest x-ray report of the same date, "Impression: Interstitial lung disease with no acute process." Claimant's Exhibit 4. On remand, the administrative law judge must resolve any conflict in the record. *See Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

benefits claimant must lose since he bears the burden of persuasion," Decision and Order at 9 (emphasis added). Claimant argues that while a claimant bears the burden of proof in claims filed under the Act, and must establish evidentiary facts by a preponderance of the evidence, a claimant does not "lose" benefits.

The record reveals that the administrative law judge did not provide a substantive analysis of the weight and credibility of the new x-ray evidence sufficient to support his finding that it is "evenly balanced." *See* Decision and Order at 8-9. Accordingly, on remand, we instruct the administrative law judge to grapple with the new x-ray evidence at 20 C.F.R. §718.202(a)(1) and to provide adequate analysis in support of his findings thereunder. 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).

Claimant contends that the administrative law judge did not properly analyze the evidence on causation at 20 C.F.R. §718.204(c), but rather based his finding that claimant failed to establish total disability due to pneumoconiosis on his assessment that claimant did not establish the existence of legal or clinical pneumoconiosis in this case. Claimant's contention has merit. At 20 C.F.R. §718.204(c), the administrative law judge accorded greater weight to Dr. Dahhan's opinion, that claimant does not have coal workers' pneumoconiosis and is totally disabled due to his chronic obstructive pulmonary disease that is caused by claimant's "lengthy smoking habit," Employer's Exhibit 3. Specifically, the administrative law judge stated:

> Under the circumstances of this case, for reasons similar to those set forth above, I accord greater weight to Dr. Dahhan's analysis of the cause of Claimant's pulmonary disability. As stated above, Dr. Dahhan concludes the cause of Claimant's pulmonary disability is chronic obstructive lung disease due to his long cigarette smoking history and not to coal worker's [sic] pneumoconiosis. Therefore, I find Claimant has not submitted evidence sufficient to establish that the miner was totally disabled due to pneumoconiosis as required by Section 718.204(c).

Decision and Order at 10. The record contains the following new medical opinions: By report dated July 13, 2002, Dr. Baker diagnosed coal workers' pneumoconiosis 1/0, due to coal dust exposure, and chronic obstructive pulmonary disease, chronic bronchitis and hypoxemia, each due to both coal dust exposure and cigarette smoking. Director's Exhibit 11. In a separate report also dated July 13, 2002, Dr. Baker indicated that claimant is totally disabled due to a moderate impairment resulting from both coal dust exposure and cigarette smoking. *Id.* By report dated October 21, 2003, Dr. Broudy diagnosed, (1) moderately severe chronic obstructive airway disease due to cigarette smoking, and (2) back pain. Employer's Exhibit 2. Dr. Broudy stated that he found it "highly doubtful that [claimant] could perform all of the work of an underground coal

miner or similarly arduous manual labor." *Id.* By report dated October 31, 2002, Dr. Kelly diagnosed coal workers' pneumoconiosis, and chronic obstructive pulmonary disease "with reversible component, likely due to cigarette smoking." Claimant's Exhibit 4. Dr. Kelly opined that in consideration of claimant's pulmonary impairment, he should not return to work; however, Dr. Kelly indicated that he could not estimate the degree of impairment attributable to claimant's obstructive lung disease versus his coal workers' pneumoconiosis as each process contributes independently thereto. *Id.* By report dated May 20, 2004, Dr. Dahhan diagnosed, *inter alia*, chronic obstructive lung disease due to claimant's "lengthy smoking habit," and opined that claimant is totally disabled thereto. Employer's Exhibit 3. The only previously submitted medical opinion that addresses the cause of claimant's disability is Dr. Baker's May 28, 1997 report, *see* Claimant's Exhibits 1, 3. Dr. Baker diagnosed coal workers' pneumoconiosis, moderately severe resting arterial hypoxemia, chronic obstructive airways disease, and chronic bronchitis by history, attributing each condition to coal dust exposure. *Id.* Dr. Baker opined that claimant is not able to perform his usual coal mine employment because he should have no further exposure to coal dust, rock dust, or similar noxious agents, and is not able to do arduous, heavy labor because of his coal mine dust related conditions. *Id.*

By relying on Dr. Dahhan's opinion without addressing the other relevant opinions of record, the administrative law judge failed to weigh all of the relevant evidence at 20 C.F.R. §718.204(c), as he is required to do. 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); 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). We, therefore, vacate the administrative law judge's finding at 20 C.F.R. §718.204(c) and further remand the case.

Based on the foregoing, we instruct the administrative law judge on remand to determine whether claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). If reached, the administrative law judge must determine whether the pneumoconiosis arose out of claimant's coal mine employment at 20 C.F.R. §718.203(b) and whether claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c).[8]

[8] The administrative law judge made no finding at 20 C.F.R. §718.203(b). Rather, the administrative law judge indicated that since claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202, "the issue of whether or not his pneumoconiosis arose out of his coal mine employment is moot." Decision and Order at 10.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, 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