BRB No. 06-0716 BLA

ROGER D. JUSTICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/28/2007
	)	
CLIFFCO ENTERPRISES, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Roger D. Justice, Shelbiana, Kentucky, *pro se*.

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of legal counsel,[1] the Decision and Order – Denial of Benefits (04-BLA-6217) of Administrative Law Judge Thomas F. Phalen, Jr., 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 adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's June 25, 2001 filing date, and credited the miner with twenty years and ten months of coal mine employment, based on employer's concession.[2] Initially, the administrative law judge noted the medical evidence set forth by the parties on the Black Lung Benefits Act Evidence Summary Form (Evidence Summary Form) as the evidence conforming to the limitations appearing at 20 C.F.R. §725.414(a). The administrative law judge then found that this medical evidence failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

Claimant, in a letter to the Board, challenges the administrative law judge's denial of benefits. In response, employer urges 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 participate in this appeal.[3]

In an appeal by a claimant filed 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the

[1] Kelly Fidell, a benefits counselor with the Kentucky Black Lung Coalminers & Widows Association, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order. The Board, in a letter dated August 11, 2006, indicated that it would consider claimant to be representing himself on appeal. *Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995)(Order.)

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. Decision and Order at 3; Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Because the administrative law judge's length of coal mine employment determination is not adverse to claimant and unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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 light of claimant's *pro se* status, we address the procedural issue raised by the administrative law judge's consideration of a limited portion of the record. Initially, in his Decision and Order, the administrative law judge set forth the specific medical evidence identified by the parties on their Evidence Summary Forms. Decision and Order at 4. Specifically, the administrative law judge stated that claimant set forth as his affirmative evidence the readings of the October 4, 2001 x-ray by Drs. Sundaram and Potter, a pulmonary function study administered by Dr. Forehand on March 31, 2004, a pulmonary function study obtained at Oakwood Respiratory Care on May 17, 2005, and the treatment notes and progress reports submitted by Drs. Sundaram and Forehand, located at Director's Exhibit 18 and Claimant's Exhibit 3, as records of claimant's treatment for a respiratory condition under Section 725.414(a)(4). Decision and Order at 4; Director's Exhibits 13, 17-19; Claimant's Exhibits 1-3; 20 C.F.R. §725.414(a)(2)(i), (a)(4).

The administrative law judge then set forth the evidence identified by employer, which included the complete pulmonary examinations by Drs. Broudy and Dahhan and the objective testing, *i.e.*, x-ray reading, pulmonary function study and blood gas study, associated with each of the reports. Decision and Order at 4; Director's Exhibit 16; Employer's Exhibit 1. In addition, the administrative law judge stated that employer included the x-ray rereadings by Dr. Poulos of the October 4, 2001 and January 8, 2003 x-rays, as its rebuttal evidence. Director's Exhibits 14, 15. After summarizing the evidence set forth by the parties, Decision and Order at 5-7, the administrative law judge noted that the May 17, 2005 pulmonary function study administered at Oakwood Respiratory Care was not contained in Claimant's Exhibit 2, and, therefore, stated that it would not be considered. Decision and Order at 5, n.5.

A review of the record indicates that it contains medical evidence not included in these summaries and, thus, not considered by the administrative law judge. Specifically, the record indicates that claimant submitted, in addition to Dr. Sundaram's treatment notes, Director's Exhibit 18, a medical report and accompanying objective testing evidence dated March 12, 2002, Director's Exhibit 13. Additionally, the record contains a partial report by Dr. Simpao dated August 14, 2002, Director's Exhibit 17. While not explicitly identified on the Evidence Summary Form that claimant submitted to the administrative law judge, this medical evidence was properly admitted into the record at the hearing, Hearing Transcript at 7-8. However, because neither party included this evidence as part of its affirmative evidence or as rebuttal evidence on its Evidence Summary Form, it was not weighed by the administrative law judge.

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount and type of medical evidence that the parties can submit into the record, the purpose of which is to limit the inclusion of excessive and disproportionate amounts of medical evidence. 20 C.F.R. §§725.414(a), 725.456(b)(1); 65 Fed Reg 79989; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). In this case, the opinions of Drs. Sundaram and Simpao are within the limitation of two medical reports allowed claimant under Section 725.414(a)(2)(i). 20 C.F.R. §725.414(a)(2)(i). The administrative law judge did not consider these opinions, however, because they were not included on claimant's Evidence Summary Form. In light of the fact that claimant has not exceeded the Section 725.414(a)(2)(i) limitations on the medical evidence, it is unclear upon what authority and for what reason the administrative law judge omitted the reports of Drs. Sundaram and Simpao from his weighing of the relevant evidence. *Dempsey*, 23 BLR 1-47; s*ee Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). In addition, contrary to the administrative law judge's finding, the May 17, 2005 pulmonary function study provided by Oakwood Respiratory Care is included in the record, not at Claimant's Exhibit 2, but rather, it is marked as Claimant's Exhibit 1.

In evaluating the record, if the adjudicator misconstrues either the quality or the quantity of relevant evidence, *i.e.*, if the evidentiary analysis does not coincide with the evidence of record, the case must be remanded for reevaluation of the issue to which the evidence is relevant. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Consequently, because the administrative law judge has not considered all of the relevant evidence in the record, we vacate his Decision and Order and remand the case for the administrative law judge to consider the admission of all of the properly submitted evidence, *i.e.*, all the relevant evidence that was timely submitted and is in conformance with the evidentiary limitations, on the issue of the merits of entitlement. *See* 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. §§725.414, 725.456(a), (b); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated and the case is remanded to the administrative law judge for further proceedings 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