BRB No. 09-0407 BLA

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| KENNETH L. GOODMAN | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| ROUND MOUNTAIN COAL COMPANY | ) | |
| | ) | |
| and | ) | |
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| TRAVELERS INSURANCE COMPANY | ) | DATE ISSUED: 02/24/2010 |
| | ) | |
| 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 – Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Kenneth L. Goodman, Devonia, Tennessee, *pro se.*

John R. Sigmond (Penn, Stuart, & Eskridge), Bristol, Virginia, for employer.

Emily Goldberg Kraft (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals,[1] without the assistance of counsel, the Decision and Order – Denying Benefits (2006-BLA-06017) of Administrative Law Judge William S. Colwell rendered on a claim filed on August 29, 2005, 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). In his Decision and Order dated January 26, 2009, the administrative law judge credited claimant with thirteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the examination by Dr. Kelly, performed at the request of the Department of Labor (DOL), was not a complete, credible pulmonary evaluation sufficient to substantiate the claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief requesting that the case be remanded to the district director in order for the DOL to satisfy its statutory obligation to provide claimant with a complete pulmonary evaluation. Employer responds to the Director's letter brief, asserting that Dr. Kelly's report is sufficient to discharge the DOL's obligation to claimant.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The record indicates that claimant's coal mine employment was in Tennessee. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 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*).

The regulation at 20 C.F.R. §718.202(a) provides four methods by which a claimant may establish the existence of pneumoconiosis: 1) chest x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge weighed eleven readings of four x-ray films dated November 15, 2005, February 27, 2006, June 6, 2006 and March 19, 2007, of which there were five positive and five negative readings for pneumoconiosis, and one quality reading.[3] Decision and Order at 4-5, 11-12. The administrative law judge properly considered the radiological qualifications of the physicians and indicated that he would give controlling weight to the readings by dually qualified Board-certified radiologists and B readers. *See 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); Decision and Order at 12. He determined that the November 15, 2005 x-ray was negative because there were two negative readings by dually qualified radiologists of that film, in comparison to only one positive reading by a dually qualified radiologist. With respect to the x-rays dated February 27, 2006, June 6, 2006 and March 19, 2007, the administrative law judge noted that "for each study[,] equally qualified readers have conflicting opinions as to the existence of pneumoconiosis." Decision and Order at 12; *see Staton*, 65 F.3d at 59, 19 BLR at 2-279-

[3] The November 15, 2005 x-ray was read by Dr. Kelly, whose qualifications were not in the record, as positive for pneumoconiosis, by Dr. Scott, a Board-certified radiologist and B reader, as negative, by Dr. Scatarige, a Board-certified radiologist and B reader, as negative, by Dr. Alexander, a Board-certified radiologist and B reader, as positive and by Dr. Barrett for quality only. Director's Exhibits 11, 13; Claimant's Exhibit 3. The February 27, 2006 x-ray was read by Dr. Wheeler, a Board-certified radiologist and B reader, as negative and by Dr. Ahmed, a Board-certified radiologist and B reader, as positive. Director's Exhibit 14; Claimant's Exhibit 4. The June 6, 2006 x-ray was read by Dr. Alexander as positive, and by Dr. Scott as negative. Claimant's Exhibit 1; Employer's Exhibit 9. The March 19, 2007 x-ray was read by Dr. Miller, a Board-certified radiologist and B reader, as positive and by Dr. Scott as negative. Claimant's Exhibit 2; Employer's Exhibit 10.

80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Thus, the administrative law judge concluded that the x-ray evidence, as a whole, was equally probative. Because the administrative law judge permissibly found one x-ray to be negative and the remaining three x-rays to be in equipoise, we affirm his finding that claimant failed to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Since there is no biopsy evidence of record, the administrative law judge properly found that claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 12. Additionally, since claimant is not eligible for the presumptions set forth at 20 C.F.R. §§718.304, 718.305 or 718.306, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[4] *Id*.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered claimant's hospitalization and treatment records, and the CT scan and medical opinion evidence, and correctly found that there was no specific diagnosis of pneumoconiosis. The administrative law judge also correctly found that, although claimant was treated for chronic obstructive pulmonary disease (COPD), there was no "causal nexus made between [c]laimant's chronic lung disease and/or respiratory or pulmonary impairment and his coal mine dust exposure." Decision and Order at 13; *see* Director's Exhibits 10, 12.

The administrative law judge also permissibly assigned little weight to the report of Kellie Brooks, a family nurse practitioner from Stone Mountain Health Services, who examined claimant on July 24, 2005, and identified "[s]evere COPD" and "[c]oal workers' pneumoconiosis." Claimant's Exhibit 8; *see* Decision and Order at 13. As noted by the administrative law judge, Ms. Brooks is not a physician, "and she did not specify what rationale and documentation she relied on to support her assessment." Decision and Order at 13; *see* 20 C.F.R. §718.202(a)(4); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989). The administrative law judge also correctly found that

[4] The administrative law judge properly determined that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304, as the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304. Claimant also is not eligible for the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305, as that presumption does not apply to a claim, such as this one, which was filed on or after January 1, 1982. *See* 20 C.F.R. §718.305. The regulation at 20 C.F.R. §718.306 does not apply because this is not a survivor's claim. 20 C.F.R. §718.306.

none of the three CT scans was read specifically for the presence or absence of clinical or legal pneumoconiosis. Decision and Order at 12.

Turning to the two medical opinions of record, the administrative law judge found that Dr. Kelly examined claimant on November 15, 2005, at the request of the DOL, at which time he recorded a twenty year coal mine employment history and a smoking history of one pack a day, beginning when claimant was a teenager. Director's Exhibit 11. Dr. Kelly obtained and read a chest x-ray as positive for pneumoconiosis, with increased markings consistent with COPD. *Id*. He opined that claimant's pulmonary function study showed severe airflow obstruction, while the arterial blood gas study showed an "elevated Aa gradient." *Id*. Dr. Kelly diagnosed COPD based on history and clinical findings, and also diagnosed coal workers' pneumoconiosis. *Id*. He attributed the COPD to cigarette smoking and the coal workers' pneumoconiosis to claimant's coal dust exposure. *Id*. He opined that claimant "should not return to mine work due to lung disease." *Id*. When asked on Form CM-988 to describe the extent to which each diagnosis contributes to claimant's impairment, he wrote: "Primary contributor is COPD. Unable to accurately quantify individual contribution of each." *Id*.

Dr. Dahhan examined claimant on February 27, 2006, and noted a twenty year coal mine employment history, along with a cigarette smoking history of one pack per day since the age of eighteen, totaling forty-eight pack years. Director's Exhibit 14. Dr. Dahhan obtained and read an x-ray as negative for pneumoconiosis. *Id*. He indicated that a pulmonary function study obtained in conjunction with his examination was invalid due to poor effort and that the arterial blood gas study showed minimal hypoxemia. *Id*. Dr. Dahhan diagnosed COPD caused by smoking, and opined that claimant suffered from a totally disabling respiratory impairment. *Id*. Dr. Dahhan further opined that claimant's respiratory impairment was unrelated to coal dust exposure, noting that claimant had not been exposed to coal dust since 1970, that the impairment is purely obstructive in nature and that there was a response to bronchodilator medication. *Id*.

The administrative law judge found that Dr. Kelly's diagnosis of clinical pneumoconiosis was based on claimant's history of coal dust exposure and a positive chest x-ray. Decision and Order at 13. Because the administrative law judge considered the x-ray evidence on the issue of the existence of pneumoconiosis to be equally probative, he found that Dr. Kelly's diagnosis of pneumoconiosis was not persuasive. The administrative law judge further found that it was "not clear" whether Dr. Kelly's opinion was sufficient to establish the existence of legal pneumoconiosis. *Id*. The administrative law judge indicated that he was unable to "glean" from the doctor's report

"whether claimant's impairment was significantly related to, or substantially aggravated by, coal dust exposure."[5] *Id*. at 14. The administrative law judge further noted:

> Dr. Kelly provided no rationale or documentation for his assessment beyond stating that he is "unable to accurately quantify" the contribution of each [coal dust exposure and cigarette smoking]. While one may argue Dr. Kelly's statement indicates that both exposures contributed and that he cannot apportion them, such phrasing could also be interpreted as Dr. Kelly's acknowledgement that making such a distinction is beyond his capabilities and also leaves open the possibility that coal mine dust exposure made an insignificant contribution. Dr. Kelly's statement is essentially a bald assertion. *I find that further rationale and documentation is required on Dr. Kelly's part with regard to this crucial issue.*

*Id*. (emphasis added). Thus, the administrative law judge concluded that Dr. Kelly's opinion was insufficient to establish claimant's burden of proof at 20 C.F.R. §718.202(a)(4).

Claimant contends that, based on the administrative law judge's findings with respect to Dr. Kelly, he did not receive a complete pulmonary evaluation. The Director concedes that the DOL did not satisfy its statutory obligation because "as the [administrative law judge] observed, Dr. Kelly did not address in a meaningful way the extent to which the miner's coal dust exposure and smoking contributed to his pulmonary impairment." Director's Letter Brief at 4. The Director contends that the administrative law judge's finding that Dr. Kelly's report was not clear on the issue of whether claimant had legal pneumoconiosis, "is essentially a finding that the report is incomplete." *Id*. at 4-5. The Director also asserts that "Dr. Kelly failed to address the degree of [c]laimant's respiratory impairment," since Dr. Kelly's "admonition that the [c]laimant should not return to mine work does not allow the [administrative law judge] to make any reasonable inferences about the degree of [c]laimant's disability." *Id*. at 5. The Director maintains, therefore, that the "correct remedy . . . is to remand the case to the [district director] to provide a credible opinion on the issue of legal pneumoconiosis, as well as [total] disability and disability causation." *Id*. at 5.

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id*.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy* Mines, 18 BLR 1-84, 1-88 n.3 (1994). The regulations provide that the evaluation must "comply with the applicable quality standards," and must "address the relevant conditions of entitlement." 20 C.F.R. §725.456(e).

The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, the DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . *that is both documented, i.e., based on objective medical evidence, and reasoned*.

*Greene v. King James Coal Mining, Inc*., 575 F.3d 628, 641-42, --- BLR --- (6th Cir. 2009) (emphasis added).

We agree with the Director that because the administrative law judge found that Dr. Kelly's opinion on the issue of legal pneumoconiosis was unclear, the DOL has failed to provide claimant with a complete pulmonary evaluation, as required by the Act. Decision and Order at 14. Thus, we vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand this case in accordance with the Director's request.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the district director to allow for a complete pulmonary evaluation and for reconsideration of the merits of this claim in light of the new evidence.

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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JUDITH S. BOGGS
Administrative Appeals Judge