BRB No. 03-0271 BLA

HERMAN D. KNIGHT	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 01/22/2004
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC 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 Order and Decision - Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order and Decision - Denying Benefits (02-BLA-0152) of Administrative Law Judge Stephen L. Purcell (the administrative law judge) 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] The administrative law judge found that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge found, however, that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge concluded, therefore, that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), overall. Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), overall. Claimant asserts that the administrative law judge erred by weighing the unlike evidence together in this case arising within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit. Claimant also asserts that the administrative law judge erred in failing to render a finding as to claimant's years of coal mine employment. Employer/carrier (employer), in response, urges affirmance of the administrative law judge=s denial of benefits. In the alternative, employer challenges the administrative law judge's determination to admit two x-ray interpretations by Dr. Brandon, over employer's objection, and without allowing the employer an opportunity to respond to them. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.

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 may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address the administrative law judge's finding pursuant to Section 718.202(a)(1). At Section 718.202(a)(1), the administrative law judge found that the record contains eight x-ray interpretations of four films. Decision and Order at 5-6. The administrative law judge found that the November 12, 1999 film was read by Drs.

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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.

Westmoreland, Sargent and Wiot as negative for pneumoconiosis and by Dr. Simpao as positive for pneumoconiosis. Decision and Order at 6; Director's Exhibits 12, 13, 28. The administrative law judge concluded that the weight of the evidence established that the November 12, 1999 x-ray was negative for pneumoconiosis. *Id*. The administrative law judge weighed two interpretations of the August 23, 2000 film by Drs. O'Bryan and Wiot, both of which were negative for pneumoconiosis. Decision and Order at 6; Director's Exhibit 28. The administrative law judge concluded, therefore, that the August 23, 2000 film was negative for pneumoconiosis. Decision and Order at 6-7. The administrative law judge then noted that two films dated April 16, 2001 and April 25, 2002, respectively, were read as positive for pneumoconiosis by Dr. Brandon, a Board-certified radiologist and a B-reader. Decision and Order at 7; Claimant's Exhibits 1, 2. He concluded that each of these films was, therefore, positive for pneumoconiosis. Decision and Order at 7. The administrative law judge then credited Dr. Brandon's two films on the basis that they were the most recent, and concluded that the x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1). *Id*. Employer asserts that claimant submitted Dr. Brandon's x-ray interpretations only twenty-seven days prior to the hearing, and therefore, employer did not have an opportunity to respond to them in a timely manner, as Section 725.456(b)(2) provides that documentary evidence must be exchanged " at least 20 days before a hearing is held in connection with a claim." 20 C.F.R. §725.456(b)(2). Employer correctly asserts that it objected to the admission of both of Dr. Brandon's x-ray interpretations at the hearing. Hearing Transcript at 9-13. We hold, however, that the employer was required to file a cross-appeal in order to advance its argument that its due process rights were violated because it was precluded from filing evidence in response to Dr. Brandon's x-ray readings. *See Shelosky v. Director, OWCP*, 7 BLR 1-34 (1984); *see also King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983). Thus, this issue is not properly before the Board on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).[2] In light of the foregoing, we affirm the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

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[2] The administrative law judge properly determined that Dr. Brandon's x-ray interpretations were timely submitted by claimant, and that employer's counsel made no effort to contact claimant's counsel or to obtain responsive evidence prior to the hearing. Hearing Transcript at 9-13. Therefore the administrative law judge did not abuse his discretion in overruling employer's objection to the admission of Dr. Brandon's x-ray interpretations, or in denying employer's motion to hold the record open, post-hearing, for it to submit evidence in response to Dr. Brandon's x-ray interpretation. *Id; Amorose v. Director, OWCP*, 7 BLR 1-899 (1985); *DeLara v. Director, OWCP*, 7 BLR 1-110 (1984).

Next, we address claimant's contentions with regard to the administrative law judge's weighing of the all of the medical evidence together pursuant to Section 718.202(a)(1) and (a)(4). Claimant asserts that the administrative law judge erred in his application of legal precedent at Section 718.202(a). Employer, in its brief, argues that the holdings set forth in *Island Creek Coal Co. v. Compton*, 211 F. 3d 203, 22 BLR 2-162 (4th Cir. 2000) and *Penn Allegheny Coal Co. v. Williams*, 114 F. 3d 22, 21 BLR 2-104 (3d Cir. 1997) should apply to the instant case on the basis that all relevant evidence should be considered prior to any finding that an element of entitlement is established. Employer's Brief at 12-15. As previously stated, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 7. The administrative law judge then found that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge next applied the holdings set forth in *Compton* and *Williams* to determine that the evidence as a whole did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, where the holdings of *Compton* and *Williams* do not apply. The Board has declined to apply the holdings in *Compton* and *Williams* outside of the Fourth and Third Circuits, respectively, as Section 718.202(a) sets forth four alternative methods for establishing the existence of pneumoconiosis pursuant to Section 718.202(a). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Thus, it was error for the administrative law judge to have weighed the x-ray interpretations against the medical opinions. The administrative law judge instead should have concluded that claimant met his burden of establishing the existence of pneumoconiosis based solely on the administrative law judge's findings at Section 718.202(a)(1). *See Dixon*, 8 BLR at 1-345. Because the administrative law judge properly found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), claimant has met his burden at Section 718.202(a) in the instant case. 20 C.F.R. §718.202(a)(1).[3]

We next address claimant's contention that the administrative law judge erred by failing to make a specific finding as to claimant's years of coal mine employment. Claimant's Brief at 5. The administrative law judge noted that the parties stipulated to "at least 5 years of qualifying coal mine employment." Decision and Order at 2; Hearing Transcript at 7-8. Under the heading "Coal Miner's Background", the administrative law judge noted that claimant's first employment in coal mining was sometime in the 1960's with the White Brothers, that he worked as a coal truck driver from 1970 through 1976 for United

[3]We decline to address claimant's contentions with respect to the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), as they are rendered moot by our holding pursuant to 20 C.F.R. §718.202(a)(1). *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Dock Service, Inc., and that he worked for employer, Peabody Coal Company, from 1977 through 1982. *Id.* The administrative law judge never rendered a conclusion as to the actual number of years of coal mine employment, although claimant alleged fifteen years of coal mine employment on his application for benefits, and employer, in its brief, conceded that claimant "worked as a miner between 1968 and 1982." Employer's Brief at 3. On remand, therefore, the administrative law judge must render a specific finding as to the actual number of years that claimant worked in coal mine employment. Thereafter, the administrative law judge must make a finding with respect to whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203.

Finally, the administrative law judge must render findings on total respiratory disability pursuant to Section 718.204(b), and, if necessary, on disability causation pursuant to Section 718.204(c). 20 C.F.R. §718. 204(b), (c); *See also Adams v. Director, OWCP*, 806 F. 2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Order and Decision - Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge