BRB No. 07-0418 BLA

T.L.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 01/30/2008
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.

Joseph Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (06-BLA-6066) of Administrative Law Judge Stephen L. Purcell rendered on a subsequent 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] Judge Purcell (the administrative

[1] Claimant filed his initial claim on March 20, 1985, which was denied by Administrative Law Judge John H. Bedford in a decision issued on December 28, 1987. Judge Bedford found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), but failed to prove that he was totally disabled due to

law judge) credited claimant with at least twenty-nine years of coal mine employment and found that the evidence developed since the previous denial established that claimant is totally disabled by a respiratory or pulmonary impairment. The administrative law judge further found, therefore, that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Upon considering entitlement on the merits, however, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not adequately consider all of the relevant evidence in finding that claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief in this appeal.[2]

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pneumoconiosis. Director's Exhibit 1. Claimant filed a second claim on June 13, 1989, which was denied by Administrative Law Judge Edward J. Murty, Jr., because the newly submitted evidence was insufficient to establish total disability. The Board affirmed Judge Murty's decision. *[T.L.M.] v. Island Creek Coal Co.*, BRB No. 93-0747 BLA (Nov. 21, 1994)(unpub.). The United States Court of Appeals for the Fourth Circuit affirmed the decision on November 17, 1995. Claimant filed a third claim on May 2, 1997, which was denied by Administrative Law Judge Linda S. Chapman because claimant did not establish total disability. Claimant subsequently requested modification, which was denied by Administrative Law Judge Pamela Lakes Wood on August 30, 2001, because the new evidence did not prove that claimant was totally disabled. Claimant filed a fourth claim for benefits on September 12, 2002, which is the subject of the present appeal. DX 3. The district director determined that claimant was entitled to benefits and employer requested a hearing. The claim was forwarded to the Office of Administrative Law Judges and a hearing was scheduled before Administrative Law Judge Edward Terhune Miller. In response to the parties' request at the hearing, however, Judge Miller issued an order remanding the claim to the district director for further development of the medical evidence. After additional evidentiary development by both parties, the district director reaffirmed his earlier decision awarding benefits and employer requested a hearing.

[2] We affirm the administrative law judge's finding that claimant had at least twenty-nine years of coal mine employment and that he established total disability under 20 C.F.R. §718.204(b) and, therefore, a change in an applicable condition of entitlement

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 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

When considering whether claimant established the existence of pneumoconiosis on the merits, the administrative law judge reviewed each individual x-ray and indicated the number of positive or negative interpretations of each film and the qualifications of the readers. Decision and Order at 18-19. With respect to the previously submitted x-ray evidence, the administrative law judge found that "the overwhelming majority of these x-ray readings…many of which were rendered by dually-qualified physicians, do not support a finding of pneumoconiosis." *Id*. at 19. The administrative law judge further found that of the "ten interpretations of the five newly submitted x-rays, only four are positive for pneumoconiosis." *Id*. The administrative law judge determined that the recent x-ray evidence was "at best in equipoise." *Id*. The administrative law judge concluded that because the preponderance of readings, including those by the most highly qualified physicians, was negative for pneumoconiosis, the weight of the x-ray evidence did not support a finding of pneumoconiosis. *Id*. at 19-20.

Claimant contends that the administrative law judge's finding under Section 718.202(a)(1) cannot be affirmed, as the administrative law judge did not consider Dr. DePonte's positive reading of the December 15, 2004 x-ray and mischaracterized Dr. Ranavaya's positive interpretation of the November 12, 2002 x-ray. Director's Exhibit 12; Claimant's Exhibit 3. In addition, claimant argues that the administrative law judge ignored Dr. Alexander's positive reading of the November 12, 2002 film. Claimant's Exhibit 2. Claimant also alleges that the administrative law judge's reliance upon a "numerical head count" to resolve the conflict in the x-ray evidence was unfair, as

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pursuant to 20 C.F.R. §725.309(d), as these findings have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-719 (1983).

claimant was "not in a position to match the quantity of [employer's] evidence submissions." Claimant's Brief at 9. These contentions have merit, in part.

In a chart setting forth the newly submitted x-ray evidence, the administrative law judge listed three readings of the film dated December 15, 2004, including the positive interpretation submitted by Dr. DePonte, a Board-certified radiologist and B reader. Decision and Order at 4; Director's Exhibit 12. In the narrative summary of these films, however, the administrative law judge omitted Dr. DePonte's positive reading. *See* Decision and Order at 19. With respect to Dr. Ranavaya's interpretation of the film obtained on November 12, 2002, the administrative law judge listed Dr. Ranavaya's reading on the evidence chart as "0/1, pq, six zones," and in his narrative summary, he stated that this x-ray "was read by Dr. Ranavaya, a B reader,…as negative for pneumoconiosis." Decision and Order at 4, 19. Contrary to the administrative law judge's description of this x-ray reading, the ILO classification form shows that Dr. Ranavaya's interpretation was positive, as it was recorded as 1/2, pq, six zones. Director's Exhibit 12. Thus, in his treatment of the x-ray interpretations of Drs. DePonte and Ranavaya, the administrative law judge omitted evidence from consideration and mischaracterized the quality of the evidence.

We do not find merit, however, in claimant's contention that the administrative law judge erred in relying upon a "numerical head count" to resolve the conflict in the x-ray evidence of record. Contrary to claimant's argument, the administrative law judge referred to both the quantity of readings and the qualifications of the physicians who performed them. Decision and Order at 19-20; *see Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992).[3] Nevertheless, because the evidentiary limitations are mandatory and cannot be waived by the parties, we must address whether the number of newly submitted x-ray interpretations admitted by the administrative law judge accords with the terms of 20 C.F.R. §725.414(a).[4] *See Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004). As noted by the administrative law judge, claimant filed the present claim on September 12, 2002. Decision and Order at 3; Director's Exhibit 3. The district director issued a Proposed Decision and Order awarding benefits and, in response, employer requested a hearing. Director's Exhibits 28, 30. The claim was forwarded to the Office of Administrative Law Judges (OALJ) and assigned to

[3] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The administrative law judge correctly admitted all of the evidence submitted in conjunction with claimant's previous claims pursuant to 20 C.F.R. §725.309(d)(1).

Administrative Law Judge Edward Terhune Miller. Director's Exhibits 39, 43. Judge Miller issued an Order of Remand stating that:

> This case came on for hearing on September 22, 2004, in Abingdon, Virginia, but the parties moved for a remand to enable Employer, and Claimant to the extent appropriate, to develop additional medical evidence, particularly pertaining to tests involving exercise arterial blood gas tests, and to allow consideration of such evidence by the District Director.

Director's Exhibit 46.

On remand, the district director notified the parties that the record was being reopened for the submission of additional evidence. Director's Exhibit 47. Additionally, the district director instructed the parties to:

> Please note the limitations of 20 C.F.R. §725.310 on the submission of medical evidence. Under *modification proceedings*, each party is limited to one additional chest x-ray interpretation, one additional pulmonary function test, one additional arterial blood gas test, and one additional medical report in support of its affirmative case, plus rebuttal evidence as authorized by 20 C.F.R. §725.414(a)(2)(ii).

Director's Exhibit 47 (emphasis added). Additional evidence was obtained and submitted by both parties. The district director issued a "Proposed Decision and Order Granting Request for Modification," in which he affirmed his earlier decision awarding benefits. Director's Exhibit 49. At employer's request, the case was then returned to the OALJ for a formal hearing. Director's Exhibit 51.

At the hearing, the administrative law judge noted that the district director's most recent order awarding benefits "was mis-captioned as an Order granting modification and didn't really modify the prior Order because benefits had originally been ordered anyway." Hearing Transcript at 6. Nevertheless, the administrative law judge stated that:

> Under the evidentiary limitations provisions of [20 C.F.R. §]725.414 as well as the rule relating to modification at [20 C.F.R. §]725.310, it is my view that the parties can submit two items of evidence within the categories of chest x-ray, pulmonary function study, arterial blood gas study, medical report, plus one additional item as initial evidence in light of the modification proceeding before the District Director.

Hearing Transcript at 6. The administrative law judge reiterated his determination that this case involved modification of a subsequent claim at several points throughout the hearing. Hearing Transcript at 10, 11, 16, 18, 20.

Although the administrative law judge correctly determined that the claim before him was a subsequent claim, he incorrectly found that Judge Miller's remand order to the district director initiated modification proceedings. The case was not in the posture of modification at that point, as the district director's initial Proposed Decision and Order awarding benefits had not become effective due to employer's request for a hearing. In addition, Judge Miller indicated in his Order of Remand that the parties asked that the case be returned to the district director for the development of additional evidence, not for consideration of whether there had been a change in conditions since the issuance of the Proposed Decision and Order or whether the Proposed Decision and Order contained a mistake in a determination of fact. *See* 20 C.F.R. §725.310(a). As a result of this error, the administrative law judge admitted x-ray evidence in excess of the limitations contained in Section 725.414(a).

Because the administrative law judge neglected to consider all of the relevant x-ray evidence, mischaracterized one of the x-ray readings, and did not properly address the admissibility of the newly submitted x-ray evidence, we must vacate the administrative law judge's finding under Section 718.202(a)(1). *See Smith*, 23 BLR at 1-73-74; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must instruct both claimant and employer to designate the x-ray evidence submitted in conjunction with the most recent claim in accordance with Section 725.414(a)(2), (3). The administrative law judge must then render findings as to the admissibility of this evidence and must reconsider whether the x-ray evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) in light of his determinations.

In this regard, the administrative law judge must also resolve the conflict in the record concerning the status of Dr. Alexander's positive interpretation of the November 12, 2002 x-ray. At the hearing, claimant identified Dr. Alexander's reading as Claimant's Exhibit 2, but did not have an actual copy of the reading to provide to the administrative law judge. Hearing Transcript at 13-14. Claimant agreed to submit a copy post-hearing, which would then be admitted. *Id*. The record does not contain, however, a copy of Dr. Alexander's reading nor did the administrative law judge address the disposition of this evidence in his Decision and Order. On remand, the administrative law judge must determine the status of this evidence and render a finding as to its admissibility.

Finally, because the administrative law judge relied upon his weighing of the x-ray evidence under Section 718.202(a)(1) to determine that claimant did not prove the existence of pneumoconiosis under Section 718.202(a)(4) or total disability due to pneumoconiosis at Section 718.204(c), we must also vacate these findings. The administrative law judge must reconsider the issue of existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4) on remand. If he determines that claimant has proven, by a preponderance of the evidence, that he has pneumoconiosis under Section

718.202(a), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), he must then reconsider whether claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order – Denying 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