

BRB No. 06-0894 BLA

D.A.)
)
 Claimant-Respondent)
)
 v.)
)
 TBK COAL COMPANY, INCORPORATED) DATE ISSUED: 01/30/2009
)
 and)
)
 AMERICAN BUSINESS & MERCANTILE)
 INSURANCE MUTUAL INCORPORATED)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER ON
 RECONSIDERATION

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

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

PER CURIAM:

Employer has filed a timely Motion for Reconsideration *En Banc* of the Board's Decision and Order in [D.A.] v. *TBK Coal Co., Inc.*, BRB No. 06-0894 BLA (Nov. 30, 2007) (unpub.). In [D.A.], the Board vacated the Decision and Order Awarding Benefits and the Attorney Fee Order of Administrative Law Judge Paul H. Teitler with respect to a living miner's subsequent claim and ordered that the case be remanded to the administrative law judge for further consideration. The Board rejected, however,

employer's assertion that the administrative law judge erred in failing to consider the x-ray readings performed by Drs. Poulos and West, which were contained in claimant's hospital records. The Board held, *inter alia*, that the administrative law judge's action was appropriate in light of the fact that these readings were not classified in accordance with the International Labour Organization (ILO) system referenced in 20 C.F.R. §718.102(b).

Employer asserts in support of its Motion for Reconsideration *En Banc* that the Board erred in affirming the administrative law judge's decision to exclude the x-ray readings performed by Dr. Poulos and West from consideration pursuant to 20 C.F.R. §718.202(a)(1). Employer thus maintains that the Board also erred in declining to vacate the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant responds, urging denial of employer's Motion for Reconsideration *En Banc*. The Director, Office of Workers' Compensation Programs, has not filed a response.

Upon consideration of employer's arguments and the relevant regulations, we grant employer's motion and provide the relief requested.¹ Dr. Poulos interpreted a film dated October 11, 2004 and determined that "[t]he right upper lobe and left lung are clear." Employer's Exhibit 6. Dr. Poulos also read an x-ray dated October 12, 2004, reporting that "[n]o acute areas of consolidation or pleural pathology [are] noted." *Id.* Dr. West interpreted an x-ray obtained on October 13, 2004, and indicated that there was "[n]o active pathology." *Id.* In his Decision and Order, the administrative law judge set forth a chart containing the x-ray readings that were classified under the ILO system. With respect to the remaining interpretations of record, the administrative law judge stated:

There are several x-rays in the record via the hospital exception to the limitations on evidence. 20 C.F.R. 725.414(a)(4). These are from Buchanan and Pikeville Hospitals. However, they are not listed here as they do not have ILO classifications, as required by Section 718.102 to show the existence or absence of pneumoconiosis.

Decision and Order at 4. We are now persuaded that the administrative law judge's finding must be vacated, as the quality standard set forth in 20 C.F.R. §718.102(b) does not apply to the x-ray readings performed by Drs. Poulos and West.

Pursuant to 20 C.F.R. §718.101(b), the quality standards contained in 20 C.F.R. Part 718 apply only to "evidence developed by any party . . . in connection with a

¹ In light of this disposition, we decline to grant employer's request for *en banc* reconsideration.

claim[.]” 20 C.F.R. 718.101(b). Contrary to the administrative law judge’s finding, therefore, the x-ray readings by Drs. Poulos and West did not have to be classified under the ILO system, as they were obtained in connection with claimant’s hospitalization rather than in connection with a claim. *Id*; *see also* 64 Fed. Reg. 54966, 54975 (Oct. 8, 1999). The Board has held that in the absence of applicable quality standards, the significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge in his role as fact-finder. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). We vacate, therefore, the administrative law judge’s finding excluding the x-ray readings performed by Drs. Poulos and West from consideration under 20 C.F.R. §718.202(a)(1) and his finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We remand this case to the administrative law judge for reconsideration of the significance of the x-ray interpretations rendered by Drs. Poulos and West and for reconsideration of whether claimant has established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1).

Accordingly, we grant employer's Motion for Reconsideration and modify our prior Decision and Order. This case is remanded to the administrative law judge for further consideration consistent with our prior Decision and Order and the Decision and Order on Reconsideration.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge