BRB No. 91-1305 BLA

MAYNARD FENNELL)
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Claimant-Respondent)
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v.)
)
DIRECTOR, OFFICE OF WORKERS') Date Issued:
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Barry A. Schultz (Schultz & Winicik), Chicago, Illinois, for claimant.

Barry H. Joyner (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*
PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (90-BLA-0836) of Administrative Law Judge Robert G. Mahony awarding benefits 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

et seq. (the Act). This claim is before the Board for the third time. Claimant filed a claim for benefits on September 8, 1978 and, in the first Decision and Order in this case, Administrative Law Judge Peter McC. Giesey credited claimant with eight years of coal mine employment. The administrative law judge then considered the claim pursuant 20 C.F.R. Part 410, Subpart D, and found that claimant is totally disabled by pneumoconiosis arising out of his coal mine employment. Accordingly, benefits were awarded. On appeal, the Board found that the claim must be evaluated under the regulations at 20 C.F.R. Part 718 pursuant to the holding in *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987). However, the Board further held that there was no need to remand the case for consideration under 20 C.F.R. Part 718 as the evidence of record was insufficient as a matter of law to establish that claimant's pneumoconiosis arose from his coal mine employment, or that his total disability is due to pneumoconiosis. *Fennell v. Director, OWCP*, BRB No. 86-2816 BLA (May 31, 1988)(unpub.). Accordingly, the administrative law judge's Decision and Order awarding benefits was reversed. Claimant thereafter filed a motion for reconsideration which was denied by the Board on July 28, 1988. *Fennell v. Director, OWCP*, BRB No. 86-2816 BLA (July 28, 1988)(unpub.). Claimant then filed a request for modification and a request for a formal hearing. After the hearing, Administrative Law Judge Robert G. Mahony determined that modification was appropriate, considered the claim pursuant to 20 C.F.R. Part 718 and determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that his pneumoconiosis arose from coal mine employment pursuant to 20 C.F.R. §718.203(c), and that he was totally disabled pursuant to 20 C.F.R. §718.204(c)(1). Accordingly, benefits were awarded. On appeal, the Director contends that the administrative law judge erred in failing to consider the claim pursuant to 20 C.F.R. §410.490, in finding that claimant's pneumoconiosis arose out of coal mine employment, in finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(c), and in failing to make a finding as to whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Claimant responds in support of the administrative law judge's Decision and Order, and further asserts that the Director is precluded from raising any issues on appeal since each of the issues raised on appeal could have been addressed before the administrative law judge. The Director, in a reply brief, argues that claimant's assertions are without merit.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965).

The Director first contends that the administrative law judge erred in failing to consider the claim pursuant to 20 C.F.R. §410.490. Subsequent to the administrative law judge's decision, the Supreme Court issued *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991). Pursuant to *Pauley*, the Board, in *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(*en banc* with Smith, J., concurring and McGranery, J. concurring and dissenting), determined that, in claims filed prior to the effective date of Part 718, and where a miner has established less than ten years of coal mine employment, claimants may avail themselves of the interim presumption of total disability due to pneumoconiosis pursuant to Section 410.490(b) by establishing the existence of pneumoconiosis by x-ray, autopsy or biopsy evidence, and by establishing that this pneumoconiosis arose from coal mine employment. The Board further held that this presumption may be rebutted by any one of the available methods contained at 20 C.F.R. §727.203(b). *See Phipps*, *supra*. The administrative law judge therefore erred by failing to consider this claim pursuant to Section 410.490. This error is harmless, however, as in this case, the administrative law judge made findings pursuant to 20 C.F.R. Part 718 which are sufficient to establish invocation of the presumption at Section 410.490(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In his Decision and Order Awarding Benefits, the administrative law judge first determined that the x-ray evidence of record establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). As this finding is unchallenged by the Director on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, as the administrative law judge's finding in regards to the x-ray evidence of record is affirmed, we hereby apply this finding to 20 C.F.R. §410.490(b)(1)(i), and hold that claimant has established the existence of pneumoconiosis under this regulation. *See Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Hamric v. Director, OWCP*, 6 BLR 1-1091 (1984).

We now turn to the question of whether claimant has established that his pneumoconiosis arose out of his coal mine employment. The Director contends that the administrative law judge erred in crediting Dr. Ankin's report over Dr. Hughes' report in making his finding pursuant to 20 C.F.R. §718.203, as neither Dr. Ankin nor the administrative law judge were aware of claimant's non-coal mine employment dust exposure. Dr. Hughes opined, in August 1980, that claimant's respiratory impairment was not related to his coal mine employment, while Dr. Ankin stated, in November 1990, that "the chest x-ray findings of the small irregular opacities are not consistent with emphysema nor cigarette smoking and are most certainly related to his coal mining exposure." Director's Exhibit 17; Claimant's Exhibit-posthearing.

The administrative law judge permissibly discredited Dr. Hughes' opinion as it was rendered without the benefit of review of the positive x-ray evidence and because he provided no rationale for his conclusion. *See* Decision and Order Awarding Benefits at 4; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). The administrative law judge then found Dr. Ankin's opinion sufficient to establish that claimant's pneumoconiosis arose from his coal mine employment. *See* Decision and Order Awarding Benefits at 4. While Dr. Ankin's opinion appears sufficient to establish causality on its face, the Director's contention that the administrative law judge erred in weighing this opinion has merit. In his discussion of Dr. Ankin's report, the administrative law judge stated that Dr. Ankin reviewed the evidence of record prior to rendering his opinion. *See* Decision and Order at 4. In his report, Dr. Ankin states that he reviewed the pulmonary function study and x-ray evidence of record and coal mine employment affidavits of at least five people testifying that claimant had engaged in coal mine employment. He further states that he did not examine claimant. *See* Claimant's Exhibit-posthearing. Thus, it is not apparent from Dr. Ankin's report that he was aware of claimant's non-coal mine employment dust exposure, which included jobs as a welder and coal hauler.[1] *See* Director's Exhibit 3; *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Further, the administrative law judge does not discuss claimant's non-coal mine employment dust exposure when discussing causality pursuant to Section 718.203. *See* Decision and Order at 3; *Long*, *supra*. As a result, the administrative law judge's finding that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 is vacated and the case is remanded to the administrative law judge for further consideration of the issue of causality pursuant to 20 C.F.R. §410.490(b)(2).

[1]As the Director notes in his brief, claimant's coal mine employment form indicates that he was exposed to smoke and fumes as a welder in non-coal mine employment and that he was exposed to coal dust while delivering coal to, and arranging this coal in the basements of, homes and businesses. *See* Director's Exhibit 3. This exposure is not mentioned either by the administrative law judge or in Dr. Ankin's report.

The Director also contends that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. In making this determination, the administrative law judge considered the six pulmonary function studies of record and erroneously determined that only the study dated January 11, 1983, failed to meet the requirements of the regulations for total disability. *See* Decision and Order Awarding Benefits at 5; Director's Exhibits 8, 10, 12, 16, 34, 38. In fact, the pulmonary function study of October 2, 1981 also yielded non-qualifying results. *See* 20 C.F.R. 718.204(c)(1); Director's Exhibits 12, 34. However, this error is harmless as the administrative law judge permissibly determined that the weight of the pulmonary function study evidence established total disability.[2] *See* Decision and Order Awarding Benefits at 5; *Lafferty*, *supra*; *Larioni*, *supra*. The administrative law judge however erroneously failed to discuss all of the evidence of record and to weigh the contrary probative evidence of record on the issue of total disability. *See Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Additionally, the administrative law judge failed to make a finding as to the cause of claimant's total disability pursuant to 20 C.F.R. §718.204(b). As a result, the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 is vacated.

Thus, the administrative law judge's finding in regards to the x-ray evidence is affirmed, and the case is remanded for the administrative law judge to determine whether the evidence of record is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 410.490(b)(2), and, if invocation of the presumption is established, whether the evidence is sufficient for employer to establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b). *See Phipps*, *supra*. Additionally, if rebuttal is established, the administrative law judge must reconsider the evidence pursuant to 20 C.F.R. §§718.203 and 718.204(b) and (c)(2)-(4).[3]

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[2]The administrative law judge permissibly credited Dr. Ankin's report on the validity of the pulmonary function studies over Dr. Long's report containing merely a blanket statement on several of the studies as Dr. Ankin's report was better reasoned. *See* Decision and Order Awarding Benefits at 5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

[3]If, on remand, the administrative law judge is required to consider the claim under Part 718, he must determine whether the blood gas study conducted in May 1985 yielded qualifying values. *See* Claimant's Exhibit 1. Also, as Director argues, when considering the evidence at Section 718.204(c)(4), the administrative law judge must determine whether the exertional requirements included in Dr. Hughes' report are the result of his physical assessment of claimant, which would make the

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part and remanded for further consideration pursuant to this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

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report probative on the issue of total disability. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988).