BRB No. 95-0891 BLA

HARVEY E. BROWN)
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Howell G. Clements (Reingold, Clements & Shulman, P.C.), Chattanooga, Tennessee, for claimant.

C. William Mangum (Thomas S. Williamson, Jr., 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: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (92-BLA-0928) of

[1]Claimant is Harvey E. Brown, the miner, whose first application for benefits filed on August 1, 1977 was finally denied by Administrative Law Judge Jeffrey Tureck on June 22, 1984. Director's Exhibit 25. Subsequently, the Board dismissed claimant's

Administrative Law Judge E. Earl Thomas denying 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 *et seq*. (the Act). This case is before the Board for

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appeal of this denial as untimely. *Brown v. Director, OWCP*, BRB No. 84-1806 BLA (Sep. 28, 1984)(unpub.). The present claim was filed on May 3, 1991. Director's Exhibit 2.

the second time. Initially, the administrative law judge found that claimant failed to establish either a material change in conditions pursuant to 20 C.F.R. §725.309 or the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 718.202(a)(1), reversed his finding pursuant to Section 725.309 based on *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992), vacated his findings pursuant to Section 718.202(a)(4), and remanded the case for the administrative law judge to reconsider the conflicting medical opinions of record. *Brown v. Director, OWCP*, BRB No. 93-0956 BLA (Aug. 24, 1994)(unpub.). On remand, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, benefits were again denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to Section 718.202(a)(4). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand the case for further consideration.

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).

In its prior Decision and Order, the Board vacated the administrative law judge's finding pursuant to Section 718.202(a)(4) because he impermissibly rejected Dr. Simpao's diagnosis of pneumoconiosis as based on an x-ray reading that he found was outweighed by other readings of record. *Brown*, slip op. at 3. On remand, the administrative law judge stated that "[l]ooking solely at Dr. Simpao's report, which is based upon all of the usual observations and tests, there is nothing to indicate that it is unreasoned or erroneous." Decision and Order on Remand at 2. The administrative law judge further stated that Dr. Simpao's opinion stands alone as the only documented positive statement that would qualify for a finding of pneumoconiosis under Section 718.202(a)(4), Decision and Order on Remand at 6.

The administrative law judge noted that while "none of the 17 other physicians' opinions expressly says that claimant does not have pneumoconiosis," these opinions "must be considered" with the other medical evidence relevant to the existence of the disease, the numerous x-ray readings. *Id*. The administrative law

judge then concluded:

> in weighing all of the relevant medical evidence I find that the objective x-ray evidence is far more persuasive than the physician's opinions, only one of which was documented, reasoned and unequivocal....Except for autopsy or biopsy evidence [x-rays] are afforded greater prominence in the regulations as an objective indicator... of the disease. The Board has held that it is not essential for a physician to perform a physical examination in order to provide a credible opinion concerning the existence of pneumoconiosis by x-ray...Drs. Spitz, Cole, Sargent, and Gilley did not find x-ray evidence of pneumoconiosis. I assign greater weight to their opinions because they are better qualified than Drs. Weisman, Haren, Simpao, and Stokes.

Decision and Order on Remand at 7-8. The administrative law judge then found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Section 718.202(a) provides "alternative methods" for determining the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). Further, x-ray interpretations are not considered reasoned and documented opinions and thus are not relevant medical evidence pursuant to Section 718.202(a)(4). *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), citing *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). While the administrative law judge may discredit a medical opinion which is merely a restatement of, or based solely on, an x-ray interpretation, *see Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Weaver v. Reliable Coal Corp.*, 7 BLR 1-486 (1984), here the administrative law judge erroneously weighed Dr. Simpao's medical opinion against the x-ray interpretations of record instead of with the conflicting medical opinion evidence of record pursuant to Section 718.202(a)(4), *see Anderson*, *supra*; *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, we vacate the administrative law judge's conclusion pursuant to Section 718.202(a)(4).

Claimant next contends that the administrative law judge erred in rejecting Dr. Rodriguez's opinion pursuant to Section 718.202(a)(4). Claimant's Brief at 2. In his report of November 13, 1991, Dr. Rodriguez stated that he performed pulmonary function studies on claimant and that the values obtained are "markedly below and are consistent with a severe obstructive impairment." Director's Exhibit 20. Dr. Rodriguez did not consider a chest x-ray or recent arterial blood gas study. In his Decision and Order, the administrative law judge properly found that Dr. Rodriguez did not diagnose pneumoconiosis inasmuch as he did not relate claimant's

diagnosed respiratory condition to coal mine employment. Decision and Order at 6; Director's Exhibit 20; *see Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *see also Southard v. Director, OWCP*, 6 BLR 2-26 (1984). Thus, we reject claimant's contentions regarding Dr. Rodriguez's report.

Claimant finally contends that the administrative law judge erred in failing to consider Dr. Hua's report of April 25, 1991 in conjunction with his report of May 10, 1982. Claimant's Brief at 2. In his May 10, 1982 report, Dr. Hua states that he reviewed a copy of a medical report from the East Ridge Black Lung Clinic which stated that claimant was seen for a physical examination and ventilatory function studies. Director's Exhibit 25. Dr. Hua further states:

> Forced Vital Capacity severely reduced no significant expiratory obstructions and Maximum Ventilatory very severely reduced. After reviewing these medical reports, I feel that [claimant's] condition is totally disabling for coal mine employment due to his respiratory condition.

Director's Exhibit 25. Dr. Hua does not diagnose pneumoconiosis in this report. In his April 25, 1991 report, Dr. Hua states merely that claimant "complain[s] of shortness of breath with history of 34 years in coal mine. I do believe that [t]his patient has C.W.P. [coal workers' pneumoconiosis]." Director's Exhibit 15. Upon considering Dr. Hua's reports, the administrative law judge states that "Dr. Hua's belief that claimant is afflicted with the disease apparently is based solely upon claimant's mining history. His first report provided no other basis for his conclusion and there are no contemporary tests or studies of record which might have supported his opinion. This is not a reasoned medical opinion." Decision and Order on Remand at 6.

Contrary to claimant's contention, the administrative law judge considered Dr. Hua's reports together and permissibly found the April 25, 1991 report to be unreasoned. Decision and Order on Remand at 6; Director's Exhibit 15, 25; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Therefore, we reject claimant's contentions regarding Dr. Hua's reports.[2]

[2]The administrative law judge's treatment of Dr. Gilley's report is affirmed as unchallenged on appeal. *See* Decision and Order on Remand at 5; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We instruct the administrative law judge on remand to reconsider Dr. Simpao's medical opinion and determine if it is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). If the administrative law judge finds pneumoconiosis established, he must then make findings at Sections 718.203(c) and 718.204. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[3]

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]Subsequent to the issuance of the Board's Decision and Order of August 24, 1994, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, held in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), that pursuant to Section 725.309(d), the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change in conditions. *Ross*, 42 F.3d at 997-8; 19 BLR at 2-20. Thus, we vacate our prior holding pursuant to Section 725.309(d), and instruct the administrative law judge on remand to consider Section 725.309(d) pursuant to the standard established in *Ross*.