BRB Nos. 95-2174 BLA
and 95-2174 BLA-A

CLEON DAWSON)
)
Claimant-Petitioner)
)
v.)
)
BETHENERGY MINES, INCORPORATED)
) DATE ISSUED:
Employer-Respondent)
Cross-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

Cleon Dawson, Buckhannon, West Virginia, *pro se*.

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

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals, and employer cross-appeals, the Decision and Order (94-BLA-0965) of Administrative Law Judge Robert

[1]Claimant is Cleon Dawson, the miner, whose first application for benefits, filed on August 21, 1985, was ultimately denied on March 12, 1991, when the Board affirmed the Decision and Order of Administrative Law Judge Bernard J. Gilday, Jr.

S. Amery 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). The administrative law judge credited the miner with at least twelve and three-quarter years of qualifying coal

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denying benefits. Director's Exhibit 36; *Dawson v. Bethenergy Mines Inc.*, BRB No. 89-3885 BLA (Mar. 12, 1991)(unpub.). Claimant filed this claim on July 19, 1993. Director's Exhibit 1.

mine employment, and found that employer is the responsible operator and that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309, but established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and entitlement to the rebuttable presumption that his pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge then found the presumption rebutted and accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. On cross-appeal, employer contends that the administrative law judge erred in relying on the true-doubt principle pursuant to Section 718.202(a)(4). The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Initially, the administrative law judge found that claimant had not "submitted sufficient evidence" of a material change in conditions pursuant to Section 725.309, citing *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted en banc*, No. 94-2523 (Nov. 16, 1995), but because claimant was not represented by counsel the administrative law judge stated that he would " examine the relevant evidence anyway." Decision and Order at 2-3. Subsequent to the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this claim arises, granted a motion for *en banc* reconsideration of *Rutter*, which "vacates the previous panel judgment and opinion." Fed. R. App. P. 35(c). Accordingly, we will consider whether the evidence establishes a material change in conditions pursuant to 20 C.F.R. §725.309 in accordance with the standard set out in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). Because the record contains evidence which, if fully credited on the merits, could change the prior administrative result, Decision and

[2]We affirm the administrative law judge's findings regarding the length of coal mine employment and responsible operator status as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Order at 2-3, Director's Exhibits 12-14, 17-19, we reverse the administrative law judge's finding pursuant to Section 725.309. *See Shupink*, *supra*.

Pursuant to Section 718.202(a)(1), the administrative law judge found that of twenty-eight interpretations of eighteen x-rays, only five were read as positive for pneumoconiosis, and concluded that claimant failed to establish the existence of pneumoconiosis. Decision and Order at 3-5; Director's Exhibits 17-19, 26, 28-32, 36; Employer's Exhibit 1. However, in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), the Fourth Circuit implied that an administrative law judge may not weigh evidence solely on the basis of numerical superiority. Thus, because the administrative law judge offered no other rationale for his weighing of the x-ray evidence, Decision and Order at 3-5, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand the case for further findings pursuant to that subsection. *See Adkins*, *supra*.

We affirm the administrative law judge's findings that Section 718.202(a)(2)-(3) is unavailable to claimant inasmuch as the record contains no autopsy or biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306; Director's Exhibit 1.

Pursuant to Section 718.202(a)(4), the administrative law judge noted that the West Virginia Occupational Pneumoconiosis Board and two physicians diagnosed pneumoconiosis while three physicians opined that claimant did not have pneumoconiosis. Decision and Order at 9; Director's Exhibits 3-4, 13, 31, 36; Employer's Exhibits 2, 4, 5, 7. The administrative law judge then stated: "Giving the Claimant the benefit of any doubt, I find that he has established the presence of pneumoconiosis by medical opinion under Section 718.202(a)(4)." Decision and Order at 9.

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court, in *Director, OWCP v. Greenwich Collieries [Ondecko]*, U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub. nom.*, *Greenwich v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), held that the true- doubt rule is not available to assist claimant in meeting his burden of proof. Thus, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4). *See Ondecko*, 990 F.2d _at 736-737, 17 BLR at 2-76 (case remanded for administrative law judge to determine whether claimant's evidence satisfies preponderance standard); *see also Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

Pursuant to Section 718.203(b), the administrative law judge found the presumption that claimant's pneumoconiosis arose out of his coal mine employment to be rebutted by the reports and testimony, not only of Drs. Renn, Wiot, and Morgan, who determined there was no pneumoconiosis, but also by the opinions of Drs. Scattaregia and Bellotte, "both of whom eventually decided" that claimant's pulmonary impairment was more likely due to cigarette smoking. The administrative law judge stated:

> Therefore on the issues of whether the Claimant's pneumoconiosis arose out of coal mine employment and whether the Claimant's total disability is due to pneumoconiosis, I find that the weight of the evidence shows that...Employer has successfully rebutted the presumption of Section 718.203(b) by establishing that the Claimant's pneumoconiosis arose out of factors and conditions other than his coal mine employment.

D&O at 9.

Section 718.203(b), in conjunction with Section 718.302 which implements Section 411(c)(1) of the Act, provides a rebuttable presumption that the miner's pneumoconiosis arose out of coal mine employment if the presence of pneumoconiosis is established and the miner had at least ten years of coal mine employment. *Adams v. Director, OWCP*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1989). Before Section 718.203 is applicable, a finding must first be made that the miner has pneumoconiosis. *See Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Adams*, *supra*. Thus, because we have vacated the administrative law judge's findings pursuant to Section 718.202(a)(4), we also vacate the administrative law judge's finding pursuant to Section 718.203(b) and instruct the administrative law judge to reconsider the evidence pursuant to this subsection on remand, if necessary. *See Nance*, *supra*; *Adams*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge