BRB No. 99-1089 BLA

FREDDIE GENTRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED POCAHONTAS COAL COMPANY	)	
	)	DATE ISSUED:
Employer-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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

K. Keian Weld (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-1294) of Administrative Law Judge Edward Terhune Miller 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 *et seq.* (the Act). The administrative law judge properly determined that the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309[1] and considered entitlement

[1]Claimant filed his initial claim for benefits on July 6, 1987, which was finally denied by the district director on December 9, 1987 for failure to establish the existence of pneumoconiosis or total disability. Director's Exhibit 29. Claimant filed a second claim on December 7, 1993. Director's Exhibit 28. The claim was finally denied by the district

pursuant to 20 C.F.R. Part 718. Decision and Order at 2-3, 6-7. The administrative law judge, noting the proper standard, determined that the newly submitted evidence was sufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204(c), and thus sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 3-6. The administrative law judge found, and the parties agreed to, at least eighteen years of qualifying coal mine employment. Decision and Order at 3; Director's Exhibit 25. The administrative law judge concluded that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203, 718.204(c), (b). Decision and Order at 8-11. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge mischaracterized the x-ray evidence and erred in failing to consider all of the evidence of record in concluding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(1) and that claimant established that he was totally disabled and that his total disability was due to pneumoconiosis at 20 C.F.R. §718.204(b), (c)(4). Claimant responds that the administrative law judge's Decision and Order is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

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).

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director on June 2, 1994 as claimant failed to establish that he was totally disabled. Director's Exhibit 28. Claimant took no further action until he filed the present claim on November 20, 1996. Director's Exhibit 1.

[2]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§725.309, 718.203 and 718.204(c)(1) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer initially contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), asserting that the administrative law judge mischaracterized Dr. Cappiello's qualifications when considering the January 23, 1997 x-ray reading. Employer's contention has merit. The administrative law judge indicated that Dr. Cappiello was a B-reader and board-certified radiologist. Decision and Order at 4. The administrative law judge found the existence of pneumoconiosis established as he accorded controlling weight to the positive x-ray readings based on the preponderance of positive interpretations by physicians who were dually certified as B-readers and board-certified radiologists. Decision and Order at 8-9. The record, however, is devoid of any evidence on Dr. Cappiello's qualifications. Director's Exhibit 20. Inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) is vacated and we remand this case for further consideration.[3] *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Additionally, we note that subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease.[4] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000).

[3]Employer also asserts that the administrative law judge failed to properly consider the additional credentials of the physicians who interpreted the x-ray evidence of record. Employer's Brief at 2. We have held that after the administrative law judge considers the qualifications of the x-ray readers of records, under the regulatory directive at Section 718.202(a)(1), he may consider further factors relevant to the level of radiological competence, such as a professorship in the field of radiology in evaluating the relative weight of the x-ray readings. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). On remand, the administrative law judge may consider if any of the physicians possess qualifications that merit additional consideration.

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West

Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), then the administrative law judge, on remand, must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Compton, supra*.

With respect to Section 718.204(c)(4), (b), employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in finding that the evidence established that claimant was totally disabled and that the total disability was due to pneumoconiosis in that he failed to specifically address all the medical opinions of record. E`mployer's Brief at 2-3. We agree. In finding that claimant established total disability and that the disability was due to pneumoconiosis, the administrative law judge noted the opinions of Drs. Rasmussen, Forehand, Jabour and Vasudevan and stated that the opinions of Drs. Rasmussen and Jabour were reasoned and more persuasive. Decision and Order at 10-11. The administrative law judge failed, however, to specifically consider the opinion of Dr. Fino. Employer's Exhibit 5. Under the APA, the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge is empowered to weigh the evidence, as he failed to consider all the medical opinions of record, the basis for the administrative law judge's credibility determinations in this particular case can not be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We therefore vacate the administrative law judge's findings under Section 718.204 and remand this case to the administrative law judge to specifically discuss all the evidence of record.

Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge