BRB No. 00-0933 BLA

FRANCIS WISCOUNT, JR.	)	
	)	
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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Timothy S. Williams (Howard M. Radzely, 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 McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, a living miner, appeals the Decision and Order Denying Benefits (00-BLA-0040) of Administrative Law Judge Robert D. Kaplan with respect to 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 claimant with twelve years of coal mine employment and considered the claim, filed on June 14, 1999, pursuant to the regulations set forth in 20 C.F.R. Part 718 (2000).[1]

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

The administrative law judge determined that the evidence of record was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). The administrative law judge also found that inasmuch as claimant was performing gainful employment comparable to his coal mine work, total respiratory disability was not established pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge erred in permitting the Director, Office of Workers' Compensation Programs (the Director), to obtain post-hearing rereadings of an x-ray that was available to the Director before the case was transferred to the Office of Administrative Law Judges for a hearing. Claimant also asserts that the administrative law judge erred in requiring the parties to submit an equal number of x-ray interpretations performed by physicians certified as B readers. Claimant further maintains that the administrative law judge did not properly weigh the x-ray and medical opinion evidence concerning the existence of pneumoconiosis. With respect to the issue of total disability, claimant contends that the administrative law judge misconstrued the evidence concerning the nature of claimant's non-coal mine employment. Finally, claimant preserves the issue of the length of claimant's coal mine employment for appeal. The Director has responded and agrees that it is necessary to remand this case to the administrative law judge for reconsideration of the issues identified by claimant.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which the Director and claimant have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Having reviewed the briefs

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effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the regulations in effect at the time the administrative law judge issued his Decision and Order unless otherwise noted.

and the record in the case at bar, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

Claimant's initial argument concerns the administrative law judge's determination, at the hearing, that the Director would be permitted to obtain additional x-ray rereadings and that the parties would be required to submit an equal number of interpretations performed by B readers. Claimant contends that the administrative law judge erred in allowing the Director to submit post-hearing evidence without first determining that there was good cause for the Director's failure to proffer this evidence twenty days before the hearing as is required under 20 C.F.R. §725.456. Claimant also asserts that the administrative law judge violated claimant's right to due process in mandating that the parties submit an equal number of B reader interpretations. Claimant further alleges that the administrative law judge did not provide a meaningful analysis of the x-ray evidence, but rather engaged in "nose counting." These contentions have merit.

At the time of the hearing, conducted on February 15, 2000, the Director had submitted two readings of an x-ray dated July 15, 1999, while claimant had submitted six readings of the same x-ray. During the portion of the hearing concerning the admission of evidence, the Director's counsel requested an extension of time to obtain additional readings of the July 15, 1999 film, maintaining that the film was in the possession of a physician from whom claimant had not sought a reading until December 21, 1999. Hearing Transcript at 12. Claimant's counsel responded that the Director had access to the original x-ray while it was in the district director's office for several months prior to December. *Id*. at 13. After ascertaining the number of B reader interpretations each side had procured, the administrative law judge stated that "I'm going to allow an equal number of B-readings" and directed the parties to come to an agreement as to how to accomplish this goal. *Id*. at 15. Claimant's counsel noted her objection to the administrative law judge's ruling, but agreed to withdraw three B reader interpretations and to allow the Director to obtain one more B reader interpretation so that the record would contain three interpretations by a B reader from each party. *Id*. at 15-17.

Pursuant to Section 725.456(b)(1), documentary evidence which is not submitted before the district director may be received in evidence, subject to the objection of another party, if such evidence is submitted at least twenty days before the date of the

hearing with respect to a claim. Section 725.456(b)(2) provides that documentary evidence which was not submitted in accordance with the twenty-day rule set forth in Section 725.456(b)(1) can be admitted if the parties consent or upon a showing of good cause as to why the evidence was not proffered in a timely manner. Under Section 725.456(e), an administrative law judge can allow the parties to submit post-hearing evidence if he determines that documentary evidence with respect to any issue is incomplete. Inasmuch as claimant, by counsel, explicitly did not consent to allowing the Director to submit post hearing evidence the administrative law judge was required to address whether good cause existed for the Director's failure to acquire additional B reader interpretations prior to the hearing or to determine that the x-ray evidence was incomplete. 20 C.F.R. §725.456(b)(2), (e); *see Conn v. White Deer Coal Co.*, 6 BLR 1-979 (1984); *see also Buttermore v. Duquesne Light Co.*, 8 BLR 1-36 (1985)(Smith, J., dissenting). In light of the fact that the administrative law judge did not make either of these findings, we vacate his decision to permit the Director to submit the post-hearing x-ray reading and remand the case to the administrative law judge so that he can render the necessary findings.

We must also vacate the administrative law judge's ruling requiring the parties to proffer an equal number of B reader interpretations. As a result of this ruling claimant withdrew three of the six timely submitted x-ray readings performed by B readers and physicians who are both B readers and Board-certified radiologists. Claimant's Exhibits 9, 15, 17. The regulations and case law which are applicable to this claim do not contemplate a regime under which the parties are limited to a particular quantum of evidence.[2] As indicated above, Section 725.456 provides for the admission of all evidence if it is filed in accordance with the specified time limits and no objection is made. In addition, under the case law developed by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, and the Board, all timely submitted evidence must be admitted provided that it is not irrelevant, immaterial or unduly repetitious.[3] *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222

[2]The amended regulations specify the number of x-ray readings, medical opinions, pulmonary function studies, and blood gas studies that each party to a claim can submit. 65 Fed. Reg. 80,074 (2000)(to be codified at 20 C.F.R. §725.414). The new regulations do not apply to claims, such as the present one, filed before January 19, 2001. 65 Fed. Reg. 80,057 (2001)(to be codified at 20 C.F.R. §725.2).

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

(3d Cir. 1989); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). In the present case, the Director did not object to the inclusion of claimant's evidence in the record and the administrative law judge did not find that claimant's x-ray readings were irrelevant or cumulative. *See* Hearing Transcript at 5. The administrative law judge's finding in this regard is, therefore, vacated. On remand, the administrative law judge should admit all of claimant's timely x-ray evidence unless he determines that it is irrelevant, immaterial, or unduly repetitious.

Inasmuch as we have vacated the administrative law judge's findings concerning the admission of x-ray evidence relevant to Section 718.202(a)(1), we also vacate the administrative law judge's determination that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis. In reconsidering this issue on remand, the administrative law judge should address both the quantity and the quality of the x-ray interpretations, including the qualifications and expertise of the respective readers. *See Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Under Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Raymond and Matthew Kraynak, Dr. Kruk, and Dr. Talati. The administrative law judge determined that the medical reports submitted by Drs. Talati, R. Kraynak, and M. Kraynak were adequately documented and reasoned. Decision and Order at 7-8; Director's Exhibits 18, 17; Claimant's Exhibits 2, 5, 19, 32, 36, 38, 39. With respect to the report in which Dr. Kruk diagnosed pneumoconiosis, however, the administrative law judge noted that Dr. Kruk did not find any clinical signs indicating that claimant had pneumoconiosis and concluded that the opinion provided little objective support for Dr. Kruk's diagnosis. Decision and Order at 7; Claimant's Exhibit 5. The administrative law judge concluded that:

> [T]he opinion of Dr. Talati that Claimant does not have pneumoconiosis is in essential balance with the contrary opinions of Drs. R. Kraynak, M. Kraynak and Kruk because Dr. Talati's qualifications are superior to those other physicians and because of the defects in the opinion of Dr. Kruk[.]

Decision and Order at 8. The administrative law judge found, based upon this determination, that claimant did not prove the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant argues that the administrative law judge failed to provide an adequate explanation for his finding and selectively analyzed the opinions of Drs. Talati and Kruk. Claimant also alleges that the administrative law judge erred in neglecting to address the treating physician status of two of the doctors.

These contentions have merit, in part. The Administrative Procedure Act (APA), 5 U.S.C. §554 *et seq.*, as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C.

§919(d) and U.S.C. §932(a), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented[.]" 5 U.S.C. §557(C)(3)(a); *see Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *see Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). In determining that the opinions of Drs. Talati, R. Kraynak, and M. Kraynak were reasoned and in equipoise, the administrative law judge did not render a finding as to the validity of Dr. R. Kraynak's criticisms of Dr. Talati's report nor did he consider the significance of Dr. R. Kraynak's role as claimant's treating physician.[4] Claimant's Exhibits 32 at 17, 36. Although the administrative law judge was not required to accord more weight to Dr. R. Kraynak's opinion based upon his status, this is a relevant factor to be considered by the administrative law judge when weighing the medical opinions of record. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 572, 21 BLR 2-12 (3d. Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-104 (1994).

Moreover, while the administrative law judge determined correctly that he was permitted to accord more weight to Dr. Talati's opinion based upon his qualifications as a Board-certified internist and pulmonologist, he should have also addressed Dr. R. Kraynak's critique of Dr. Talati's conclusions. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Finally, in the absence of a more detailed explanation of the administrative law judge's findings, the qualitative differences between Dr. Kruk's and Dr. Talati's reports of their physical examinations of claimant are not evident. Director's Exhibit 17; Claimant's Exhibit 5. There is merit, therefore, in claimant's contention that the administrative law judge did not apply an equal degree of scrutiny to each physician's report, as is required. *See Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

[4]The identity of the other treating physician to whom claimant refers cannot be discerned from the record. Dr. R. Kraynak testified that he first examined claimant on July 15, 1999, at the request of the Department of Labor, and has seen him every two months since that date. Claimant's Exhibit 32 at 17.

In light of the foregoing, we vacate the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4). On remand, the administrative law judge must reconsider the medical opinions of record, resolve all conflicts between the opinions, and set forth his findings, including the underlying rationale, in detail in his Decision and Order. *See Hall, supra*. If the administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) or Section 718.202(a)(4), he must weigh all of the relevant evidence together in order to determine whether claimant has met his burden of proof under Section 718.202(a).[5] *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Pursuant to Section 718.204, the administrative law judge determined that claimant is not totally disabled, as he is engaged in comparable and gainful employment. Claimant argues that the administrative law judge erred in addressing the comparability issue, as it was not raised by the Director, and that the evidence in the record is inadequate to resolve the issue. Claimant also asserts that the administrative law judge did not properly apply the decision of the United States Court of Appeals for the Third Circuit in *Echo v. Director, OWCP*, 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984).

These contentions have merit, in part. Contrary to claimant's allegation, the issue of the comparability of his post-coal mine employment was properly before the administrative law judge. Inasmuch as this subject is encompassed within the analysis of total respiratory or pulmonary disability as set forth in Section 718.204, an issue that was clearly raised by the Director, claimant's argument is not persuasive. Director's Exhibit 15. With respect to the administrative law judge's application of *Echo* and other relevant case law, however, claimant is correct.

[5]If it is determined on remand that the x-ray evidence is again in equipoise, this is tantamount to a finding that the x-ray evidence does not establish either the presence or the absence of pneumoconiosis. Thus, this finding cannot be relied upon to discredit a medical report in which a physician bases his diagnosis of pneumoconiosis, only in part, upon a positive x-ray reading. *See generally Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985).

In *Echo*, the Third Circuit vacated the administrative law judge's determination that the miner's job as a piece-goods inspector was comparable to his coal mine employment, as the administrative law judge did not consider the fact that the miner's hourly wage as a piece-goods inspector was substantially lower than the average hourly wage of a coal miner. The court stated that the factors relevant to the comparability analysis include relative compensation, working conditions, level of exertion, education requirements, location of employment, and skills and abilities required. The court further explained that compensation is the "prime criterion" of comparability and will "often obviate the need for further subjective inquiry" because "where compensation is manifestly unequal, comparability is unlikely to be found." *Echo*, 744 F.2d at 331-332 n.6, 6 BLR at 2-117-2-118 n.6.

In *Romanoski v. Director, OWCP*, 8 BLR 1-407 (1985), the Board held that "the Third's Circuit's emphasis on the relative compensation factor should be extended to the converse situation where a miner's current employment is more remunerative than his previous coal mine employment." *Romanoski*, 8 BLR 407, 409. In *Garcia v. Director, OWCP*, 15 BLR 1-8 (1991), the Board applied *Echo* and reversed the administrative law judge's finding that the miner's job as a Sub-District Manager for the Department of Labor (DOL) was not comparable to his usual coal mine employment. The Board stated that:

> [T]he administrative law judge noted that claimant's current salary as a Sub-District Manager is approximately $55,000 a year while the highest paid miner earns only approximately $35,000 a year. Nevertheless, the administrative law judge found that claimant's current position was not comparable to his former coal mine employment. We disagree. Inasmuch as claimant is currently earning approximately $55,000 a year, his present employment clearly constitutes comparable and gainful employment pursuant to 20 C.F.R. §718.204(b)(2).

15 BLR at 1-11.

In the present case, the record reveals that claimant was a coal truck driver until approximately 1962 when he opened a garage in which he has worked as a mechanic up until the present time. During the first five years of his self-employment, the bulk of claimant's work consisted of repair work performed at coal mine sites. The administrative law judge credited the latter as coal mine employment. Decision and Order at 4. On his application for benefits, claimant stated that his maximum earnings as a mechanic were between $13,000 and $14,000 per year. Director's Exhibit 1. The Social Security Administration (SSA) records, which cover the period from 1937 through 1965, show that in the first year that claimant was self-employed, but still doing the work

of a miner, he earned $1,944. In the subsequent three years covered by the SSA records, which the administrative law judge also treated as coal mine employment, claimant earned an average of $3,500 annually. Claimant was not questioned as to his relative earnings at the hearing. Director's Exhibit 4.

The administrative law judge summarized *Echo* in detail and cited *Garcia* prior to determining that claimant was engaged in comparable and gainful employment based upon the fact that "even taking inflation into account, it appears that claimant's current earnings exceeded his earnings from coal mine employment." Decision and Order at 9. As the Director maintains, the decisions in *Echo*, *Romanoski*, and *Garcia* indicate that in cases in which a claimant earns significantly more in his current position than he did as a miner, he is engaged in comparable and gainful employment and there is no need to examine the other factors in the comparability analysis. If the relative earnings are not "manifestly unequal," however, the other factors must be addressed. In order to make this determination, however, a valid comparison of the miner's relative wages must be made. In this case, although the administrative law judge rationally relied upon the earnings statements in the record, he did not explain how he arrived at the conclusion that, even if adjusted for inflation, claimant's non-coal mine employment wages exceeded what he earned in last coal mine employment. Thus, we vacate the administrative law judge's finding under Section 718.204.

On remand, the administrative law judge must reconsider whether claimant is performing comparable and gainful employment in accordance with the standards set forth in *Echo*, *Romanoski*, and *Garcia* and must set forth his findings in detail, including the underlying rationale. If the administrative law judge determines that claimant's relative earnings are not manifestly unequal, he must address the other factors identified by the Third Circuit in *Echo*.

Finally, claimant contends that the administrative law judge erred in crediting him with only twelve years of coal mine employment, as the administrative law judge did not fully consider all relevant evidence. We agree. Although the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole, the administrative law judge must set forth the method of computation utilized to determine length of coal mine employment and identify the evidence that is credited or rejected and the rationale therefor. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *Fee v. Director, OWCP*, 6 BLR 1-1100 (1984). In the present case, the administrative law judge did not explain why he apparently discredited claimant's testimony regarding his employment as a coal truck driver for Jim Byerly between 1950 and 1952. Accordingly, we vacate the administrative law judge's finding of twelve years of coal mine employment. The administrative law judge must reconsider this issue on remand, setting forth his findings

in detail, including the underlying rationale. The administrative law judge rationally determined, however, that the Itemized Statement of Earnings provided by Social Security Administration (SSA) was the most reliable evidence regarding claimant's work for his father's coal trucking company, which claimant alleged occurred between 1952 and 1962.[6] Decision and Order at 3-4; Director's Exhibit 4; *see Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]Claimant does not challenge the administrative law judge's discrediting of the affidavit in which his cousin stated that claimant worked as a miner for seventeen years. Decision and Order at 4 n.4; Claimant's Exhibit 26. The administrative law judge's finding with regard to this affidavit is, therefore, affirmed. *See Skrack, supra*.