BRB No. 10-0627 BLA

BILLY G. PARSONS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTINENTAL AMERICAN TRUCKING	)	DATE ISSUED: 07/15/2011
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Billy G. Parsons, South Charleston, West Virginia, *pro se*.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (05-BLA-06012) of Administrative Law Judge Ralph A. Romano (the administrative law judge) on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act). This claim was filed on August 9, 2004.[2] The administrative law judge found that claimant established twenty-five years and seven months of coal mine employment, but that he failed to establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal claimant generally challenges the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the decision. The Director, Office of Workers' Compensation Programs (the Director), responds,[3] arguing that the administrative law judge's decision must be vacated and the case remanded because the administrative law judge erroneously based his finding that legal pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4) on his finding that the x-ray evidence was negative.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203,

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[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] As this case was filed before January 1, 2005, the 2010 amendments to the Black Lung Benefits Act do not apply.

[3] We consider the Motion to Remand of the Director, Office of Workers' Compensation Programs, as his response brief.

718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Clinical Pneumoconiosis

Turning first to Section 718.202(a)(1), the administrative law judge found that the x-ray evidence did not establish pneumoconiosis thereunder because the weight of the x-ray evidence was negative. The administrative law judge determined that the November 8, 2004 x-ray was negative for pneumoconiosis, even though the x-ray was read as positive for pneumoconiosis, 1/0, by Drs. Patel, Miller and Alexander, dually-qualified radiologists, and as negative by Drs. Gogineni and Wiot, dually-qualified radiologists. Decision and Order at 6; Director's Exhibit 13; Claimant's Exhibits 2, 4; Employer's Exhibits 1, 7. Specifically, the administrative law judge found Dr. Patel's positive x-ray reading questionable, based on the deposition testimony of Drs. Zaldivar and Crisalli, who stated that coal workers' pneumoconiosis is usually found in the upper lung zones and does not generally produce linear densities as found by Dr. Patel. Decision and Order at 7; Employer's Exhibit 3 at 11; Employer's Exhibit 4 at 10-11, 13. Further, the administrative law judge accorded diminished weight to the positive readings of Drs. Alexander, Miller and Patel because Drs. Zaldivar and Crisalli testified that these doctors disagreed as to the location, size and shape of opacities. Decision and Order at 7; Employer's Exhibit 11 at 8; Employer's Exhibit 10 at 7-8.

Turning to the January 5, 2005 x-ray, the administrative law judge found that it did not establish either the existence or absence of pneumoconiosis, as its readings were in "equipoise," *i.e.*, Dr. Miller, a dually-qualified radiologist, read the x-ray as positive, while Dr. Wiot, a dually-qualified radiologist, read it as negative. Decision and Order at 7; Director's Exhibit 4; Claimant's Exhibit 5; Employer's Exhibit 3.

Likewise, the administrative law judge found that the x-ray of March 13, 2006 could not establish the existence or absence of pneumoconiosis, as its readings were in "equipoise," *i.e.*, Dr. Ahmed, a dually-qualified radiologist, read it as positive, while Dr. Willis, a dually-qualified radiologist, read it as negative. Decision and Order at 7; Claimant's Exhibit 7; Employer's Exhibit 2.

Finally, turning to the March 26, 2008 x-ray, the administrative law judge determined that it was negative for pneumoconiosis, even though it was read as positive by Dr. Alexander, a dually-qualified radiologist and as negative by Dr. Wiot, a dually-qualified radiologist. *See* Claimant's Exhibit 1; Employer's Exhibit 8. The administrative law judge accorded less weigh to Dr. Alexander's positive reading because he read the 2008 x-ray as showing s/p opacities, which was different from his reading of the 2004 x-ray, and Drs. Zaldivar and Crisalli, in their deposition testimony, opined that

"opacities [of] coal workers' pneumoconiosis do not change their shape over time." Decision and Order at 7; Employer's Exhibit 11 at 11; Employer's Exhibit 8 at 9.

Based on our review of the record and the administrative law judge's decision, we conclude that the administrative law judge erred in his overall evaluation of the x-ray evidence at Section 718.202(a)(1). The administrative law judge properly found that the x-ray readings of the 2005 and 2006 x-rays were in "equipoise," as they were equally read as both positive and negative by dually-qualified radiologists. *See* 20 C.F.R. §718.202(a)(1). The administrative law judge, therefore, properly determined that these x-rays did not establish either the existence or absence of pneumoconiosis.

However, the administrative law judge erred in according less weight to the positive readings of the 2004 and 2008 x-rays, in light of the deposition testimony of Drs. Zaldivar and Crisalli. Drs. Zaldivar and Crisalli questioned the positive readings of those x-rays because coal workers' pneumoconiosis does not generally produce linear densities, coal workers' pneumoconiosis is usually found in the upper lung zones; and the radiologists who read the x-rays disagreed as to the location, age and shape of the opacities. Decision and Order at 7.

Because the readings in question were properly classified as positive for pneumoconiosis, however, the administrative law judge erred in giving them less weight for these reasons. *See* 20 C.F.R. §718.102(b); *Cranor v. Peabody Coal Co.*, 22 BLR 1-2 (1999) (*en banc*). Evidence relevant to a determination of whether the opacities seen on x-ray are opacities of coal workers' pneumoconiosis, and not some other disease process, cannot be used to negate a properly classified positive reading at Section 718.202(a)(1). *See Cranor*, 22 BLR at 1-5. Rather, such evidence is relevant to the source of the pneumoconiosis diagnosed by x-ray and is to be considered at Section 718.203. *See Cranor*, 22 BLR at 1-5. Thus, because the evidence relied on by the administrative law judge to accord less weight to the positive x-ray readings did not address the quality of the reading itself, or detract from the credibility of the reading, it cannot be used to negate the positive readings. *See Cranor*, 22 BLR at 1-5. Consequently, we vacate the administrative law judge's finding that the x-ray evidence failed to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1) and we remand the case for the administrative law judge to reconsider the x-ray evidence.

Next, the administrative law judge found that the CT scan evidence and the medical opinion evidence failed to establish clinical pneumoconiosis at Section 718.202(a)(4). Considering the CT scan evidence, the administrative law judge correctly found that the only CT scan of record, conducted on June 11, 2008, did not show evidence of coal workers' pneumoconiosis. Decision and Order at 8; Employer's Exhibit 9. The administrative law judge, therefore, properly found that the CT scan evidence did not establish the existence of coal workers' pneumoconiosis at Section 718.202(a)(4).

Turning to the medical opinion evidence at Section 718.202(a)(4), the administrative law judge accorded greater weight to the opinions of Drs. Zaldivar and Crisalli, that claimant did not have coal workers' pneumoconiosis, than to the contrary opinion of Dr. Rasmussen, because they were supported by the negative x-ray and CT scan evidence. Decision and Order at 13. However, because the administrative law judge erred in evaluating the x-ray evidence and that error affects his weighing of the medical opinion evidence, we vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of coal workers' pneumoconiosis and remand the case for the administrative law judge to reconsider the medical opinion evidence at Section 718.202(a)(4). *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Further, in reconsidering the issue of clinical pneumoconiosis, the administrative law judge must, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), weigh all of the relevant evidence together, namely the x-ray, CT scan, and medical opinion evidence, in determining whether coal workers' pneumoconiosis is established.[4]

Legal Pneumoconiosis

In finding that legal pneumoconiosis[5] was not established at Section 718.202(a)(4), the administrative law judge accorded greater weight to the opinions of Drs. Zaldivar and Crisalli, that claimant did not have legal pneumoconiosis, than to the contrary opinion of Dr. Rasmussen,[6] because of their "reliance on [x]-rays I find to be overall negative for pneumoconiosis and a CT scan that did not find pneumoconiosis." Decision and Order at 13. As the Director contends, the administrative law judge's reasoning appears to violate Section 413(b) of the Act, 30 U.S.C. §923(b), *see* 20 C.F.R. §718.202(b), which states that no claim for benefits shall be denied solely on the basis of

[4] We affirm the administrative law judge's finding that the record does not establish pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (3). Decision and Order at 8.

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[6] Drs. Zaldivar and Crisalli opined that claimant's respiratory impairment was due to tobacco induced emphysema and asthma, and not related to coal mine employment. Director's Exhibit 14; Employer's Exhibits 2, 3, 4, 10 and 11. Dr. Rasmussen opined that claimant's lung disease was due to coal mine dust exposure. Director's Exhibit 13.

a negative chest x-ray.[7] Further, as the Director contends, such reasoning is contrary to established law which prohibits the use of negative x-rays alone to reject a physician's diagnosis of legal pneumoconiosis. *See generally Compton*, 211 F.3d at 210, 22 BLR at 2-173 (Evidence that does not establish [clinical] pneumoconiosis, *e.g.*, an x-ray read as negative for coal workers' pneumoconiosis, should not necessarily be treated as evidence weighing *against* a finding of legal pneumoconiosis.); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990).

Consequently, since the administrative law judge relied solely on the negative x-ray and CT scan evidence to reject the medical opinion evidence finding legal pneumoconiosis, we vacate the administrative law judge's finding that the medical opinions did not establish legal pneumoconiosis at Section 718.202(a)(4). On remand, the administrative law judge may not rely solely on the absence of clinical pneumoconiosis, to determine whether or not the medical opinion evidence establishes the existence of legal pneumoconiosis at Section 718.202(a)(4). *See Fuller*, 180 F.3d at 625, 21 BLR at 2-661.

The Director next contends that the administrative law judge failed to make any "findings on the comparative credibility of the competing opinions that attribute [claimant's] respiratory condition to either combined smoking and coal dust exposure or smoking." Director's Brief at 6. We agree. As the administrative law judge failed to adequately resolve the conflicts in the evidence, and provide a rationale for his findings that comports with the requirements of 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), we remand this case to the administrative law judge for reconsideration. The administrative law judge must reconsider the evidence relevant to legal pneumoconiosis and make findings consistent with this opinion. Further, if reached, the administrative law judge must determine whether claimant has established the other necessary elements of entitlement. *See Anderson*, 12 BLR at 1-112.

[7] Section 718.202(b) provides that "[n]o claim for benefits shall be denied solely on the basis of a negative chest X-ray." 20 C.F.R. §718.202(b).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge