BRB No. 05-0808 BLA

IRENE ELSIE BRAY (Widow of FRED H. BRAY)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 06/23/2006
CONSOLIDATION COAL COMPANY	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (04-BLA-5866) of Administrative Law Judge Daniel F. Solomon rendered on a survivor's 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).[1] After crediting the miner with thirty-six and one-half years of coal mine employment, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), and death due to pneumoconiosis pursuant to Section 718.205(c).[2] Claimant responds in support of the administrative law judge's award of benefits, asserting that employer is estopped from relitigating the issue of pneumoconiosis, as it conceded the existence of pneumoconiosis in the living miner's claim, Claimant's Brief at 3. Claimant also argues that the administrative law judge rationally relied on the opinions of Drs. Rasmussen and Faulkner to find that the miner's death was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge erred in finding the existence of pneumoconiosis by x-ray pursuant to Section 718.202(a)(1), since none of the x-rays the administrative law judge identified in his decision is classified according to the ILO classification system. Employer points out that the administrative law judge did not consider the x-ray readings from the miner's claims. The instant survivor's claim contains approximately twenty-six x-ray interpretations in Director's Exhibit 11, none of which is classified according to the ILO classification system. The miner's claims, found at Director's Exhibits 1 and 2, contain x-ray readings that are classified according to the ILO classification system. The administrative law judge found that the miner suffered from pneumoconiosis by a preponderance of the x-ray evidence, since only nine of twenty-six x-ray readings in the

[1] Claimant, the miner's widow, died on May 8, 2005. Her survivor's claim, filed on October 29, 2002, is being pursued by her estate. Director's Exhibit 4. The miner died on September 17, 2002, and had been awarded disability benefits during his lifetime. Decision and Order at 2; Director's Exhibits 4, 10.

[2] The administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9.

survivor's claim make no mention of a condition that meets the statutory definition of pneumoconiosis. Decision and Order at 10. The administrative law judge did not discuss and weigh the x-ray interpretations from the miner's claims, found at Director's Exhibits 1 and 2, although he admitted these exhibits into the record without discussing the evidentiary limitations pursuant to 20 C.F.R. §725.414, and without making a good cause determination for their admission pursuant to 20 C.F.R. §725.456(b)(1). Decision and Order at 2.

As a preliminary matter, we address the evidentiary limitations imposed by 20 C.F.R. §725.414. When a living miner files a subsequent claim, all the evidence from any prior miner's claims is specifically made part of the record. *See* 20 C.F.R. §725.309(d). Such an inclusion is not automatically available in a survivor's claim filed pursuant to the revised regulations. As this case involves a survivor's claim, the medical evidence from the prior living miner's claims must have been designated as evidence by one of the parties, in order for it to have been included in the record relevant to the survivor's claim. Furthermore, 20 C.F.R. §725.414(a)(2)(i) provides:

> Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible . . . .

20 C.F.R. §725.414(a)(2)(i). Thus, if any of the medical reports is based on evidence in the record that was not properly admitted into the survivor's claim, the administrative law judge is required to address the implication of Section 725.414(a)(2)(i).[3] The administrative law judge did not discuss the evidentiary limitations found at 20 C.F.R. §725.414 before admitting into the record the miner's claims found at Director's Exhibits 1 and 2, and therefore it is unclear whether the x-ray and medical opinion evidence from the miner's claims is a part of the instant survivor's claim. Consequently, we vacate the administrative law judge's admission into the record of the medical evidence from the living miner's claims found at Director's Exhibits 1 and 2, and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must first determine whether the record of the instant survivor's claim includes the evidence from the miner's claims. *See* 20 C.F.R. §725.414. The administrative law judge may find good cause for the admission of the evidence from the miner's claims into the record in the instant survivor's claim. 20 C.F.R. §725.456(b)(1).

Upon consideration of employer's remaining arguments at Section 718.202(a)(1), we cannot affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis. The administrative law judge erred in finding the

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[3] We note that the regulations specifically provide that "[n]otwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

existence of pneumoconiosis by x-ray at Section 718.202(a)(1), as the x-ray readings from the survivor's claim that the administrative law judge considered are not classified according to the ILO classification system, and are therefore insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). 20 C.F.R. §718.102; Decision and Order at 3-4, 10; Director's Exhibit 11. We, therefore, vacate the administrative law judge's finding at Section 718.202(a)(1), and remand this case to the administrative law judge for further consideration. On remand, after the administrative law judge determines the evidence properly admitted in the instant survivor's claim, he must then reconsider whether the x-ray evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1). In discussing and weighing the x-ray evidence, the administrative law judge must rely only on x-ray readings that are classified according to the ILO classification system, must look to the qualifications of the x-ray readers, and must consider all relevant factors, not merely the numerical superiority of the x-ray evidence. 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Employer next argues that the administrative law judge erred in finding that the preponderance of the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4) because only Dr. Hippensteel did not diagnose pneumoconiosis. Employer argues that, in fact, the hospital records from the miner's hospitalizations from 1999, until his death in 2002, repeatedly fail to list pneumoconiosis as a diagnosis. The relevant medical opinions in the survivor's claim consist of the opinions of Drs. Faulkner, Rasmussen, Zaldivar, and Spagnolo, who diagnosed pneumoconiosis, Director's Exhibit 26; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 7, 8, and Dr. Hippensteel, who did not diagnose pneumoconiosis, Employer's Exhibit 5, as well as the records from the miner's hospitalizations, which do not mention pneumoconiosis.[4] Director's Exhibit 11. The administrative law judge found the existence of pneumoconiosis by a preponderance of the medical opinion evidence pursuant to Section 718.202(a)(4) because only Dr. Hippensteel did not diagnose pneumoconiosis, and thus, his opinion was contrary to the x-ray and remaining medical opinions of record. Decision and Order at 10. Weighing all of the evidence regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant established pneumoconiosis by a preponderance of the evidence, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Id*. The administrative law judge additionally found that employer tacitly admitted to the existence of pneumoconiosis in this case. Decision and Order at 10; Transcript at 18.

We also cannot affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as

[4] Additionally, the relevant evidence in the miner's claims includes the opinions of Drs. Modi, Piracha, Taylor, and Zaldivar, who all diagnosed pneumoconiosis. Director's Exhibit 2.

the administrative law judge's improper weighing of the x-ray evidence at Section 718.202(a)(1) necessarily affects his evaluation of the medical opinion evidence at Section 718.202(a)(4). *See* Decision and Order at 10. Moreover, the administrative law judge erred in relying on the numerical superiority of the medical opinions to find the existence of pneumoconiosis established, without supplying additional rationale. *Adkins*, 958 F.2d 49, 16 BLR 2-61. Contrary to employer's argument, however, the administrative law judge need not find that the miner's hospital records which are silent as to the existence of pneumoconiosis establish that the miner did not have pneumoconiosis; rather, the records do not support a finding of pneumoconiosis. *See generally Reed v. Director, OWCP*, 8 BLR 1-217 (1985)(administrative law judge could properly find that x-ray reports from the miner's hospitalization did not establish the existence of pneumoconiosis, where the x-ray reports did not mention pneumoconiosis and the hospital records did not discuss the issue of disability or make any reference to the origins of the miner's tuberculosis). Consequently, we vacate the administrative law judge's findings at Section 718.202(a)(4) and remand this case to the administrative law judge for reconsideration of the medical opinion evidence consistent with *Compton*.[5]

Because the administrative law judge must reconsider whether the x-ray and medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an analysis that could affect his weighing of the evidence on the issue of death due to pneumoconiosis at Section 718.205(c), we vacate the administrative law judge's findings pursuant to Section 718.205(c), and remand this case to the administrative law judge for further consideration of this issue, if reached.[6]

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[5] Although the administrative law judge found that employer tacitly admitted to the existence of pneumoconiosis, citing Transcript at 18, employer's statements at the 2004 hearing do not support the administrative law judge's assessment. At the hearing, employer's counsel noted that one of his consultants, Dr. Spagnolo, conceded that pneumoconiosis was present and formulated his assessment based on that assumption. Transcript at 17-18. Consequently, employer's counsel stated that he did not really think the existence of pneumoconiosis was the key issue in the case but that the key issue was death due to pneumoconiosis. Transcript at 18. However, employer's counsel explicitly stated earlier at the hearing that he wanted to preserve a challenge to the finding of pneumoconiosis and that it was caused by coal mine employment. Transcript at 10. Moreover, employer identified pneumoconiosis as a contested issue in the Office of Administrative Law Judge's referral letter in the survivor's claim, Director's Exhibit 35, and in its pre-hearing report in the instant claim. ALJ Exhibit 2.

[6] The administrative law judge found that employer was not collaterally estopped from contesting pneumoconiosis in the survivor's claim. The miner's award was finally determined by the Board's 1993 Decision and Order affirming the administrative law judge's award of benefits on the miner's claim, and thus, the miner's award was decided prior to the

holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Decision and Order at 8-9. Claimant's argument, that employer is estopped from attempting to relitigate the issue of pneumoconiosis in the survivor's claim, because it conceded the existence of pneumoconiosis by x-ray in the miner's claim, lacks merit; the change in law resulting from the issuance of *Compton* makes collateral estoppel inapplicable. *See Sturgill v. Old Ben Coal Co.*, 22 BLR 1-314 (2003); *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge