BRB No. 08-0645 BLA

J.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAUREL CREEK MINING COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 06/29/2009
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

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

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand Denying Benefits (2005-BLA-05705) of Administrative Law Judge Jeffrey Tureck rendered 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). This case is before the Board for a second time. In his first Decision and Order issued on January 27, 2006, the administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant is totally disabled and, therefore, found that claimant established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). However, in considering all of the record evidence relevant to claimant's entitlement, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly benefits were denied.

Claimant appealed to the Board, challenging the administrative law judge's findings pursuant to Section 718.202(a)(1), (4).[1] The Board affirmed the administrative law judge's determination that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). [*J.H.*] *v. Laurel Creek Mining Co.*, BRB No. 06-0525 BLA, slip op. at 5 (Feb. 27, 2007) (unpub.). However, the Board held that the administrative law judge erred in weighing the x-ray evidence pursuant to Section 718.202(a)(1). *Id.*, slip op. at 3. The Board remanded the case for the administrative law judge to reconsider whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), taking into consideration the radiological qualifications of the physicians who interpreted claimant's x-rays. *Id.*, slip op. at 5. The Board further instructed the administrative law judge to determine, as necessary, whether claimant established the existence of pneumoconiosis based on a weighing of all of the evidence together at Section 718.202(a). *Id*. On remand, the administrative law judge again denied benefits, finding that the x-ray evidence did not establish that claimant had pneumoconiosis pursuant to Section 718.202(a)(1) and that claimant failed to satisfy his overall burden to establish the existence of the disease.

On appeal, claimant contends that the administrative law judge erred in finding that he failed to establish the existence of pneumoconiosis based on a preponderance of the x-ray evidence at Section 718.202(a)(1). Carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response unless specifically requested to do so by the Board.

[1] The administrative law judge previously found that there is no biopsy evidence of record to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and we affirm that finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 2006 Decision and Order at 3. The administrative law judge has not made any findings pursuant to 20 C.F.R. §718.202(a)(3).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

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, 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant asserts that the administrative law judge erred in his analysis of the x-ray evidence at Section 718.202(a)(1) because he did not consider whether each x-ray was positive or negative for pneumoconiosis based on the radiological qualifications of the physicians who provided an interpretation of the film. Claimant points out that when "[c]onsidered individually," three of the four x-rays of record are positive for pneumoconiosis. Claimant's Brief at 10. Claimant also maintains that the administrative law judge abused his discretion in finding the positive x-ray evidence to be inconsistent. Claimant's assertions of error have merit.

Pursuant to Section 718.202(a)(1), the administrative law judge considered nine readings of four x-rays dated April 26, 2004, August 30, 2004, September 9, 2004, and August 23, 2005.[3] The April 26, 2004 x-ray was read by Dr. Simpao, whose qualifications are not of record, and by Dr. Ahmed, a Board-certified radiologist and B reader, as positive for pneumoconiosis, and by Dr. Binns, a Board-certified radiologist and B reader, as negative for pneumoconiosis. Director's Exhibits 14, 46, 63. There is an additional reading of this film by Dr. Verhulst as showing chronic obstructive pulmonary disease.[4] Director's Exhibit 14. The August 9, 2004 x-ray was read by Dr.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

[3] Although the record also contained an earlier x-ray dated October 19, 1993, which was read as negative for pneumoconiosis, the administrative law judge gave little weight to that x-ray, citing the progressive nature of pneumoconiosis. 2006 Decision and Order at 3; Decision and Order on Remand at 2.

[4] Dr. Verhulst did not complete an ILO classification form with regard to his reading of the April 26, 2004 x-ray. Director's Exhibit 14.

Simpao and Dr. Ahmed as positive for pneumoconiosis. Director's Exhibits 47, 63. The August 30, 2004 x-ray was read by Dr. Ahmed as positive for pneumoconiosis, and by Dr. Majmudar, who holds no radiological qualifications and is not a B reader, as negative for the disease. Director's Exhibit 53; Claimant's Exhibit 2. Finally, the August 23, 2005 x-ray was read by Dr. Gaziano, a B reader, as negative for pneumoconiosis. Claimant's Exhibit 1.

On remand, the administrative law judge noted that he "vociferously disagree[d]" with the Board's interpretation of the term *radiological qualifications* contained in Section 718.202(a)(1) as referring to "qualifications as a radiologist." Decision and Order on Remand at 1. Nonetheless, the administrative law judge stated that, in accordance with the Board's directive, he found that the readings by Drs. Ahmed and Binns were entitled to "greatest weight" given that they were dually qualified radiologists. He additionally found that Dr. Gaziano's reading was entitled to "great weight," since Dr. Gaziano is qualified as a B reader, and that Dr. Majmudar's reading was entitled to "some weight," given his status as a Board-certified pulmonary specialist, although not a B reader. *Id*.

The administrative law judge specifically noted that "although Dr. Ahmed did read three x-rays [as positive], they were all taken during a period of [four and one- half] months and are essentially contemporaneous." Decision and Order on Remand at 2. In contrast to Dr. Ahmed's "contemporaneous" readings, the administrative law judge noted that the negative readings covered a span of sixteen months: "Dr. Binns read the earliest x-ray taken on April 26, 2004; Dr. Majmudar read the August 30, 2004 [x-ray]; and Dr. Gaziano read the most recent x-ray taken on August 23, 2005." *Id*. The administrative law judge further noted that, "Dr. Gaziano's negative reading was offered into evidence by [claimant], not employer, adding to its probative value." *Id*. at 2-3.

Finally, the administrative law judge determined that Dr. Ahmed's positive readings were inconsistent and, therefore, entitled to less weight. Decision and Order on Remand at 3. The administrative law judge explained:

> Although [Dr. Ahmed] consistently found category 1/0 pneumoconiosis, on the April 26, 2004 x-ray he found only category s/s irregular opacities; on the August 30, 2004 x-ray he found only category p/p round opacities; and on the September 9, 2004 x-ray he found only category s/s opacities. The difference between round and irregular opacities is not insignificant, as the shape of the opacities is a factor considered by doctors in interpreting chest x-rays. That Dr. Ahmed found only irregular opacities twice, and only rounded opacities in between, detracts from the overall weight to which his opinion is entitled.

Id. The administrative law judge therefore concluded that the x-ray evidence does not support a finding of pneumoconiosis since "[o]nly a single B-reader found claimant's x-rays to be positive for pneumoconiosis as compared to two [B-readers,] one of whom is also a [B]oard-certified radiologist[,] – who [found] them to be negative." *Id*. In further support of his finding, the administrative law judge noted that Dr. Gaziano's positive reading "was selected by claimant" and that the positive readings were less credible because they were inconsistent. *Id*.

Claimant contends that the administrative law judge's analysis at Section 718.202(a)(1) "penalize[s] claimant for using only one Board-certified radiologist and B reader to read three separate x-rays." Claimant's Brief at 10. We agree. Although the administrative law judge acknowledged that readings by dually qualified Board-certified radiologists and B readers were entitled to greatest weight, he determined that claimant failed to satisfy his burden of proof at Section 718.202(a) based on *the number of B readers* who interpreted claimant's x-rays as negative for the disease.

The administrative law judge also stated that he gave added weight to the negative readings by the two B readers (Drs. Binns and Gaziano) because one of the B readers (Dr. Binns) was also a Board-certified radiologist. The administrative law judge's analysis, however, does not reconcile the fact that all of the positive readings were also by a dually qualified B reader and Board-certified radiologist (Dr. Ahmed). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Section 718.202(a)(1) provides specific instructions on how an administrative law judge must weigh conflicting x-ray reports as they pertain to a single chest x-ray presented in the record:

> A chest X-ray conducted and classified in accordance with §718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

20 C.F.R. §718.202(a)(1). In this case, the administrative law judge erred in performing a simple head count of the B readers who rendered positive versus negative readings of the x-ray evidence as a whole, as opposed to performing both a quantitative and qualitative analysis of the x-ray evidence and resolving the conflicts in the x-ray reports as they pertained to each of claimant's x-rays. *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see generally Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). The administrative law judge's analysis is contrary to Section 718.202(a)(1) since he did not consider whether each of claimant's x-rays is positive or negative for pneumoconiosis, taking into consideration the qualifications of the readers, and then render a finding as to

whether claimant established the existence of pneumoconiosis based on a preponderance of the x-ray evidence, rather than by a preponderance of the x-ray readers. 20 C.F.R. §718.202(a)(1); *see also Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

Furthermore, the administrative law judge erred in failing to explain why Dr. Ahmed's positive readings are inconsistent in comparison to the negative readings for pneumoconiosis. The administrative law judge's rationale for according Dr. Ahmed's positive readings less weight is that Dr. Ahmed read three "contemporaneous" x-rays, dated April 26, 2004, August 30, 2004 and September 9, 2004, as showing different "shapes" of opacities: Dr. Ahmed identified s/s opacities on the April 26, 2004 x-ray, p/p opacities on the August 30, 2004 x-ray, and s/s opacities on the August 23, 2005 x-ray. Decision and Order on Remand at 2-3; Director's Exhibit 63; Claimant's Exhibit 2. The administrative law judge concluded that Dr. Ahmed's readings were inconsistent because he found s/s opacities on two occasions and p/p opacities on one. Claimant's Brief at 10. We agree with claimant that the administrative law judge erred in requiring Dr. Ahmed's positive readings to be uniform, while not imposing the same burden on the negative readings of record.[5] Thus, because the administrative law judge applied an inconsistent standard in weighing the x-ray evidence, and he failed to properly explain the weight accorded the conflicting x-ray readings, his findings at Section 718.202(a)(1) do not satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).[6] *Wojtowicz*, 12 BLR at 1-165.

Additionally, claimant asserts that the administrative law judge failed to consider that while Dr. Gaziano provided a negative x-ray reading for pneumoconiosis (0/1), he specifically opined that claimant suffered from legal pneumoconiosis. Contrary to claimant's assertion, however, Dr. Gaziano's diagnosis of legal pneumoconiosis is not a factor for consideration in weighing the x-ray evidence at Section 718.202(a)(1). Notwithstanding, we conclude that the administrative law judge erred in assigning additional weight to Dr. Gaziano's *negative* reading of the August 23, 2005 x-ray simply because that x-ray reading was proffered by claimant and not employer. Decision and Order on Remand at 2-3; Claimant's Exhibit 1. Party affiliation is not a dispositive factor

[5] The negative readings by B readers also identify different shapes of opacities. Dr. Binns read the April 26, 2004 x-ray as negative (0/1, s/t) and Dr. Gaziano read the August 23, 2005 x-ray as negative for pneumoconiosis (0/1, q/r). Director's Exhibit 46; Claimant's Exhibit 1.

[6] The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), requires an administrative law judge to provide an explanation for his or her findings of fact and conclusions of law.

in determining the weight to be assigned to the medical evidence of record. *See generally Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991) (*en banc*).

For these reasons, we vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and remand this case for further consideration of the x-ray evidence. On remand, the administrative law judge must consider whether each individual x-ray establishes the existence of pneumoconiosis in light of qualifications of the readers, and then consider whether the weight of the x-ray evidence satisfies claimant's burden of proof at Section 718.202(a)(1). The administrative law judge must also render findings at Section 718.202(a)(3), as to whether claimant is eligible for any of the presumptions available to establish that he has pneumoconiosis. If the administrative law judge determines that claimant has established the existence of pneumoconiosis under the provisions of Section 718.202(a)(1), (3), the administrative law judge must weigh all of the evidence together at Section 718.202(a), like and unlike, in order to determine whether claimant has established the existence of pneumoconiosis by a preponderance of the evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If the administrative finds that claimant has established the existence of pneumoconiosis, he must then address the remaining elements of entitlement. *See* 20 C.F.R. §§718.203, 718.204(b), (c).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

_____
BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only:

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge