BRB No. 09-0646 BLA

VESTIL HUNT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EDD POTTER COAL COMPANY/JAWBONE COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 06/30/2010
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Kirby (Sands Anderson Marks & Miller), Blacksburg, Virginia, for employer.

Michelle S. Gerdano (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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2008-BLA-5730) of Administrative Law Judge Paul C. Johnson, Jr., with respect to a miner's claim filed on March 5, 2007, 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). After crediting claimant with 27.25 years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b), and a totally disabling respiratory impairment due to coal workers' pneumoconiosis at 20 C.F.R. §718.204(b)(2)(ii), (iv), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in his consideration of the x-ray evidence as to the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that he failed to consider all of the relevant evidence, as to whether claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in this appeal.

By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[1] *Hunt v. Edd Potter Coal Co./Jawbone Coal Corp*, BRB No. 09-0646 BLA (Mar. 30, 2010)(unpub. Order). The Director and employer have responded.

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. However, the Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, would be required, as the present claim was filed after January 1, 2005, and the administrative law judge credited claimant with more than

[1] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

fifteen years of coal mine employment. Employer responds, agreeing that if the Board affirms the administrative law judge's findings, the issue of the invocation of the presumption is moot, but that if the case is remanded, the administrative law judge would need to consider the applicability of the recent amendments in this claim.

To determine whether this case must be remanded for consideration of the invocation of the rebuttable presumption of total disability due to pneumoconiosis, we will first address employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204(b)(2)(ii), (iv), (c).

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.[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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. 20 C.F.R. §718.202(a)(1)

In considering whether claimant established the existence of pneumoconiosis, the administrative law judge considered interpretations of three x-rays, dated May 17, 2007, November 7, 2007, and June 26, 2008. The May 17, 2007 x-ray was read by Drs. Rasmussen and DePonte as positive for simple and complicated pneumoconiosis.[3] Director's Exhibit 15; Claimant's Exhibit 4. In contrast, Dr. Scatarige interpreted the same x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibit 3. He wrote in the comments section of the ILO classification form that there were a

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Dr. Barrett also interpreted the May 17, 2007 x-ray for quality purposes only. Director's Exhibit 18.

"few nodular opacities in [right] mid-lung. I favor bilateral pneumonia; other possibility would be cancer metastasis." *Id*. Dr. Scartarige further noted that there were "no small, round opacities" to suggest coal workers' pneumoconiosis or silicosis. *Id*.

The November 7, 2007 x-ray was read by Dr. DePonte as positive for simple and complicated pneumoconiosis. Claimant's Exhibit 2. Drs. Scatarige and Wheeler both interpreted the x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibits 1, 2. In the comments section of the ILO classification form, Dr. Scatarige identified some "probable subsegmental nodular infiltrates in the [right upper lung]" that he thought were due to pneumonia or another cause. Employer's Exhibit 1. Dr. Wheeler also noted some "ill defined irregular and possible nodular infiltrates" in the middle zone of claimant's lung and in the left lower lateral lung, which he opined could indicate granulomatous disease. Employer's Exhibit 2.

The June 26, 2008 x-ray was read by Dr. DePonte as positive for simple and complicated pneumoconiosis. Claimant's Exhibit 1. Drs. Scatarige and Wheeler interpreted the same x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibits 13, 14. In the comments section of the ILO classification form, Dr. Scatarige noted a few scattered nodules in the upper and middle zones of claimant's right lung, which he attributed to "bilateral pneumonia, cancer or lymphoma, fungal disease, or atypical sarcoid or mycrobacterial infection." Employer's Exhibit 13. Dr. Scatarige reiterated that there were "no background small opacities" indicating coal workers' pneumoconiosis. *Id*.

In weighing the conflicting readings, the administrative law judge noted that all of the physicians who provided interpretations are B readers. Decision and Order at 4-7; Director's Exhibits 15, 18; Claimant's Exhibits 1, 2, 4; Employer's Exhibits 1-3, 13, 14. In addition, he found that Drs. DePonte, Scatarige, and Wheeler are dually-qualified as Board-certified radiologists. Decision and Order at 4-7; Claimant's Exhibits 1, 2, 4; Employer's Exhibits 1-3, 13, 14. The administrative law judge determined that Dr. DePonte's positive interpretations for simple pneumoconiosis outweighed the contrary, negative readings for simple pneumoconiosis by Drs. Scatarige and Wheeler. In support of this finding, he noted that Dr. DePonte "has been quite consistent in her interpretations over time" and that "although Drs. Scatarige and Wheeler observed no nodules or fibrosis in the earliest x-ray, they did observe them in later x-rays and did not provide alternative explanations for their presence." Decision and Order at 11. In addition, the administrative law judge found that Dr. DePonte's interpretation of the May 17, 2007 x-ray was supported by the positive reading by Dr. Rasmussen, a B reader. *Id*. The administrative law judge specifically stated, "I do not intend to imply the [e]mployer bears any burden to show the non-existence of pneumoconiosis; I simply note that statements by Drs. Wheeler and Scatarige that the x-rays do not show pneumoconiosis are undermined by the unexplained presence of small infiltrates, nodules, and fibrosis."

Id. at 11 n.6. Thus, the administrative law judge found that claimant established the existence of simple, clinical pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1).[4] *Id.* at 11.

Employer asserts that, although the administrative law judge explained that he did not intend to shift the burden of proof to employer, in giving less weight to the interpretations of Drs. Scatarige and Wheeler because they did not explain the presence of certain radiological abnormalities they observed, this is in effect what the administrative law judge did. Employer also argues that the administrative law judge mischaracterized the interpretations by Drs. Scatarige and Wheeler, insofar as both physicians explained that they did not find any opacities indicating the presence of coal workers' pneumoconiosis. Further, employer contends that the administrative law judge did not give appropriate weight to the interpretations of Drs. Scatarige and Wheeler, based on their credentials as dually qualified Board-certified radiologists and B readers.

Contrary to employer's contention, the administrative law judge was not required to give greater weight to the interpretations of Drs. Scatarige and Wheeler, based on their credentials. While the administrative law judge must consider both the quantity and quality of the x-ray evidence, taking into consideration the qualifications of the respective physicians, there is no requirement that he automatically defer to the readings by dually qualified physicians. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sexton v. Director, OWCP*, 752 F.2d 213 (6th Cir. 1985).

We agree with employer, however, that the administrative law judge impermissibly shifted the burden of proof to employer to disprove the existence of pneumoconiosis when he discredited the opinions of Drs. Scatarige and Wheeler for failing to provide an alternative explanation, other than pneumoconiosis, for the presence of the nodules and fibrosis identified on claimant's x-rays. Decision and Order at 11 n.6. Contrary to the administrative law judge's analysis, absent the availability of a presumption, claimant bears the burden of establishing all of the requisite elements of entitlement, including the existence of pneumoconiosis, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In addition, the administrative law judge's characterization of the opinions of Drs. Scatarige and Wheeler was not accurate. Drs. Scatarige and Wheeler specifically reported on the ILO classification forms that there were no parenchymal or pleural abnormalities consistent with pneumoconiosis. Although these physicians

[4] The administrative law judge found that complicated pneumoconiosis was not established by the x-ray evidence. Decision and Order at 9.

reported "opacities" or "fibrosis" in the comments section of the ILO form, they specifically identified possible causes for these findings, including pneumonia, cancer, lymphoma, fungal infection and granulomatous disease. Employer's Exhibits 1-3, 13, 14. Dr. Scatarige also stated specifically stated that there were no rounded opacities consistent with coal workers' pneumoconiosis or silicosis. Employer's Exhibits 1, 3, 13.

We also agree with employer that the administrative law judge erred in finding that Dr. DePonte's positive x-ray interpretations were entitled to greatest weight, on the ground that she had been "quite consistent in her interpretations . . . over time," in comparison to Drs. Scatarige and Wheeler, who "observed no nodules or fibrosis in the earliest x-ray," but "did observe them in the later x-rays." Decision and Order at 11. Contrary to the administrative law judge's finding, Dr. Wheeler did not read the earliest x-ray, which was dated May 17, 2007. Director's Exhibit 15; Claimant's Exhibit 4; Employer's Exhibit 3. In addition, Dr. Wheeler noted the presence of ill-defined fibrosis on the film dated June 26, 2008, and both physicians observed nodules, nodular infiltrates, or nodular opacities on all of their x-ray readings. Employer's Exhibits 1-3, 13, 14. Thus, in light of the administrative law judge's errors in weighing the x-ray evidence, we vacate his finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

II. 20 C.F.R. §718.204(b)(2)(ii), (iv)

In considering whether claimant established total disability, the administrative law found that blood gas studies performed by Dr. Rasmussen on May 17, 2007,[5] and Dr. Agarwal on June 26, 2008, produced qualifying results. Director's Exhibit 15; Claimant's Exhibit 1. Therefore, the administrative law judge found that claimant established total disability based on the blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 12, 14. The administrative law judge also found that the blood gas studies supported the opinions of Drs. Rasmussen and Agarwal, that claimant has a totally disabling respiratory or pulmonary impairment, and, thus, found that total disability was established pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 13-14.

Employer correctly argues that, in finding that claimant is totally disabled, the administrative law judge failed to consider Dr. Hippensteel's November 10, 2008 report, in which Dr. Hippensteel opined that claimant has "variable gas exchange impairment likely related to variable ventilation perfusion matching associated with his obesity and

[5] The May 17, 2007 blood gas study was also reviewed by Dr. Michos for validation purposes only and was found to be technically acceptable. Director's Exhibit 17.

possibly coronary artery disease found on chest CT scans, and not related to intrinsic lung disease." Employer's Exhibit 7. As noted by employer, there is no mention of Dr. Hippensteel's November 10, 2008 report in the administrative law judge's Decision and Order, although it was designated by employer as an affirmative medical opinion and was admitted into evidence at the hearing. *See* Employer's Exhibit 7; Hearing Transcript at 18. Therefore, because the administrative law judge did not consider all of the relevant evidence, we must vacate his finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and remand this case for consideration of Dr. Hippensteel's report. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Because the administrative law judge relied on his findings at 20 C.F.R. §718.204(b)(2), in addressing the issue of disability causation, and he also did not consider Dr. Hippensteel's report under that subsection, we also vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Therefore, we vacate the administrative law judge's award of benefits and remand this case for further consideration.

Based on our decision to vacate the award of benefits in this case, we agree with the Director and employer that the Section 411(c)(4) is applicable. On remand, the administrative law judge must initially consider claimant's entitlement pursuant to Section 411(c)(4). Thereafter, if necessary, the administrative law judge must determine whether claimant has established that he is totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge