BRB No. 00-0594 BLA

BOBBY G. LAFFOON	)	
	)	
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 - Rejection of Claim of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Mulhollon & Kelley), Madisonville, Kentucky, for claimant.

Rita Roppolo (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-670) of Administrative Law Judge Rudolf L. Jansen denying benefits 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).[1] The administrative law judge, based in part on a stipulation by the parties,

[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 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). All citations to the regulations, unless otherwise noted,

credited claimant with thirteen years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge noted that claimant testified at the hearing that his last job as a coal miner was as a roof bolter and that the job involved heavy lifting, but the administrative law judge, based on documents accompanying the prior claims, found that claimant's last usual coal mine employment involved truck driving and delivering parts. The administrative law judge then considered all of the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). The administrative law judge thus found that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (1999)[3] in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.

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refer to the amended regulations.

[2] Claimant filed his first claim for black lung benefits in 1980, which was finally denied in 1988. Decision and Order at 3; Director's Exhibit 20. Claimant filed his second claim for benefits in 1991, which was finally denied in 1992. Decision and Order at 3; Director's Exhibit 21. Claimant filed his third claim in 1995, which was denied in 1995. Decision and Order at 3; Director's Exhibit 22. Claimant filed the instant claim on January 30, 1998. Decision and Order at 3; Director's Exhibit 1.

[3] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

On appeal, claimant contends that the administrative law judge erred in finding that the recent evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000) and total disability pursuant to 20 C.F.R. §718.204(c)(1), (2) and (4) (2000), and thus erred in failing to find a material change in conditions established pursuant to 20 C.F.R. §725.309(d) (1999). The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in his determination of claimant's usual coal mine employment, his evaluation of the x-ray evidence and his rejection of Dr. Simpao's opinion.[4] Both claimant and the Director argue that if Dr. Simpao's opinion cannot be considered credible, claimant is entitled to a new pulmonary evaluation and the administrative law judge's Decision and Order must be vacated and the case remanded.[5]

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 February 21, 2001, to which both claimant and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by claimant and the Director, and our review, 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. If the administrative law judge's

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[4] The Director has filed a Motion to Remand in this case. The Board accepts the Director's Motion to Remand as his response brief, and herein decides this case on its merits.

[5] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) (2000) and 718.204(c)(3) (2000) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In addition, claimant makes a general assertion that the administrative law judge erred in concluding that Dr. Simpao's reports were undocumented and unreasoned and thus failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000), but cites to no specific error made by the administrative law judge in weighing the reports on this issue. Claimant's Brief at 9. Thus, the Board has no basis upon which to review this determination by the administrative law judge and we thus affirm his finding thereunder. *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Claimant initially contends that the administrative law judge erred in finding that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). Claimant asserts that the administrative law judge improperly considered Dr. Sargent's September 2, 1999, x-ray reading that was interpreted as "unreadable" and improperly accorded less weight to Dr. Brandon's positive reading of the July 7, 1998 x-ray. In his consideration of the x-ray evidence submitted with the most recent claim, the administrative law judge noted that there were six readings of four x-rays, five of which were by physicians who were both B-readers and Board-certified radiologists. Decision and Order at 5-6, 8; Director's Exhibits 6-7, 14, 25-26; Claimant's Exhibit 1. The administrative law judge found that of those five readings, two were negative, two were positive and one was unreadable. *Id*. Contrary to claimant's assertion, the administrative law judge did not indicate that he gave any weight to Dr. Sargent's determination that the September 2, 1999, x-ray was unreadable. Claimant's other contention, however, has merit. The administrative law judge gave less weight to Dr. Brandon's July 7, 1998, positive reading since the Director was not afforded an opportunity to have the x-ray reread. See 20 C.F.R. §718.102 (2000); Decision and Order at 8. Claimant challenges the administrative law judge's determination to give this reading diminished weight as the Director did not object to the inclusion of Dr. Brandon's reading in the record at the hearing. As the Director concedes on appeal herein, Dr. Brandon's reading was properly before the administrative law judge since she effectively waived her right to object to the admission of this evidence by failing to object at the hearing. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); Director's Brief at 4-5. The administrative law judge thus erred in according less weight to Dr. Brandon's reading on this basis. Consequently, we vacate the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis, and thus a material change in conditions, and remand the case for further consideration of this issue.

Claimant next contends that the administrative law judge erred in assigning little weight to the October 21, 1998, qualifying pulmonary function study performed by Dr.

O'Bryan.[6] We disagree. The administrative law judge's finding that Dr. Burki was a "highly-qualified pulmonary specialist," who had provided a documented explanation for his invalidation of the October 1998 pulmonary function study, and therefore was entitled to greater weight than Dr. O'Bryan, is rational and supported by substantial evidence.[7] *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 6, 10; Director's Exhibits 6, 16. Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment.[8]

Claimant next asserts that the administrative law judge erred in discrediting the newly submitted February 1998 medical opinion of Dr. Simpao, supplemented by subsequent responsive letters, at claimant's request, based on revisions to the length of claimant's coal mine employment and smoking histories. Dr. Simpao affirmatively responded to a question of whether claimant's moderate pulmonary impairment precluded performing general manual labor involving bending and lifting up to 50 pounds and extensive walking. In discussing this medical opinion on the issue of total disability, the administrative law judge found that Dr. Simpao's conclusion lacked sufficient information to compare claimant's impairment and his usual coal mine employment as a truck driver. The administrative law judge rejected the report in part because the physician was under the impression that claimant's last coal mine employment involved lifting heavy objects underground, which

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[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[7] Dr. Burki is Board-certified in Internal Medicine with a subspecialty in pulmonary medicine while Dr. O'Bryan's qualifications are not contained in the record. Director's Exhibit 6.

[8] We reject claimant's assertion that the administrative law judge "created a presumption that a non-qualifying arterial blood gas study proves the absence of total disability" and substituted his own medical expertise by ignoring Dr. Simpao's interpretation of the results. Claimant's Brief at 10. After addressing the pulmonary function study evidence, the administrative law judge noted that the single newly submitted blood gas study was non-qualifying and then concluded that "[t]hus this evidence, as a whole, weighs against a finding of total disability." Decision and Order at 10. The administrative law judge merely found that the objective evidence pursuant to 20 C.F.R. §718.204(c)(1), (2) (2000) was insufficient to support a finding of total disability and subsequently considered Dr. Simpao's medical opinion pursuant to 20 C.F.R. §718.204(c)(4) (2000).

differed from the administrative law judge's own finding that claimant was last employed as a truck driver. Decision and Order at 11. The administrative law judge further found that Dr. Simpao's report lacked sufficient information to make a comparison of the physician's assessment of claimant's physical limitations with the exertional requirements of claimant's usual coal mine work as a truck driver. *Id*. Inasmuch as Dr. Simpao's report was the only medical report submitted with the instant claim, the administrative law judge concluded that the evidence was insufficient to establish total disability.

Claimant asserts that the administrative law judge mischaracterized claimant's usual coal mine employment and that Dr. Simpao's opinion is credible. The Director, however, urges remand because the administrative law judge failed to adequately explain his finding that claimant's usual coal mine employment was a truck driver in contravention of the of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). We agree. The administrative law judge discussed claimant's testimony at the hearing that his last job in coal mining was as a roof bolter as well as the variety of duties listed on the employment history form associated with the instant claim, but also noted that claimant had stated in the previous claim that his last coal mine job was as a truck driver. Decision and Order at 4. Without any stated explanation for his conclusion, the administrative law judge found that claimant's last usual coal mine employment involved driving a truck and delivering parts on coal mine sites and that he may have performed other duties from time to time. *Id*.

The Board has defined an individual's usual coal mine work as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). The evidence on this issue is conflicting and, on remand, the administrative law judge is instructed to determine claimant's usual coal mine employment and state a specific rationale for his finding. Consequently, we vacate the administrative law judge's finding that the evidence fails to establish total disability and we remand this case for further consideration. Moreover, as Dr. Simpao was under the impression that claimant's job involved manual labor, he did not comment on whether claimant's impairment would preclude performance of the duties of a truck driver. In light of this deficiency, both claimant and the Director argue that if, on remand, the administrative law judge again finds that claimant's last coal mine job was as a truck driver, then the Director's statutory obligation to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, as required by the Act, would not be satisfied. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b) (2000); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). We agree. Thus, on remand, the administrative law judge is instructed to reevaluate Dr. Simpao's report in light of his finding on claimant's usual coal mine employment. If the administrative law judge

should again find Dr. Simpao's opinion is not credible, then the Director's obligation under the Act will not have been satisfied in this case and the administrative law judge must remand the case to the district director to afford the Director the opportunity to fulfill her statutory obligation. *Newman, supra*; *Pettry, supra*; *Hall, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge