BRB No. 99-0842 BLA

CHRISTOPHER C. JENNINGS Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)))))))))))	 DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Richard A. Seid (Henry L. Solano, 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1325) of Administrative Law Judge Edward Terhune Miller 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). The instant case involves a duplicate claim filed on August 17, 1993.[1]

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[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on June 28, 1973. Director's Exhibit 20. The SSA denied the claim on December 5, 1973, May 16, 1974 and June 7, 1979. *Id.* The Department of Labor denied the claim on February 19, 1981. *Id.*

In the initial decision, Administrative Law Judge Reno E. Bonfanti found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Judge Bonfanti, therefore, considered claimant's 1993 claim on the merits. After finding that claimant "clearly failed" to establish ten years of coal mine employment, Judge Bonfanti found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, Judge Bonfanti found that the evidence was insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Assuming *arguendo* that the evidence was sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment, Judge Bonfanti found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3). Although Judge Bonfanti found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), he found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Bonfanti denied benefits.

By Decision and Order dated April 30, 1996, the Board affirmed Judge Bonfanti's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(1) and 718.204(c)(1)-(4) as unchallenged on appeal. *Jennings v. Director, OWCP*, BRB No. 96-0165 BLA (Apr. 30, 1996) (unpublished). The Board also affirmed Judge Bonfanti's finding that the evidence was insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). *Id.* The Board, therefore, affirmed Judge Bonfanti's denial of benefits. *Id.*

There is no evidence that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on August 17, 1993. Director's Exhibit 1.

Claimant subsequently filed an appeal with the United States Court of Appeals for the Fourth Circuit. Claimant argued that Judge Bonfanti's findings were not supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), contended that Judge Bonfanti's reasoning was not sufficiently explained and that the factual record was inadequate for a proper adjudication of the claim. Noting its agreement with the Director, the Fourth Circuit vacated the Board's decision and remanded the case with instructions that it be resubmitted to an administrative law judge for reconsideration.[2] *Jennings v. Director, OWCP*, No. 96-1753 (4th Cir. July 2, 1997) (unpublished).

Administrative Law Judge Edward Terhune Miller (the administrative law judge) reconsidered the claim. The administrative law judge initially found that while the evidence was sufficient to establish that claimant "probably worked a total of three or four years as a coal miner underground," it was insufficient to establish ten years of coal mine employment. The administrative law judge further found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1993 claim on the merits. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues, *inter alia*, that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4). The Director has filed a Motion to Remand, urging the Board to vacate the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The Director also contends, *inter alia*, that the administrative law judge erred in his consideration of the evidence pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4).

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[2]By Order dated October 1, 1997, the Board remanded the case to the Office of Administrative Law Judges for further consideration consistent with the Opinion of the United States Court of Appeals for the Fourth Circuit. *Jennings v. Director, OWCP*, BRB No. 96-0165 BLA (Oct. 1, 1997) (Order) (unpublished). By Order of Remand dated April 30, 1998, Administrative Law Judge Thomas F. Phalen, Jr. remanded the case to the district director for the purpose of developing additional and more recent medical evidence regarding the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 53.

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).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, F.3d , 2000 WL 524798, No. 98-2051 (4th Cir. May 2, 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). However, inasmuch as the administrative law judge, in the instant case, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), his findings, if affirmable, would conform to the newly adopted Fourth Circuit holding in *Compton*.

In the instant case, the Director notes that he conceded that claimant "produced x-ray evidence that he is afflicted with pneumoconiosis when this claim was before the Fourth Circuit." Director's Brief at 5. The Director, therefore, contends that the district director and the administrative law judge were bound to accept this fact in developing new evidence and adjudicating the claim. *Id.* We disagree. There is no support in the record for the Director's contention that he conceded that the x-ray evidence was sufficient to establish the existence of pneumoconiosis when the case was before the Fourth Circuit. In any event, the Fourth Circuit vacated the Board's decision and remanded the case with instructions that the case be resubmitted to an administrative law judge for reconsideration. It does not appear to have been the Fourth Circuit's intention to preclude the administrative law judge from reconsidering each element of entitlement if evidence relevant thereto was admitted into the record on remand.

The issues to be resolved by the administrative law judge are confined to those identified as contested by the district director or raised in writing before the district director. *See* 20 C.F.R. §725.463(a); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). The list of contested issues forwarded to the administrative law judge by the district director in the instant case includes whether claimant has pneumoconiosis as defined by the Act and the regulations. *See* Director's Exhibit 63. Moreover, the administrative law judge, at the February 10, 1999 hearing, specifically asked the Director whether he could stipulate or withdraw any of the contested issues. Transcript at 7. After the Director noted that he was willing to stipulate to three days of coal mine employment, the administrative law judge indicated that the existence of pneumoconiosis continued to be a contested issue. *Id.* at 8. Neither claimant nor the Director objected to the administrative law judge's consideration of

the existence of pneumoconiosis as a contested issue. Inasmuch as the issue was properly before him, we hold that the administrative law judge properly considered whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5-6. Although a majority of the physicians with these qualifications interpreted claimant's September 26, 1994 x-ray as positive for pneumoconiosis, Director's Exhibits 22, 25, the administrative law judge noted that physicians with these same qualifications uniformly interpreted claimant's June 29, 1998 x-ray as negative for pneumoconiosis. Decision and Order at 6; Director's Exhibits 59, 60. The administrative law judge, therefore, found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) by a preponderance of the x-ray evidence. Decision and Order at 6, 13. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as no party challenges 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), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly found that Dr. Vasudevan's opinion was insufficient to establish the existence of pneumoconiosis. Although Dr. Vasudevan referenced Dr. Ranavaya's 0/1 interpretation of claimant's September 22, 1993 x-ray in his October 24, 1993 medical report, Dr. Vasudevan's final diagnoses did not include a finding of pneumoconiosis. *See* Director's Exhibits 8, 11.

The administrative law judge also properly found that Dr. Rasmussen's opinion was insufficient to support a finding of pneumoconiosis. In diagnosing pneumoconiosis, Dr. Rasmussen relied upon a nine year coal mine employment history.[3] Director's Exhibit 27.

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[3]In his 1995 report, Dr. Rasmussen, after noting that the x-ray evidence was mixed in regard to the existence of pneumoconiosis, stated that dust conditions in the coal mines prior to 1957 were sufficient that nine years of exposure would be sufficient to acquire coal

The administrative law judge, however, credited claimant with only three to four years of coal mine employment. Decision and Order at 5. An administrative law judge may give less weight to a doctor's opinion which is based upon an inaccurate length of coal mine employment. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). The effect of this discrepancy upon the credibility of a medical report is a determination to be made by the administrative law judge. *Addison*, 11 BLR at 1-70. The administrative law judge acted within his discretion in discrediting Dr. Rasmussen's diagnosis of pneumoconiosis because it was "dependent upon an excessive assumption of coal mine employment not sustained by the record." Decision and Order at 13.

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workers' pneumoconiosis. Director's Exhibit 27. Dr. Rasmussen, therefore, opined that it was "reasonable to conclude that [claimant] does suffer from coal workers' pneumoconiosis." *Id.* In a subsequent report dated January 14, 1999, Dr. Rasmussen did not specifically address whether claimant suffered from pneumoconiosis. Claimant's Exhibit 1.

Claimant finally notes that a June 16, 1992 report from the West Virginia Occupational Pneumoconiosis Board indicates that claimant suffers from pneumoconiosis.[4] Director's Exhibit 26. However, any error committed by the administrative law judge in his consideration of this report is harmless inasmuch as the preponderance of the medical opinions of record demonstrates that claimant does not suffer from pneumoconiosis.[5] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge properly found that Drs. Forehand and Spagnolo failed to diagnose the existence of pneumoconiosis. Decision and Order at 13; Director's Exhibits 23, 57. Consequently, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[6] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

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[4]The finding of a state workers' compensation board is not binding on an administrative law judge. *See Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). It is a matter within the administrative law judge's discretion to determine what weight to give a state workers' compensation board finding. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). The West Virginia Occupational Pneumoconiosis Board findings are arguably insufficient to establish the existence of pneumoconiosis because the record does not indicate the legal or medical criteria upon which the state board relied in reaching its finding of pneumoconiosis. *See Compton v. Itmann Coal Co.*, 7 BLR 1-644 (1985).

[5]The administrative law judge found that the findings of the West Virginia Occupational Pneumoconiosis Board were "not persuasive proof of total disability due to pneumoconiosis, given the ambiguous or equivocal attribution of cause and quantum, and the inconsistency of the estimate of actual coal mine dust exposure with the proof of record." Decision and Order at 11.

[6]In light of our affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(4), we need not address the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge