BRB No. 99-0869 BLA

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| JERRY HARDIN | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | DATE ISSUED: _____) |
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| UNITED STATES STEEL MINING COMPANY | ) | |
| | ) | |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DECISION AND ORDER |

Party-in-Interest

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1844) of Administrative Law Judge Stuart A. Levin denying benefits with respect to 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 administrative law judge accepted the parties' stipulation to at least twelve years of coal mine employment and considered the claim, filed on March 5, 1997, pursuant to the

regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge erred in discrediting the opinions of Drs. Rasmussen and Jabour pursuant to Section 718.202(a)(4). Employer responds and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that although he will not participate in this appeal, his review of the record establishes that the administrative law judge mischaracterized the results of the blood gas study obtained on September 2, 1997.[1] Director's Response Letter dated August 4, 1999 at [1 n.1].

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. 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 considering the medical opinion evidence relevant to Section 718.202(a)(4), the administrative law judge determined that the opinions in which Drs. Jabour and Rasmussen diagnosed pneumoconiosis were not sufficient to satisfy claimant's burden of proof, inasmuch as they were not adequately documented and reasoned.[2] Decision and Order at 7; Director's Exhibit 10;

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[1]We affirm the administrative law judge's findings under 20 C.F.R. §718.202(a)(1)-(3), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2]The record also contains an opinion in which Dr. Hippensteel concluded that claimant does not have pneumoconiosis. Employer's Exhibits 1, 7. The administrative law judge summarized Dr. Hippensteel's findings and noted some flaws in his reports, but did not perform a relative weighing of Dr. Hippensteel's

Claimant's Exhibit 5; Employer's Exhibit 6. Claimant alleges that the administrative law judge erred in referring to his weighing of the x-ray evidence under Section 718.202(a)(1) to discredit the diagnoses of Drs. Jabour and Rasmussen. Claimant also maintains, consistent with the Director, that the administrative law judge did not properly analyze the blood gas study evidence when weighing the medical opinions under Section 718.202(a)(4).

These contentions have merit, in part. In rendering his opinion, Dr. Rasmussen relied solely upon his review of the x-ray readings of record to diagnose pneumoconiosis. Claimant's Exhibit 5; Employer's Exhibit 6 at 7. The administrative law judge did not err, therefore, in relying upon his determination, pursuant to Section 718.202(a)(1), that the weight of the x-ray evidence was insufficient to establish the existence of pneumoconiosis, to find that Dr. Rasmussen's opinion was entitled to little weight under Section 718.202(a)(4). Decision and Order at 6-7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We cannot affirm, however, the administrative law judge's decision to discredit Dr. Jabour's opinion under Section 718.202(a)(4). Dr. Jabour did not merely rely upon the positive reading of the film dated April 10, 1997, to diagnose pneumoconiosis. He also referred to claimant's pulmonary function study results and blood gas study results; factors that the administrative law judge did not properly address. Director's Exhibit 10. The administrative law judge found that the persuasiveness Dr. Jabour's report was diminished by his failure to account for the increase in claimant's resting blood gas study values. Decision and Order at 7. The administrative law judge stated that subsequent to the qualifying study obtained by Dr. Jabour on April 10, 1997, claimant's blood gases "improve[d] to nonqualifying levels" in the study obtained by Dr. Jones on September 2, 1997. *Id*.; Director's Exhibit 10; Claimant's Exhibit 4. A review of the record indicates, however, that as stated by claimant and the Director, the blood gas study dated September 2, 1997 produced qualifying results. The pCO2 value was reported as 34 and the pO2 value was 66. Under Appendix C to 20 C.F.R. Part 718, when the pCO2 value is 34, a pO2 value *equal to* or less than 66 renders the study

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opinion against the opinions of Drs. Rasmussen and Jabour. Decision and Order at 5-6, 8.

qualifying. *See* 20 C.F.R. §718.204(c)(2); Appendix C to 20 C.F.R. Part 718. Thus, the administrative law judge did not accurately characterize the evidence of record as is required under the Administrative Procedure Act, 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). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In addition, the administrative law judge's statement that blood gas studies are not diagnostic of the existence of pneumoconiosis is not quite correct. If a physician relates the blood gas study results to other factors which support a diagnosis of either clinical pneumoconiosis or pneumoconiosis as defined in 20 C.F.R. §718.201, his diagnosis may constitute a reasoned and documented medical opinion under Section 718.202(a)(4). *See Clark*, *supra*; *Peskie*, *supra*; *Lucostic, supra*. As indicated above, Dr. Jabour indicated that the blood gas study results, in combination with the pulmonary function study results and the abnormal x-ray, supported a diagnosis of pneumoconiosis. Director's Exhibit 10. Finally, although the administrative law judge indicated accurately that Dr. Jabour also relied, in part, upon a pulmonary function study that was invalidated by a reviewing physician, the administrative law judge did not provide the requisite explanation for his decision to accept the opinion of the reviewing physician regarding the adequacy of claimant's effort over Dr. Jabour's opinion that claimant's effort "met ATS standards" and that claimant "tried hard." Decision and Order at 7; Director's Exhibits 9, 11; *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Moreover, even assuming that the study in question is not valid, because pulmonary function studies and blood gas studies measure different types of impairment, Dr. Jabour's diagnosis of pneumoconiosis may be adequately supported by the qualifying blood gas study that he obtained. *See generally Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984).

In light of the foregoing, we vacate the administrative law judge's finding that the medical opinion of Dr. Jabour is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) and remand the case to the administrative law judge. The administrative law judge must reconsider Dr. Jabour's opinion on remand in conjunction with the opinion of Dr. Hippensteel. In addition, the administrative law judge should address the issue of whether the medical opinions of record are sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) in light of the recent decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, F.3d , 2000 WL 524798 (4th Cir. May 2, 2000), and any

subsequent proceedings in that case.[3] In *Compton*, the Fourth Circuit held that in determining whether a claimant has demonstrated the existence of pneumoconiosis under Section 718.202(a)(1)-(4), the administrative law judge must weigh all relevant evidence together.[4] If the administrative law judge determines that claimant has established the existence of pneumoconiosis, the administrative law judge must then consider whether claimant has demonstrated that his pneumoconiosis arose out of coal mine employment and that he is totally disabled due to pneumoconiosis.[5] 20 C.F.R. §§718.203, 718.204.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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[3]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. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]The administrative law judge's weighing of Dr. Rasmussen's opinion is not inconsistent with the holding in *Island Creek Coal Co. v. Compton*, F.3d , 2000 WL 524798 (4th Cir. May 2, 2000).

[5]We decline to address claimant's contention that the evidence of record is sufficient to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204, inasmuch as the administrative law judge did not reach this issue and the Board is not permitted to engage in the initial consideration of evidence. *See Bozick v. Consolidation Coal Co.*, 732 F.2d 64, 6 BLR 2-23, *remanded for recon.*, 735 F.2d 1017, 6 BLR 2-119 (6th Cir. 1984).

REGINA C. McGRANERY
Administrative Appeals Judge