BRB No. 99-0907 BLA

GEORGIA FRALEY (Widow of LIT JADER FRALEY)	)	
Claimant- Respondent	)	
	)	DATE ISSUED:
v.	)	
WELLMORE COAL COMPANY	)	
Employer-Petitioner	)	
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 - Awarding Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for employer.

Edward Waldman (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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (87-BLA-3333) of Administrative Law Judge Lawrence P. Donnelly with respect to a miner's claim and a survivor's 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 relevant procedural history of this case is as follows: The miner filed an application for benefits on November 20, 1980. Director's Exhibit 1. The miner died on July 19, 1981. Director's Exhibit 12. Claimant, the miner's widow, filed a claim for survivor's benefits on January 25, 1983. Director's Exhibit 2. On March 17, 1983, the district director notified employer of the miner's and the survivor's claims and made an initial finding of entitlement with respect to both claims. Director's Exhibit 20.

The case was assigned to Administrative Law Judge Henry W. Sayrs for a hearing. In his Decision and Order, Judge Sayrs credited the miner with twenty-four years of coal mine employment and determined that the presumption of total disability due to pneumoconiosis was invoked pursuant to 20 C.F.R. §718.305(a) and was not rebutted. Accordingly, he awarded benefits on both claims. The Board, in a Decision and Order issued on July 12, 1991, vacated Judge Sayrs's findings with respect to the length of the miner's underground coal mine employment, the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(c), and rebuttal under Section 718.305(a). *Fraley v. Wellmore Coal Co.*, BRB No. 88-2606 BLA (July 12, 1991)(unpub.).

On remand, the case was reassigned to Administrative Law Judge Robert S. Amery who determined that the miner had at least twenty-four years of underground coal mine employment. Judge Amery also found that the presumption set forth in Section 718.305(a) was invoked and was not rebutted. Accordingly, he awarded benefits on the miner's claim, but determined that the evidence of record was insufficient to establish entitlement on the survivor's claim. Both claimant and employer appealed to the Board. In a Decision and Order issued on May 27, 1994, the Board affirmed Judge Amery's determination that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), but vacated his findings regarding the length of coal

[1]The administrative law judge's Decision and Order was initially labeled "Decision and Order on Remand - Denying Benefits." The administrative law judge issued an Errata on July 1, 1999, correcting the title.

mine employment and the opinions of Drs. Castle and Dahhan. *Fraley v. Wellmore Coal Co.*, BRB Nos. 92-2213 BLA and 92-2213 BLA-A (May 27, 1994)(unpub.). In a Decision and Order on Reconsideration, the Board modified its affirmance of Judge Amery's finding under Section 718.202(a)(1) and remanded the case to Judge Amery with instructions to reconsider the x-ray evidence of record in light of the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992). *Fraley v. Wellmore Coal Co.*, BRB Nos. 92-2213 BLA and 92-2213 BLA-A (Apr. 25, 1997)(unpub. Decision and Order on Reconsideration).

On remand, the case was reassigned to Administrative Law Judge Lawrence P. Donnelly due to Judge Amery's unavailability. Judge Donnelly (the administrative law judge) credited the miner with thirty-nine years of underground coal mine employment and determined that total disability was established pursuant to Section 718.204(c)(2). The administrative law judge then found that the presumption set forth in Section 718.305 was invoked and was not rebutted. Accordingly, the administrative law judge awarded benefits on the miner's claim and, based upon the filing date of the miner's claim, also awarded benefits on the survivor's claim.

Employer argues on appeal that liability for benefits with respect to the miner's claim should be transferred to the Black Lung Disability Trust Fund (Trust Fund), as employer did not receive timely notice of the miner's claim. Employer further contends that the administrative law judge findings with respect to the length of the miner's coal mine employment and Section 718.305 are in error. The Director, Office of Workers' Compensation Programs (the Director) has responded and urges the Board to reject employer's argument concerning the transfer of liability to the Trust Fund. Claimant has not responded to employer's appeal.

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).

Employer initially argues that based upon the recent decisions in *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 180, 21 BLR 2-545, 2-555 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); and *Venicassa v. Consolidation Coal Co.*, 137 F.3d

197, 21 BLR 2-277 (3d Cir. 1998), liability for benefits in the miner's claim must be transferred to the Trust Fund, as employer did not receive notice of the miner's claim until after his death and, therefore, was prevented from adequately defending the miner's claim.[2] The Director has responded and urges the Board to hold that employer waived any allegation of a due process violation, as it raised this argument for the first time in the present appeal and has never raised this argument in any form before an administrative law judge.[3] The Director also asserts that inasmuch as only six weeks elapsed between the time the district director learned of employer's identity as a potential responsible operator and the miner's demise, no due process violation occurred. We concur with the Director's assertion that employer waived this argument because it was not raised before an administrative law judge at the earliest opportunity. *See generally Dankle v. Duquesne Light Company*, 20 BLR 1-1 (1995); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Prater v. Director, OWCP*, 8 BLR 1-

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

[3]In its second appeal before the Board, employer maintained that if the Board affirmed Judge Amery's decision to discredit the opinions of Drs. Dahhan and Castle on the ground that they did not examine the miner, liability must transfer to the Trust Fund, inasmuch as employer never had the opportunity to have the miner examined. The Board vacated Judge Amery's findings regarding the reports of Drs. Dahhan and Castle and, therefore, did not reach employer's due process argument. *Fraley v. Wellmore Coal Co.*, BRB Nos. 92-2213 BLA and 92-2213 BLA-A (May 27, 1994)(unpub.), slip op. at 5.

461 (1986). The cases cited by employer do not mandate an exception to the doctrine of waiver, inasmuch as *Lockhart* and *Borda* were issued before the administrative law judge's most recent Decision and Order on Remand. Moreover, these cases did not establish new law; they merely explicated preexisting principles of due process and the adequacy of notice. *See Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999).

Turning to the merits of the present case, employer argues that the administrative law judge erred in finding that the miner had the fifteen years of underground coal mine employment required for invocation of the Section 718.305 presumption, as the evidence of record does not support his determination. The administrative law judge stated that "based on [Mrs. Fraley's] unrefuted testimony that the miner bossed in the underground mines, I find that the miner's thirty-nine years of coal mine employment was underground." Decision and Order on Remand at 4. We affirm the administrative law judge's finding on the ground that it is supported by substantial evidence. Although claimant indicated in her testimony that she was not aware of precisely how much of the miner's work occurred underground, she stated that the miner was a foreman or "boss" at underground mines, that he went down into the mines, and that his clothes were dusty. Employer's Exhibit 4 at 7-10. The record does not contain any evidence contradicting claimant's testimony. Accordingly, the administrative law judge's acted reasonably in crediting the miner with more than fifteen years of underground coal mine employment. *See O'Keeffe*, *supra*.

With respect to the issue of total disability, the administrative law judge determined that total disability was not demonstrated pursuant to Section 718.204(c)(1), (c)(3), or (c)(4), as the record does not contain any pulmonary function studies, there is no evidence of cor pulmonale with right sided congestive heart failure, and the four medical opinions of record do not contain an explicit diagnosis of a totally disabling respiratory or pulmonary impairment. Decision and Order on Remand at 11. However, the administrative law judge found that total disability was established under Section 718.204(c)(2) based upon the presence in the record of two blood gas studies, both of which produced qualifying results.[4] *Id*.; Director's Exhibits 15, 16. The administrative law judge further determined that the evidence of hypoxemia was not refuted by the lack of

[4]A "qualifying" pulmonary function study or blood gas study is one that produces values equal to or less than the values set forth in the tables appearing in Appendix B and Appendix C to 20 C.F.R. Part 718. A "nonqualifying" study is one that produces values in excess of the table values.

pulmonary function studies, the lack of cor pulmonale, or the medical opinions of Drs. Dahhan and Castle, who acknowledged the presence of the condition but contested its cause. Decision and Order on Remand at 12; Employer's Exhibit 2.

Employer alleges that the administrative law judge erred in finding total disability established under Section 718.204(c) based upon the blood gas study evidence alone, arguing that the administrative law judge should have determined that the opinions in which Drs. Castle and Dahhan attribute the miner's hypoxemia to congestive heart failure constituted contrary probative evidence sufficient to outweigh the blood gas studies. Employer's contention has merit. Although the administrative law judge rationally determined that total disability was established at Section 718.204(c)(2), he did not fully address whether the medical opinion evidence supported or contradicted this finding, as is required. *See Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987).

The record indicates that Dr. Berry recorded physical limitations in his report of his examination of the miner which, when compared to the exertional requirements of the miner's usual coal mine employment, may be relevant to the issue of total disability. Director's Exhibit 14; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). Moreover, Drs. Dahhan and Castle acknowledged that the miner had hypoxemia, but also indicated that inasmuch as it was caused by congestive heart failure, the miner did not actually have a respiratory or pulmonary impairment.[5] Employer's Exhibit 2; *see generally Casella v. Kaiser Steel Corp*., 9 BLR 1-131 (1986)(Where the record contains competent medical testimony that a miner's qualifying objective test scores may have been affected by a health condition not related to the type of disease or impairment which the objective test was designed to detect, the administrative law judge should address such evidence). On remand, the administrative law judge must consider the opinions of Drs. Berry, Dahhan, and Castle in their entirety and determine whether they constitute contrary probative evidence which outweighs the evidence supportive of a finding of total respiratory or pulmonary disability under Section 718.204(c)(2). *See Shedlock*, *supra*; *see also Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995). Thus, we vacate the administrative law judge's finding that total disability was demonstrated under Section 718.204(c) and the award of

[5]Drs. Dahhan and Castle also noted that the miner's hypoxemia was caused by fluid accumulation in the lungs which hindered the transmission of oxygen to the miner's blood. Employer's Exhibit 2.

benefits in the miner's claim and remand the case to the administrative law judge for reconsideration of whether the Section 718.305 presumption has been invoked.

Regarding rebuttal of the Section 718.305 presumption, employer maintains that the administrative law judge did not properly weigh either the x-ray evidence or the medical opinions of record in determining that employer failed to prove that the miner did not have pneumoconiosis. The administrative law judge determined that the x-ray evidence established neither the presence or absence of pneumoconiosis, as physicians qualified as B readers and Board-certified radiologists provided both positive and negative interpretations of four of the films of record. Decision and Order on Remand at 12. The administrative law judge noted that four other films were solely interpreted as negative, but still found the evidence as a whole inconclusive because these films were obtained "in-between the other x-rays, and the x-rays were taken over a 10 month period." *Id*. The administrative law judge also indicated that the poor quality of the x-ray films as a whole rendered them of little probative value. *Id*.

We affirm the administrative law judge's weighing of the x-ray evidence under Section 718.202(a)(1) as being within his discretion as fact-finder. The administrative law judge rationally determined that the x-ray evidence is qualitatively in equipoise, as dually qualified physicians were divided in their readings of several of the films of record and the films read solely as negative were not entitled to dispositive weight due to the chronology of the x-ray evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1988)(*en banc*). Contrary to employer's suggestion, the administrative law judge was not required to resolve the conflict in the x-ray interpretations by reference to the great numerical superiority of the negative readings. *See Adkins*, *supra*. As employer notes, an administrative law judge cannot discredit x-ray evidence on the ground that the films are of poor quality unless the administrative law judge explicitly concludes, based upon the opinion of a medical expert, that the films in question are not adequate for interpretation. *See Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). However, in the instant case, because the administrative law judge provided a valid alternative rationale for his finding, we need not vacate this finding. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).

Regarding the medical opinion evidence concerning the existence of pneumoconiosis, the administrative law judge discredited the opinions of Drs. Dahhan and Castle, both of whom found that the miner did not have the disease, on the ground that they considered only whether the miner had

clinical/radiological pneumoconiosis and did not address the presence of pneumoconiosis as defined in 20 C.F.R. §718.201. Decision and Order on Remand at 13. Employer asserts that the administrative law judge mischaracterized these opinions and erred in his consideration of the opinions of Drs. Berry and Caday. Employer's contentions have merit, as Drs. Dahhan and Castle specifically discussed whether the evidence of record as a whole supported the diagnosis of a respiratory or pulmonary impairment related to dust exposure in coal mine employment. Employer's Exhibit 2. In addition, as employer states, the administrative law judge did not explain his apparent determination that, in contrast to the conclusions expressed by Drs. Dahhan and Castle, Dr. Berry's diagnoses of chronic obstructive pulmonary disease (COPD), bronchitis, emphysema, and asthma related to dust exposure in coal mine employment are adequately reasoned. The basis of Dr. Berry's opinion is not apparent from the face of his report other than his reference to claimant's fifty year history of coal mine employment. Director's Exhibit 14. A history of coal mine employment does not constitute evidence of a coal dust related disease respiratory or pulmonary impairment, however. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Employer is also correct in asserting that the administrative law judge did not note the discrepancy between the length of coal mine employment recorded by Dr. Berry and the administrative law judge's finding on this issue. *See Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985).

Finally, the administrative law judge did not address the conflict between Dr. Caday's two sets of discharge diagnoses, dated approximately one month apart. Employer's Exhibit 1. Dr. Caday recorded the presence of COPD only in the first discharge summary, without identifying its cause, yet the administrative law judge found, without explanation, that this diagnosis corroborated Dr. Berry's opinion. Decision and Order on Remand at 13. The administrative law judge must reconsider Dr. Caday's opinion on remand and set forth the rationale for his findings. *See Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983).

In light of the foregoing, we vacate the administrative law judge's consideration of the medical opinion evidence relevant to the existence of pneumoconiosis under Section 718.202(a)(4) and remand the case to the administrative law judge for reconsideration of whether the evidence establishes that the miner did not have pneumoconiosis. In weighing the medical opinions of record, the administrative law judge should consider the factors which affect the reliability of each physician's report, including the physicians' respective

qualifications. *See Hicks*, *supra*; *Adkins*, *supra*. The administrative law judge should also consider the evidence relevant to the existence of pneumoconiosis 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).[6]

Concerning the administrative law judge's determination that employer failed to rebut the Section 718.305 presumption by proving that the miner's total disability was not related to pneumoconiosis, the administrative law judge relied upon his weighing of the medical opinions of record under Section 718.202(a)(4). Inasmuch as we have vacated those findings, we also vacate the administrative law judge findings with respect to the cause of the miner's alleged total disability. On remand, the administrative law judge must reconsider this issue in light of his findings with respect to the medical opinions of record.

Lastly, inasmuch as the award of benefits in the survivor's claim was premised upon the award of benefits in the miner's claim, which has been vacated, we must also vacate this aspect of the administrative law judge's Decision and Order on Remand.

In summary, we affirm the administrative law judge's finding of more than fifteen years of underground coal mine employment, but vacate the administrative law judge's finding that invocation of the presumption set forth in Section 718.305(a) was established pursuant to Section 718.204(c) and his finding that the presumption was not rebutted and remand the case to the administrative law judge for reconsideration of these issues. If the administrative law judge determines on remand that claimant has not established invocation of the Section 718.305 presumption, he must consider whether the existence of pneumoconiosis arising out of coal mine employment and total disability due to

[6]In *Island Creek Coal Co. v. Compton*, F.3d , 2000 WL 524798 (4th Cir. May 2, 2000), the Fourth Circuit recognized that 20 C.F.R. §718.202(a)(1)-(4) provides alternative methods for establishing the existence of pneumoconiosis, but held that in determining whether the evidence is sufficient to support a finding of pneumoconiosis, all relevant evidence must be weighed together.

pneumoconiosis have been proven under Sections 718.202, 718.203, and 718.204. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). If the administrative law judge determines that entitlement has been established in the miner's claim, claimant is automatically entitled to derivative survivor's benefits. 30 U.S.C. §932(l); *see Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988). If, however, the administrative law judge denies benefits on the miner's claim, he must reconsider claimant's entitlement to survivor's benefits under 20 C.F.R. §718.205(c) in accordance with the Fourth Circuit's decision in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge