BRB No. 06-0654 BLA

JUNIOR SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DONNA KAYE COAL COMPANY	)	DATE ISSUED: 05/31/2007
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (04-BLA-6267) of Administrative Law Judge Daniel F. Solomon denying benefits on a subsequent 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 credited

[1] Claimant filed his first claim on August 21, 1990. Director's Exhibit 1. On June 26, 1992, Administrative Law Judge Donald B. Jarvis issued a Decision and Order denying benefits on the grounds that claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. The Board affirmed Judge Jarvis's denial of benefits. *Sizemore v. Donna Kay Coal Co.*, BRB No. 92-2267 BLA (Apr. 26,

claimant with at least twenty years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 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. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

1994)(unpub.). Claimant filed his most recent claim on December 31, 2002. Director's Exhibit 3.

[2] Because the administrative law judge's length of coal mine employment finding and his findings that the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) on the merits are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Failure 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)(*en banc*).

Claimant initially contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Although he found the x-ray evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4). The administrative law judge further found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) overall. The administrative law judge specifically stated:

> While [c]laimant has established the existence of pneumoconiosis pursuant to the x-ray evidence, I find the biopsy evidence to be more probative. In this respect, I find the report of Dr. Bella, the pathologist to be more persuasive than that of Dr. Alam, further noting that [e]mployer did not have an opportunity to submit rebuttal to the findings of Dr. Alam. Based upon the report of Dr. Bella, as well as the medical opinion evidence and the negative CT scan readings, I find that the weight of the medical evidence leads to a finding that [c]laimant does not suffer from pneumoconiosis, despite the positive x-ray findings. *See Mabe v. Bishop Coal Co*., 9 BLR 1-67 (1986).

Decision and Order at 16.

The United States Courts of Appeals for the Fourth and Third Circuits have held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether the evidence is sufficient to establish the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). However, jurisdiction of this case arises within the United States Court of Appeals for the Sixth Circuit because claimant's most recent coal mine work occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The Board has declined to apply the holdings of *Compton* and *Williams* to cases outside of the jurisdiction of the Third and Fourth Circuits. *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216 (2002). Thus, because Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985), we hold that the administrative law judge erred in weighing together the x-ray, biopsy, CT scan and medical opinion evidence at 20 C.F.R. §718.202(a)(1)-(4). Further, because we affirm the administrative law judge's unchallenged finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), *Skrack v. Island*

Creek Coal Co., 6 BLR 1-710 (1983), we reverse the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), *Dixon*, 8 BLR at 1-345.

Claimant next contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Specifically, claimant asserts that the opinions of Drs. Alam and Baker are sufficient to satisfy the causation standard at Section 718.204(c)(1). Before he explicitly addressed whether the medical evidence established total disability due to pneumoconiosis, the administrative law judge noted that he found that the CT scan readings, the biopsy findings of Dr. Bella, and the medical opinions of Drs. Robinson and Dahhan outweighed the x-ray readings, and the opinions of Drs. Alam and Baker with regard to the issue of pneumoconiosis. Then the administrative law judge stated, "[f]or the reasons set forth above, I find the medical evidence insufficient to establish that pneumoconiosis is a substantially contributing factor in the [c]laimant's disabling respiratory impairment." Decision and Order at 18. However, as discussed *supra*, we reverse the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Thus, because the administrative law judge's weighing of the evidence of causation was affected by his weighing together of all the evidence of pneumoconiosis at Section 718.202(a), we vacate the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence thereunder.

Further, on remand, the administrative law judge must consider all of the relevant evidence of causation.[3] *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984).

[3] Although he considered the opinions of Drs. Alam and Baker with regard to the issue of pneumoconiosis, the administrative law judge failed to explicitly consider their opinions with regard to the issue of total disability due to pneumoconiosis. Decision and Order at 17-18. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984).

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

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting in part and concurring in part:

I respectfully dissent from the majority's decision to reverse the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Despite the administrative law judge's finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2)-(4), the majority holds that the administrative law judge's unchallenged finding that the x-ray evidence established pneumoconiosis at Section 718.202(a)(1) is sufficient to establish the element of pneumoconiosis under 20 C.F.R. Part 718. The majority correctly states that Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in applying Section 718.202(a), the administrative law judge is not required to mechanically proceed by separately considering evidence of the type set forth under each method (i.e., x-rays, biopsy/autopsy, physician opinion) in isolation, without regard to any other relevant evidence.[4] Indeed, to do so would

[4] The regulation permits an administrative law judge to find that pneumoconiosis exists when there are one or more pieces of specific types of evidence which meet the regulatory quality standards. ("(1) A chest X-ray conducted and classified in accordance with §718.102 *may* form the basis for a finding of the existence of pneumoconiosis . . . . (2) A biopsy or autopsy conducted and reported in compliance with §718.106 *may* be the

contravene the statutory requirement that "all relevant evidence shall be considered" in determining the validity of claims for black lung benefits. 42 U.S.C. §923(b); *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-9 (6th Cir. 1999). In this case, the administrative law judge first considered the x-ray evidence in isolation, stating "[b]ased upon the fact that a dually qualified physician found the two more recent x-rays to be positive for pneumoconiosis, I find that the existence of pneumoconiosis has been established pursuant to 20 C.F.R. 718.202(a)(1)." Decision and Order at 14. After reviewing the other types of evidence, each within its own category, he stated, "While Claimant has established the existence of pneumoconiosis pursuant to the x-ray evidence, I find the biopsy evidence to be more probative. . . . I find that the weight of the medical evidence leads to a finding that Claimant does not suffer from pneumoconiosis, despite the positive x-ray findings." Decision and Order at 16. From the foregoing, it is unclear that the administrative law judge actually found that claimant established the existence of pneumoconiosis. Contrary to the majority's opinion, the administrative law judge should be able to consider all relevant evidence, including the negative biopsy evidence, in determining whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). I therefore would vacate the administrative law judge's findings with respect to the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and remand the case for further consideration of the evidence. It is within the administrative law judge's discretion, as the trier-of-fact, to assess the evidence of record and draw his own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

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basis for a finding of the existence of pneumoconiosis . . . . (4) A determination of the existence of pneumoconiosis *may* also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. . . ." 20 C.F.R. §718.202(a)(1)-(4) (emphasis supplied). It is the responsibility of the administrative law judge to determine whether the evidence is of sufficient weight to meet the claimant's burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

I concur with the majority's determination that the administrative law judge's weighing of the evidence of disability causation at 20 C.F.R. §718.204(c) was affected by his weighing together of all the evidence of pneumoconiosis at 20 C.F.R. §718.202(a). Thus, I would vacate the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for reconsideration of the evidence thereunder.

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JUDITH S. BOGGS
Administrative Appeals Judge