BRB No. 08-0663 BLA

W. H. (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 05/22/2009
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order Denying Benefits (06-BLA-6112) of Administrative Law Judge Larry W. Price (the administrative law judge) rendered 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). This case involves a claim filed on September 6, 2005. The administrative law judge credited claimant with forty-two years of coal mine employment[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his consideration of the x-ray evidence. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response in this appeal.

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).

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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

There are four methods by which claimant may establish the existence of pneumoconiosis under the regulations: (1) a chest x-ray conducted and classified in accordance with 20 C.F.R. §718.102; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) by application of one of the presumptions

[1] By letter dated November 20, 2007, counsel for claimant notified the Department of Labor that claimant passed away on October 4, 2006. His claim is being pursued by his son.

[2] The record reflects that claimant was last employed in the coal mining industry in West Virginia. Director's Exhibit 4. Consequently, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

described in 20 C.F.R. §§718.304, 718.305 or 718.306; or (4) by a physician's reasoned medical opinion, notwithstanding a negative x-ray, that the miner had pneumoconiosis. *See* 20 C.F.R. § 718.202(a)(1)-(4). The United States Court of Appeals for the Fourth Circuit has held that although Section 718.202(a) provides four distinct methods of establishing the existence of pneumoconiosis, all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

Relevant to 20 C.F.R. §718.202(a)(1), the record contains seven readings of two x-rays. The December 14, 2005 x-ray was read as positive for pneumoconiosis by Dr. Forehand, a B reader, and by Drs. Miller and Ahmed, both Board-certified radiologists and B readers. Director's Exhibit 11, Claimant's Exhibits 1, 2. This x-ray was also read as negative for pneumoconiosis by Drs. Abramowitz and Gogineni, both of whom are Board-certified radiologists and B readers. Employer's Exhibits 1, 2. The April 5, 2006 x-ray was read as negative for pneumoconiosis by Dr. Castle, a B reader, and as positive for pneumoconiosis by Dr. Miller, a dually-qualified physician. Claimant's Exhibit 3; Employer's Exhibit 3.

Considering this evidence, the administrative law judge found the December 14, 2005 x-ray to be positive for pneumoconiosis, and the April 5, 2006 x-ray to be negative for pneumoconiosis. In so finding, the administrative law judge mischaracterized Dr. Abramowitz's negative interpretation of the December 14, 2005 x-ray as an interpretation of the April 5, 2006 x-ray. The administrative law judge therefore determined that the December 14, 2005 x-ray was interpreted as positive by two dually-qualified physicians and one B reader, and as negative by one dually-qualified physician. Giving greater weight to the three positive readings over the one negative reading, the administrative law judge found that the December 14, 2005 x-ray was positive for pneumoconiosis. Decision and Order at 9.

Further, because the administrative law judge included Dr. Abramowitz's x-ray reading with the April 5, 2006 x-ray readings, the administrative law judge determined that this x-ray was interpreted as positive by a dually qualified physician, and as negative by both a B reader, and a dually qualified physician. Giving greater weight to the two negative readings over the one positive reading, the administrative law judge found that the April 5, 2006 x-ray was negative for pneumoconiosis.

Weighing the two x-rays together, the administrative law judge determined that the preponderance of the evidence did not support a finding of pneumoconiosis, in view of the progressive nature of pneumoconiosis. The administrative law judge stated:

> Taken as a whole, there is one positive and one negative film. In readings by dually certified physicians, there are three positive and two negative

> readings. I note the most recent film is negative for pneumoconiosis. As pneumoconiosis is a progressive and irreversible disease, the Miner should not be able to improve from an earlier film. Taking into account the number of positive and negative films, and the qualifications of the interpreting physicians, I find that [the] x-ray evidence is inconclusive for the presence or absence of pneumoconiosis. The preponderance of [the] x-ray evidence does not support the existence of pneumoconiosis under §718.202(a)(1).

Decision and Order at 10.

Claimant contends that the administrative law judge "mechanically deferr[ed] to the Later Evidence Rule" to find that the weight of the x-ray evidence does not support a finding of pneumoconiosis. Claimant's Brief at 8. We agree.

To the extent that the administrative law judge used the progressive nature of pneumoconiosis to give more weight to the more recent, April 5, 2006 negative x-ray, or to discount the earlier positive x-ray, he misapplied the later evidence rule. The "later evidence is better" theory is inappropriate where the evidence taken at face value shows that the miner has improved, as it is impossible to reconcile the evidence with the progressive nature of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-65 (4th Cir. 1992). Consequently, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), and remand this case for further consideration.

In weighing the x-ray evidence on remand, the administrative law judge must reconsider whether the December 14, 2006 and April 5, 2006 x-rays are positive or negative for pneumoconiosis. In so doing, the administrative law judge must properly characterize Dr. Abramowitz's negative x-ray interpretation as a reading of the December 14, 2005 x-ray. Further, if the administrative law judge again determines that the most recent x-ray evidence is negative for pneumoconiosis, the administrative law judge cannot rely upon the "later evidence rule" when weighing the x-ray evidence together as a whole. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-65.

Further, because the administrative law judge's findings as to the credibility of the medical opinions at 20 C.F.R. §718.202(a)(4) are based, in part, on his finding at 20 C.F.R. §718.202(a)(1), that the x-ray evidence was inconclusive, which we have vacated, we must also vacate his findings at 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must reconsider whether the medical opinion evidence supports a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge must then weigh all of the relevant evidence together pursuant to 20 C.F.R.

§718.202(a), before determining whether the evidence establishes the existence of pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174.

If reached, on remand, the administrative law judge must consider whether claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

I concur:

_____
BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

_____
REGINA C. McGRANERY
Administrative Appeals Judge