BRB No. 08-0702 BLA

M.L.B. (Widow of E.B.) Claimant-Petitioner v. PITTSBURG & MIDWAY COAL MINING Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/27/2009 DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

M.L.B., Dawson Springs, Kentucky, *pro se*.

John C. Morton (Morton Law Offices), Henderson, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (06-BLA-5678) of Administrative Law Judge Thomas F. Phalen, Jr., 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). This case involves a survivor's claim filed on June 13, 2005.[1] After crediting the miner with at least thirty-

[1] The miner filed a claim on February 25, 1981. By letter dated February 25, 1983, the district director advised the parties that the claim had been deemed abandoned.

three years of coal mine employment,[2] the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

Benefits are payable on survivors' claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 CF.R §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Pneumoconiosis

Section 718.202(a)(1)

The administrative law judge recognized that the only x-ray interpretations of record are contained in the miner's hospitalization and treatment records. These x-ray interpretations include Dr. Hatfield's interpretation of a June 20, 1983 x-ray. Dr. Hatfield

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Id. There is no indication that the miner took any further action in regard to his 1981 claim.

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

interpreted the x-ray as "Pneumoconiosis, Category 1 q."[3] Claimant's Exhibit 2.

In considering the x-ray interpretations, the administrative law judge stated:

> This treatment record includes several x-ray interpretations. There is no evidence in the record as to the x-ray reading credentials of the providing physicians. Also, these interpretations were related to the treatment of [the] [m]iner's condition, and not taken for the purpose of determining the existence of pneumoconiosis. Finally, there is no record of the film quality for any of these x-rays. As a result, the treatment x-ray results are not in compliance with the quality standards of §718.102 and Appendix A to Part 718, and will not be considered under §718.202(a)(1).

Decision and Order at 5 n.6.

Because the quality standards apply only to evidence developed in connection with a claim for benefits, they are inapplicable to hospitalization and treatment records. *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008); *see* 20 C.F.R. 718.101(b); 64 Fed. Reg. 54966, 54975 (Oct. 8, 1999); 65 Fed. Reg. 79928 (Dec. 20, 2000). Consequently, the administrative law judge erred in applying the quality standards to exclude consideration of the hospitalization and treatment x-ray evidence in this case.

Although the quality standards are inapplicable, an administrative law judge "still must be persuaded that the evidence is reliable in order for it to form a basis for a finding of fact on an entitlement issue." 65 Fed. Reg. 79928 (Dec. 20, 2000). In this case, the administrative law judge noted that the credentials of the x-ray readers are not found in the record and the x-ray interpretations of record were "not taken for the purpose of determining the existence of pneumoconiosis." Decision and Order at 5 n.6. However, in regard to Dr. Hatfield's x-ray report, the doctor is identified as a "radiologist" and he explicitly interpreted the June 20, 1983 x-ray as "Pneumoconiosis, Category 1 q."[4]

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[3] Dr. Taylor also reviewed the miner's June 20, 1983 x-ray and opined that it supported a finding of pneumoconiosis. Claimant's Exhibit 1 at 10-11.

[4] We note this classification is in accordance with the requirements of the ILO-UC system, as mandated by 20 C.F.R. §718.102(b). The doctor reported not only the category (1) as required by the regulation, but his notation of "q" indicated that the size of the small opacities was between 1.5 and 3 mm. in diameter. Int'l Labour Office, *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses* 6 (1980).

Claimant's Exhibit 2. Because the administrative law judge has not adequately addressed and explained whether Dr. Hatfield's x-ray interpretation is reliable, we vacate his finding pursuant to 20 C.F.R. §718.202(a)(1) and remand the case for further consideration. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). On remand, the administrative law judge should address whether Dr. Hatfield's positive interpretation of the miner's June 20, 1983 x-ray is reliable, and weigh it against the other x-ray evidence of record pursuant to 20 C.F.R. §718.202(a)(1).[5]

Section 718.202(a)(2), (3)

Because the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 12. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[6] *Id.*

Section 718.202(a)(4)

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[7] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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[5] Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Consequently, on remand, should the administrative law judge find that the x-ray evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), this is sufficient to satisfy claimant's burden to establish the existence of pneumoconiosis.

[6] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this survivor's claim was not filed prior to June 30, 1982, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Dr. Taylor, the miner's treating physician,[8] completed a questionnaire on June 13, 2005, wherein he diagnosed clinical pneumoconiosis. Director's Exhibit 22. During an August 22, 2006 deposition, Dr. Taylor reiterated his diagnosis of clinical pneumoconiosis. Claimant's Exhibit 1 at 10-11. The administrative law judge discredited Dr. Taylor's diagnosis of clinical pneumoconiosis because he found that it was merely a restatement of Dr. Hatfield's x-ray interpretation. Decision and Order at 13. However, contrary to the administrative law judge's characterization, Dr. Taylor explained that his diagnosis of clinical pneumoconiosis was based, not only on Dr. Hatfield's positive x-ray interpretation, but also on the miner's history and the results of his physical examination. Claimant's Exhibit 1 at 11. Because the administrative law judge mischaracterized Dr. Taylor's opinion, we vacate his finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Dr. Taylor also opined that the miner suffered from chronic obstructive pulmonary disease, asthma, and bronchitis, all of which were aggravated by his coal mine dust exposure. Director's Exhibit 22; Claimant's Exhibit 1 at 21. These diagnoses, if credited, support a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b). Although the administrative law judge acknowledged Dr. Taylor's status as the miner's treating physician, the administrative law judge found that Dr. Taylor offered no explanation for attributing the miner's chronic obstructive pulmonary disease, asthma, and bronchitis to his coal mine dust exposure. Decision and Order at 14; *see* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge, therefore, found that Dr. Taylor's opinion was insufficiently reasoned to support a finding of legal pneumoconiosis. *Id.* Substantial evidence supports this permissible finding. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Because there is no other medical opinion evidence supportive of a finding of legal pneumoconiosis,[9] we

[8] The record indicates that Dr. Taylor treated the miner from January of 1980 until May of 2005. Claimant's Exhibit 1 at 6.

[9] Dr. Selby reviewed the medical evidence of record. In a report dated December 12, 2005, Dr. Selby opined that the miner did not suffer from coal workers' pneumoconiosis or any respiratory or pulmonary defect or condition due to his coal mine dust exposure. Employer's Exhibit 1. The administrative law judge found that Dr. Selby provided no support for his opinion that claimant's chronic obstructive pulmonary disease was not attributable to his coal mine dust exposure. Decision and Order at 14-15. The administrative law judge, therefore, permissibly found that Dr. Selby's opinion was not well-reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

On remand, should the administrative law judge find that the evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) or (a)(4), he must address whether the evidence establishes that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and whether the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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 consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge