BRB No. 09-0728 BLA

JOHN MARCHINES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	DATE ISSUED: 05/27/2010
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

John Marchines, Lakeland, Florida, *pro se*.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (07-BLA-5512) of Administrative Law Judge Stuart A. Levin denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed his claim before January 1, 2005. Director's Exhibit 2.

claimant with twelve years and eleven months of coal mine employment[2] and adjudicated this claim, filed on April 5, 2002, pursuant to 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), but did not establish the existence of pneumoconiosis, or total disability due to pneumoconiosis, under 20 C.F.R §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's finding that claimant failed to establish clinical pneumoconiosis by x-ray evidence under 20 C.F.R. §718.202(a)(1). However, the Director requests that the denial of benefits be vacated and the case be remanded for him to satisfy his statutory obligation to provide claimant with a complete pulmonary evaluation.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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 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 under Part 718 in a living miner's claim, 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).

In evaluating the x-ray evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered four interpretations of

[2] The record indicates that claimant's last coal mine employment was in Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Director's Brief at 5.

two x-rays. Dr. McDonald, a physician with no radiological credentials, interpreted an August 13, 2002 x-ray as positive for pneumoconiosis, while Dr. Barrett, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis.[4] Director's Exhibits 9, 10. Both Dr. Rao, a physician with no radiological qualifications, and Dr. Barrett interpreted a January 18, 2007 x-ray as negative for pneumoconiosis. Director's Exhibit 28. Considering both the quantity and the quality of the x-ray readings of record, the administrative law judge permissibly concluded that the preponderance of the negative x-ray interpretations, including those by the more highly qualified readers, outweighed Dr. McDonald's sole positive x-ray interpretation. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). Thus, the administrative law judge rationally concluded that the preponderance of x-ray evidence is negative for pneumoconiosis at 20 C.F.R. §718.202(a)(1).[5] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998). We therefore affirm his finding.

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge correctly found that the record contains no biopsy evidence. The administrative law judge also properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[6] Decision and Order at 6. Consequently, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (3).

[4] Dr. Goldstein interpreted the August 13, 2002 x-ray for quality purposes only. Director's Exhibit 9.

[5] The administrative law judge mistakenly observed that Dr. Goldstein interpreted claimant's August 13, 2002 x-ray as negative. The administrative law judge's error is harmless, however, given the administrative law judge's permissible reliance on the preponderance of negative x-ray readings, two of which were by Dr. Barrett, a Board-certified radiologist and B reader. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[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 claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered whether the opinions of Drs. McDonald,[7] Rahim,[8] and Rao[9] establish the existence of clinical[10] or legal pneumoconiosis.[11] The administrative law judge found that Dr. Rao's opinion, that claimant does not have pneumoconiosis but suffers from chronic obstructive pulmonary disease due entirely to smoking, was "marred" in part by Dr. Rao's reliance on an incorrect smoking history, finding:

> . . . Claimant testified that the 10-year, half-pack per day smoking history Dr. Rao relied upon overstated by one-half to two thirds his actual smoking history which Claimant credibly testified was only 3 to 4 cigarettes per day for ten years.

Decision and Order at 7. The administrative law judge concluded that, therefore, Dr. Rao's opinion was entitled to diminished evidentiary weight at 20 C.F.R. §718.202(a)(4).

The Director contends that he failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation under Section 413(b) by virtue of Dr. Rao's opinion. Specifically, the Director states that because Dr. Rao relied on both an

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[7] Dr. McDonald diagnosed simple pneumoconiosis based on her interpretation of the August 13, 2002 x-ray. Director's Exhibit 9. Dr. McDonald also diagnosed "mild obstruction [and] decreased diffusing capacity in pulm[onary] function test with interstitial lung disease" and stated that further evaluation was necessary "but certainly occupational exposure [is a] possible [etiology]." Director's Exhibit 9 at 4.

[8] Dr. Rahim diagnosed mild chronic obstructive pulmonary disease (COPD) and coal workers' pneumoconiosis. Director's Exhibit 23. Dr. Rahim did not state the basis for his diagnosis of coal workers' pneumoconiosis, nor provide an opinion as to the etiology of claimant's COPD.

[9] Dr. Rao, who examined claimant on behalf of the Department of Labor (DOL), stated that claimant's January 18, 2007 x-ray was completely negative for pneumoconiosis. Dr. Rao diagnosed moderate COPD, due to cigarette smoking. Director's Exhibit 28.

[10] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses. 20 C.F.R. §718.201(a)(1).

[11] "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).

exaggerated smoking history and an understated coal mine employment history,[12] his evaluation of the miner was incomplete. Director's Brief at 4. Therefore, the Director requests that the Board remand this case for the Director to satisfy his obligation under 30 U.S.C. §923(b) of the Act.[13] *Id*. at 5.

Because the Director concedes that he has not satisfied his statutory obligation, we remand this case to the district director to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994). Consequently, we vacate the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(c), and the denial of benefits. *See Hodges*, 18 BLR at 1-89-90. On remand, the administrative law judge must reconsider the medical opinion evidence in conjunction with Dr. Rao's supplemental report, and determine whether claimant has established the existence of pneumoconiosis by a preponderance of evidence pursuant to 20 C.F.R. §718.202(a)(4). Following his determinations pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should then weigh together all relevant evidence to determine whether claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; *see also Consolidation Coal Co. v. Held*, 314 F.3d 184, 187 n.2, 22 BLR 2-564, 2-571 n.2 (4th Cir. 2002). Further, if reached on remand, the administrative law judge must address whether claimant has established that his totally disabling pulmonary impairment is due to pneumoconiosis under 20 C.F.R. §718.204(c).

[12] Dr. Rao assumed ten years of coal mine employment and a smoking history of one-half pack of cigarettes per day for ten years. Director's Exhibit 28. However, the administrative law judge found that claimant had twelve years and eleven months of coal mine employment, and he credited claimant's testimony that he smoked only three-to-four cigarettes per day for ten years. Decision and Order at 7. The administrative law judge also credited claimant's testimony that he told Dr. Rao's secretary that he smoked three-to-four cigarettes a day for ten years, but that the secretary inaccurately recorded that he smoked half a pack per day. Decision and Order at 7; Hearing Transcript at 15.

[13] The Director, Office of Workers' Compensation Programs, states that on remand, Dr. Rao should be allowed to "reconsider his diagnosis with respect to the etiology of claimant's totally disabling respiratory impairment, taking into consideration the correct duration of claimant's smoking and coal mine employment histories." Director's Brief at 5.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded to the district director for a complete pulmonary evaluation to be provided to claimant and for reconsideration of his claim in light of the new evidence.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge