BRB No. 11-0628 BLA

MARY BELLE KENNEDA (o/b/o FRANKLIN D.R. CLINE)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK MINING COMPANY	)	
and	)	
	)	DATE ISSUED: 05/30/2012
ISLAND CREEK COAL COMPANY	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2009-BLA-5770) of Administrative Law Judge Thomas M. Burke rendered on a subsequent claim filed on April 26, 2006, 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).[2] The administrative law judge credited the miner with seven and one-quarter years of coal mine employment[3] and adjudicated the claim pursuant to 20 C.F.R. Part 718.[4] The administrative law judge found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant did not establish that the miner suffered from 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 weighing the x-ray evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Employer/carrier (employer) responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a response brief.[5]

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[1] Claimant is the daughter of the miner, who died on February 28, 2009. Hearing Tr. at 12-13; Director's Exhibit 77. Claimant is pursuing the claim on behalf of the miner's estate. Hearing Tr. at 12-13.

[2] The miner filed his first claim for benefits on February 1, 1980. Director's Exhibit 1. The district director denied the claim on December 18, 1980, finding that the evidence established the existence of pneumoconiosis, arising out of coal mine employment, but did not establish the existence of a totally disabling pulmonary or respiratory impairment. *Id.* The miner took no further action until he filed the current subsequent claim. Director's Exhibit 3.

[3] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. 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, 1-202 (1989)(en banc).

[4] Because the miner was credited with less than fifteen years of qualifying coal mine employment, a recent amendment to the Act does not affect this case. *See* Pub. L. No. 111-148, §1556(a), (c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[5] We affirm, as unchallenged on appeal, the administrative law judge's determinations that the miner had seven and one-quarter years of coal mine employment,

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 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 20 C.F.R. Part 718 in a miner's claim, a 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).

At 20 C.F.R. §718.202(a)(1), the administrative law judge considered eight interpretations of three x-rays. Dr. Gale, a Board-certified radiologist and B reader, interpreted a July 14, 1980 x-ray as positive for pneumoconiosis. Director's Exhibit 1. Dr. Alexander, a Board-certified radiologist and B reader, and Dr. Ranavaya, a B reader, interpreted a July 12, 2006 x-ray as positive for pneumoconiosis. Director's Exhibits 13, 16. Dr. Wiot, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 33. Dr. Miller, a Board-certified radiologist and B reader, and Dr. Alexander, interpreted a March 14, 2007 x-ray as positive for pneumoconiosis, while Dr. Meyer, a Board-certified radiologist and B reader, and Dr. Zaldivar, a B reader, interpreted the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Director's Exhibits 25, 26, 29.

The administrative law judge initially found the July 14, 1980 x-ray interpretation to be less probative than the readings of the 2006 and 2007 x-rays, due to its age. Decision and Order at 12. The administrative law judge then found that the remaining x-ray evidence did not establish the existence of pneumoconiosis:

> As these two x-rays were taken less than a year apart, the readings are analyzed collectively. Overall, the readings are evenly split between positive and negative x-ray readings based on the qualifications of the physicians. Drs. Ranavaya, Alexander, and Miller set forth positive

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and that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

> readings; whereas, Drs. Zaldivar, Meyer, and Wiot set forth negative readings. Thus, the x-ray evidence is in equipoise and fails to prove the existence of pneumoconiosis.

Decision and Order at 12.

Claimant initially asserts that the administrative law judge mechanically applied the most recent evidence rule to find the 1980 positive x-ray reading less reliable than the readings of the 2006 and 2007 x-rays. Claimant's Brief at 10. Citing *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), claimant contends that, given the progressive nature of pneumoconiosis, it is rational for an administrative law judge to credit more recent evidence only if it shows that the miner's condition has progressed or worsened. Claimant's Brief at 10. We disagree. Here, the administrative law judge specifically considered that pneumoconiosis can be progressive, but permissibly concluded that the more recent medical evidence, as a whole, which includes both positive and negative x-ray readings, is of greater probative value than the x-ray reading submitted with the prior claim, more than twenty-five years earlier. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004)(en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004)(en banc); Decision and Order at 12; Claimant's Brief at 10.

Claimant next argues that the administrative law judge erred in his evaluation of the remaining x-ray evidence. Specifically, citing *Adkins*, claimant contends that, in weighing the 2006 and 2007 x-ray evidence, the administrative law judge merely counted the physicians who read the x-rays, when he instead should have addressed whether each individual x-ray was positive, negative, or in equipoise for the existence of pneumoconiosis, before weighing the x-ray evidence as a whole. Claimant's Brief at 11. Claimant also contends that the administrative law judge failed to weigh Dr. Subramaniam's positive interpretation of an October 24, 2000 x-ray together with the readings of the 2006 and 2007 x-rays. Claimant's Brief at 9-10; Director's Exhibit 38. Claimant's arguments have merit.

As claimant asserts, the administrative law judge erred in failing to weigh the conflicting interpretations of each individual x-ray at 20 C.F.R. §718.202(a)(1), in order to determine whether the x-ray was positive or negative for pneumoconiosis, before weighing the x-ray evidence as a whole. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148-149, 11 BLR 2-1, 2-8 (1987). Additionally, the United States Court of Appeals for the Fourth Circuit has expressed its disapproval of "counting heads," as the administrative law judge did here, to resolve conflicting evidence. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66 (stating that "counting heads" is a "hollow" way to resolve conflicts in the evidence); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990).

Moreover, the Board has recognized that, in evaluating the x-ray evidence, an administrative law judge should focus on the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). In this case, in finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge focused exclusively on the number of qualified readers who read the x-rays as positive or negative for the disease.[6]

In addition, as claimant contends, and employer concedes, the administrative law judge noted that the miner's treatment notes contain a reading of an October 24, 2000 x-ray by Dr. Subramaniam, a Board-certified radiologist, classified as positive for pneumoconiosis, "p/s, 1/1," but the administrative law judge did not discuss this reading, when weighing the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 5, 12; Claimant's Brief at 9; Employer's Brief at 8; Director's Exhibit 43. Contrary to employer's argument, the fact that this x-ray reading is contained in a treatment record does not obviate the need to weigh it with the other x-rays. *See* 20 C.F.R. §§725.414(a)(4), 718.102(b); Employer's Brief at 8. Thus, the administrative law judge's analysis of the x-ray evidence fails to comply with the requirement that all relevant evidence be considered. 30 U.S.C. §923(b).

Consequently, we vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(1), and remand this case for further consideration of the x-ray evidence. Further, as the administrative law judge weighed the medical opinion evidence regarding the existence of pneumoconiosis in light of his findings as to the x-ray evidence, we also vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge should determine whether each x-ray film is positive, negative, or inconclusive for pneumoconiosis, in weighing the x-ray evidence as to the existence of the disease, pursuant to 20 C.F.R. §718.202(a)(1). The administrative law

[6] In concluding that the positive and negative x-ray readings are "evenly split," the administrative law judge found that three qualified readers read the 2006 and 2007 x-rays as positive, and three qualified readers read the x-rays as negative. Decision and Order at 12. Analysis of the two individual x-rays reveals, however, that the 2006 x-ray was read as positive by one reader who is dually qualified as a Board-certified radiologist and B reader, and by one B reader, and was read as negative by one dually qualified reader. Decision and Order at 4; Director's Exhibits 13, 16, 33. The 2007 x-ray was read as positive by two dually qualified readers, and was read as negative by one dually qualified reader, and by one B reader. Decision and Order at 4; Claimant's Exhibit 1; Director's Exhibits 35, 36, 39. Therefore, contrary to the administrative law judge's analysis, the positive and negative readings of the individual x-rays are not evenly divided.

judge must reevaluate the medical opinion evidence, pursuant to 20 C.F.R. §718.204(a)(4), in light of his x-ray findings. *See Mullins*, 484 U.S. at 148-149, 11 BLR at 2-8; *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge must then determine whether all of the relevant evidence, when weighed together, establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000). If the administrative law judge finds the existence of pneumoconiosis established, he should then consider whether claimant has established that the miner's pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(c), and whether the miner's total disability 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 affirmed in part, and vacated in part, and the case is remanded 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