BRB No. 98-0409 BLA

NORMAN VANCE)
)
Claimant-Petitioner)
)
v.) DATE ISSUED:
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of James Guill, Administrative Law Judge, United States Department of Labor.

Norman Vance, Davin, West Virginia, *pro se*.

Gary K. Stearman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand (87-BLA-2576) of Administrative Law Judge James Guill 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 involving a 1971 claim is before the Board for the second time. In the initial decision, the administrative law judge credited claimant with eight years and three and one-half months of coal mine employment. Having determined that claimant established less than ten years of coal mine employment, the administrative law judge found that

claimant was not entitled to have his claim considered under 20 C.F.R. Part 727. The administrative law judge, therefore, considered entitlement under 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D. The administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i). The administrative law judge, however, found that claimant failed to establish that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §§410.490(b)(2) and 410.416(b). The administrative law judge, therefore, found that claimant was not entitled to benefits under 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D. Accordingly, the administrative law judge denied benefits. By Decision and Order dated March 14, 1996, the Board held that although the administrative law judge erred in failing to credit claimant with an additional two quarters of coal mine employment, the administrative law judge's error was harmless since the additional two quarters of coal mine employment would not result in claimant establishing ten years of coal mine employment. *Vance v. Director, OWCP,* BRB No. 95-0406 BLA (Mar. 14, 1996) (unpublished). The Board, however, noted that the administrative law judge, in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis, did not address Dr. Greene's negative interpretation of claimant's August 26, 1992 x-ray. The Board, therefore, remanded the case to the administrative law judge to determine whether Dr. Greene's negative interpretation of claimant's August 26, 1992 x-ray should be admitted into evidence. *Id.* In the event that the administrative law judge, on remand, admitted this x-ray interpretation into evidence, the Board further instructed the administrative law judge to address whether it was barred by the Section 413(b) rereading prohibition.[1] *Id.*

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[1]In all claims filed before January 1, 1982, Section 413(b) of the Act, 30 U.S.C. §923(b), prohibits the Director, Office of Workers' Compensation Programs, from having certain x-rays reread except for purposes of determining quality. *See Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981).

The Board also affirmed the administrative law judge's finding that claimant failed to establish that his pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §§410.490(b)(2) and 410.416(b). *Vance v. Director, OWCP,* BRB No. 95-0406 BLA (Mar. 14, 1996) (unpublished). However, because the evidence of record did not address whether claimant's pneumoconiosis arose out of his coal mine employment, the Board agreed with the Director, Office of Workers' Compensation Programs (the Director), that the Department of Labor had failed to fulfill its statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. *Id.* However, the Board recognized that if the administrative law judge, on remand, found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, there was no need for further development of the evidence. *Id.* However, in the event that the administrative law judge, on remand, found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the Board instructed the administrative law judge to remand the case to the district director for further development of the evidence.[2] *Id.*

On remand, the administrative law judge acknowledged that his failure to admit and consider Dr. Greene's negative interpretation of claimant's August 26, 1992 x-ray was an oversight. The administrative law judge further found that Dr. Greene's x-ray interpretation was not barred by the Section 413 rereading prohibition. Upon consideration of all of the x-ray evidence of record, including Dr. Greene's interpretation, the administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§410.490(b)(1)(i) and 410.414. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director responds in support of the administrative law judge's denial of benefits.

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

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[2]The Board subsequently summarily denied claimant's motion for reconsideration. *Vance v. Director, OWCP,* BRB No. 95-0406 BLA (July 29, 1996) (Order)(unpublished).

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).

We initially address the administrative law judge's decision to admit Dr. Greene's interpretation of claimant's August 26, 1992 x-ray into the record. The Director submitted Dr. Greene's x-ray interpretation to the Office of Administrative Law Judges under cover letter dated October 2, 1992. The Director noted that Dr. Greene's interpretation was not listed in his pre-hearing report dated September 28, 1992 because he did not receive Dr. Greene's report until October 1, 1992. The Director indicated that he intended to offer Dr. Greene's x-ray interpretation into evidence at the hearing scheduled for October 21, 1992. However, the October 21, 1992 hearing was subsequently canceled[3] and the case was ultimately decided on the record.[4] On remand, the administrative law judge explained that his failure to admit and address Dr. Greene's x-ray interpretation had been an oversight. Decision and Order on Remand at 2. Under the facts of this case, we find no error in the administrative law judge's decision to admit Dr. Greene's interpretation of claimant's August 26, 1992 x-ray into the record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*) (An administrative law judge is afforded broad discretion in dealing with procedural matters).

The administrative law judge next considered whether Dr. Greene's negative interpretation of claimant's August 26, 1992 x-ray was barred by Section 413(b) of the Act. 30 U.S.C. §923(b). The Section 413(b) rereading prohibition is applicable when each of the following threshold requirements has been met: (1) the physician who originally read the x-ray is either Board-certified or Board-eligible in Radiology; (2) there is other evidence of a pulmonary or respiratory impairment; (3) the x-ray

[3]By Order dated October 14, 1992, Administrative Law Judge Daniel L. Leland granted claimant's request for a continuance and canceled the hearing scheduled for October 21, 1992.

[4]By Order dated March 30, 1994, the administrative law judge noted that a total of seven hearings since 1989 had been scheduled and continued at claimant's request. Because claimant had indicated that he might be unable to attend future hearings, the administrative law judge ordered that the case be assigned to an administrative law judge for a decision on the record. The administrative law judge subsequently issued a decision on the record. In its previous consideration of this case, the Board affirmed the administrative law judge's decision to decide the case on the record. *Vance v. Director, OWCP,* BRB No. 95-0406 BLA (Mar. 14, 1996) (unpublished).

was performed in compliance with the applicable quality standards and was taken by a radiologist or qualified radiologic technician; and (4) there is no evidence that the claim has been fraudulently represented. *See* 20 C.F.R. §727.206(b)(1); *Auxier v. Director, OWCP*, 4 BLR 1-717 (1982).

On remand, the administrative law judge noted that the Director had stipulated that Dr. Subramaniam, a physician who rendered a positive interpretation of claimant's August 26, 1992 x-ray, was a Board-certified radiologist. Decision and Order on Remand at 2; Director's Exhibit 65. The administrative law judge further noted that the August 26, 1992 x-ray was performed in compliance with the applicable quality standards and that there was no evidence that the claim had been fraudulently represented. Decision and Order on Remand at 2. The administrative law judge, therefore, found that the sole remaining issue was whether there was other evidence of a pulmonary or respiratory impairment. *Id.*

To meet the "other evidence" requirement of Section 413(b), the Board has held that such evidence must establish a "significant and measurable" level of pulmonary or respiratory impairment. *See Bobbit v. Director, OWCP*, 8 BLR 1-381 (1985). In his consideration of whether the evidence was sufficient to establish a significant and measurable pulmonary impairment, the administrative law judge considered the objective studies of record. Although claimant's August 26, 1974 pulmonary function study is qualifying,[5] Director's Exhibit 21, five subsequent pulmonary function studies conducted on August 28, 1975, February 26, 1980, May 5, 1981, October 11, 1988 and August 26, 1992 are non-qualifying.[6] Director's Exhibits 22-24, 56, 63. Similarly, although claimant's February 26, 1980 arterial blood gas study is qualifying, Director's Exhibit 32, three subsequent studies conducted on May 5, 1981, January 12, 1987 and August 26, 1992 are non-qualifying.[7] Director's Exhibits 33, 57, 64. Because the most recent objective studies of record are non-qualifying, the administrative law judge found that the pulmonary function and arterial blood gas studies of record did not support a finding

[5]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values. *See* 20 C.F.R. §§410.490(b) (1)(ii), 410.426(b); Appendix to 20 C.F.R. Part 410, Subpart D. A "non-qualifying" study yields values which exceed the requisite table values.

[6]An earlier pulmonary function study conducted on January 14, 1972 also produced non-qualifying values. Director's Exhibit 20.

[7]We note that Dr. McQuillan reviewed claimant's qualifying February 26, 1980 arterial blood gas study and found that it was not acceptable. Director's Exhibit 25. Dr. McQuillan indicated that it was a venous sample. *Id.*

of a significant and measurable pulmonary impairment. *See* Decision and Order on Remand at 3. Inasmuch as the administrative law judge's finding is based upon substantial evidence, it is affirmed.

In regard to the medical opinion evidence, the administrative law judge permissibly credited the opinions of Drs. Thavaradhara and Spagnolo[8] that claimant did not suffer from a significant pulmonary impairment over the contrary opinions of Drs. Craft and Rasmussen because he found that the opinions of Drs. Thavaradhara and Spagnolo were better supported by the objective evidence.[9] *See Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order on Remand at 3. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish a significant respiratory or pulmonary impairment.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish a significant and measurable pulmonary impairment, we also affirm the administrative law judge's finding that Dr. Greene's x-ray interpretation was not barred by the Section 413 rereading prohibition. *See*

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[8]Dr. Thavaradhara examined claimant on January 12, 1988. In a report dated January 15, 1998, Dr. Thavaradhara opined that claimant did not have any significant impairment from a pulmonary standpoint. Director's Exhibit 55. In a letter dated November 22, 1988, Dr. Thavaradhara opined that claimant did not suffer from a respiratory impairment due to his mining occupation. Director's Exhibit 54.

Dr. Spagnolo reviewed the medical evidence of record. In a report dated January 12, 1992, Dr. Spagnolo noted that he agreed with Dr. Thavaradhara that claimant has normal lungs and "certainly does not have a totally disabling breathing impairment." Director's Exhibit 60.

Dr. Thavaradhara re-examined claimant on August 26, 1992. In a report dated September 3, 1992, Dr. Thavaradhara opined that claimant suffered from a mild degree of pneumoconiosis. Director's Exhibit 62. However, Dr. Thavaradhara opined that claimant's degree of pneumoconiosis was very mild and should not cause significant respiratory impairment to prevent him from working in the mines. *Id.*

[9]Inasmuch as the administrative law judge provided a proper basis for crediting the opinions of Drs. Thavaradhara and Spagnolo, we need not address the reasons which the administrative law judge provided for discrediting the contrary opinions of Drs. Craft and Rasmussen. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Auxier, *supra*.

In his reconsideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge permissibly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order on Remand at 5. Although Dr. Subramaniam, a Board-certified radiologist, interpreted claimant's August 26, 1992 x-ray as positive for pneumoconiosis, Director's Exhibit 65, Dr. Greene, a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 67. All of the remaining positive interpretations of earlier x-rays were rendered by physicians whose radiological qualifications are not found in the record.[10] Director's Exhibits 31, 38, 39. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§410.490(b)(1)(i) and 410.414.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[10]We note that Dr. Morgan, the only other physician dually qualified as a B reader and Board-certified radiologist, interpreted claimant's January 14, 1972 and January 24, 1972 x-rays as negative for pneumoconiosis. Director's Exhibit 36.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge