BRB No. 06-0161 BLA

MICHAEL JEROME SCRIBBICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/30/2006
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-05123) of Administrative Law Judge Ralph A. Romano with respect to 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). The administrative law judge noted that the claim before him was a subsequent claim and credited claimant with one year of coal mine employment.[1] The administrative law judge determined that because the newly

[1] Claimant filed an application for benefits on December 10, 1973, which was denied by the district director on June 2, 1980, on the ground that claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a

submitted evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). The administrative law judge denied benefits, however, because the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis arising out of coal mine employment or that claimant is totally disabled due to pneumoconiosis.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to the length of claimant's coal mine employment and 20 C.F.R. §§718.202(a)(1), (a)(4), 718.204(b)(2)(i), and 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has submitted a Motion to Remand in which he indicates that the administrative law judge did not properly consider the evidence relevant to the length of claimant's coal mine employment and did not properly weigh the newly submitted medical opinion evidence under Sections 718.202(a)(4) and 718.204(b)(2)(iv).[2]

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).

Both claimant and the Director argue that the administrative law judge erred in finding that he could not credit claimant for the time that he spent working in his father's mine because claimant was not paid for his labor. Decision and Order at 6. This contention has merit. As the parties note, the administrative law judge believed that in light of the reference to the days for which a miner receives payment in the regulation defining a year of coal mine employment, a miner cannot be credited with coal mine employment for which he is not paid. *See* 20 C.F.R. §725.101(a)(32). The Board has held, however, that a miner can be credited for unpaid work done as a child. *Bachert v. Director, OWCP*, 6 BLR 1-640 (1983). Accordingly, we vacate the administrative law judge's finding regarding the length of claimant's coal mine employment. On remand,

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second claim on March 12, 1997, which the district director denied, on the same basis, on June 19, 1997. Director's Exhibit 2. Claimant filed a third application for benefits on November 12, 2003. Director's Exhibit 3.

[2]We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(b)(2)(ii), (iii), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the administrative must reconsider the evidence relevant to all of the work that claimant performed as a miner, whether paid or unpaid.

With respect to the administrative law judge's consideration of the newly submitted x-ray evidence, the record contains seven readings of three newly submitted x-rays dated December 3, 2003, December 9, 2004, and February 17, 2005. Four of the readings are positive and three are negative. All of the interpretations were performed by physicians who are B readers and Board-certified radiologists. Director's Exhibits 13, 29, 31; Claimant's Exhibits 1, 10. The administrative law judge summarized the evidence and concluded that:

> Being mindful that two qualified doctors found the earliest x-ray of record to be positive while only one found it to be negative, I find the x-ray evidence when viewed as a whole fails to establish the presence of pneumoconiosis. Based on these physicians' opinions, I find that any number of highly qualified physicians could view claimant's x-rays and some would find the x-rays negative while others would find the x-rays slightly positive for the presence of pneumoconiosis.

Decision and Order at 8. Claimant argues that the administrative law judge's finding must be vacated, as the administrative law judge did not provide an adequate rationale for his conclusion. Claimant's contention has merit.

Pursuant to the Administrative Procedure Act, (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), an administrative law judge is required to render findings based upon the evidence of the record and set forth the rationale underlying his determinations. In the present case, the administrative law judge did not base his finding upon a weighing of the evidence before him. Rather, the administrative law judge relied upon speculation as to what type of x-ray readings a hypothetical group of physicians would make if they viewed the newly submitted x-rays. We must, therefore, vacate the administrative law judge's finding that the existence of pneumoconiosis was not established under Section 718.202(a)(1). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986). On remand, the administrative law judge must reconsider the newly submitted x-ray evidence and set forth his findings in detail, including the underlying rationale.

Regarding the administrative law judge's consideration of the newly submitted medical opinions under Section 718.202(a)(4), both the Director and claimant argue correctly that inasmuch as the administrative law judge relied upon his inaccurate calculation of the length of claimant's coal mine employment to assess the credibility of

the opinions in which Drs. Kraynak and Kruk diagnosed pneumoconiosis, the administrative law judge's finding that pneumoconiosis was not established under Section 718.202(a)(4) must also be vacated. Decision and Order at 10-11; Claimant's Exhibits 1, 4, 5, 8; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge also relied upon the findings that he made with respect to the newly submitted x-ray evidence to accord less weight to these opinions. Accordingly, we vacate the administrative law judge's finding that pneumoconiosis was not established at Section 718.202(a)(4). On remand, the administrative law judge must reconsider the newly submitted medical opinion evidence in light of his findings with respect to length of coal mine employment and the newly submitted x-ray evidence of record.

Regarding Section 718.203, the administrative law judge found that even if claimant established the existence of pneumoconiosis, he would not be entitled to the presumption that his pneumoconiosis arose out of coal mine employment, as claimant had less than ten years of coal mine employment. The administrative law judge also determined that claimant did not present any evidence of a link between coal dust exposure and his pulmonary condition. Decision and Order at 11. The parties argue that the administrative law judge's finding must be vacated in light of the administrative law judge's improper weighing of the evidence concerning the length of claimant's coal mine employment. Claimant also asserts that the administrative law judge erred in determining that there is no newly submitted evidence linking claimant's pulmonary condition to coal dust exposure. These contentions have merit.

Because we have vacated the administrative law judge's finding that claimant worked as a miner for one year, we must also vacate the administrative law judge's finding that claimant is not entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment set forth in Section 718.203(b). In addition, claimant is correct in stating that the opinions Drs. Kraynak and Kruk contain evidence regarding the source of claimant's pneumoconiosis. Claimant's Exhibits 1, 4, 5, 8. Thus, on remand, the administrative law judge must reconsider his findings under Section 718.203 in light of his determination regarding the length of claimant's coal mine employment and in light of his reconsideration of the opinions of Drs. Kraynak and Kruk.

Claimant contends that the administrative law judge erred in finding that the newly submitted post-bronchodilator pulmonary function study obtained on March 9, 2004, which produced qualifying values, was not valid. We disagree. The administrative law judge rationally determined that even if that study was valid, the preponderance of the newly submitted pulmonary function study evidence was nonqualifying and, therefore, did not support a finding of total disability. Decision and Order at 13; Director's Exhibits 15, 32, 33; Claimant's Exhibit 1; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

Concerning the administrative law judge's weighing of the newly submitted medical opinion evidence under Section 718.204(b)(2)(iv), the Director alleges that the administrative law judge erred in determining that Dr. Kruk's opinion supported a finding of total respiratory or pulmonary disability, as Dr. Kruk did not indicate that claimant's impairment was respiratory or pulmonary in nature.[3] This contention has merit. The administrative law judge found that although Dr. Kruk did not explicitly set forth a reason for concluding that claimant is totally disabled, his observation that claimant could walk on a treadmill for only four minutes before becoming lightheaded and short of breath was sufficient to establish total disability. Decision and Order at 15; Claimant's Exhibit 5. The Director is correct, however, in asserting that the administrative law judge did not address whether the impairment recorded by Dr. Kruk was respiratory or pulmonary in nature as is required pursuant to Section 718.204(b)(1).[4] In addition, the administrative law judge did not consider the fact that other physicians of record diagnosed nonrespiratory and nonpulmonary conditions that could account for claimant's breathlessness and dizziness. We vacate, therefore, the administrative law judge's finding that claimant established total disability under Section 718.204(b)(2)(iv) and instruct the administrative law judge to reconsider this issue on remand. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995).

Because we have vacated the administrative law judge's finding that the newly submitted evidence established total disability, an element that defeated entitlement in the prior denial, we must also vacate the administrative law judge's determination that claimant established a change in an applicable condition of entitlement under Section 725.309(d). *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). If the administrative law judge again finds that claimant has established a change in an applicable condition of entitlement on remand, he must then consider entitlement based upon a weighing of all of the evidence of record.

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[3] Contrary to claimant's suggestion, the Director, Office of Workers' Compensation Programs, was not required to raise this issue in a cross-appeal, as the Director's argument supported the administrative law judge's denial of benefits. *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

[4] Claimant has identified a portion of Dr. Kruk's report which could support a determination that he diagnosed a totally disabling respiratory or pulmonary impairment. Claimant's Reply Brief at 2; Claimant's Exhibit 5. The Board cannot engage in the initial consideration of this evidence, however. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, the administrative law judge must do so on remand.

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