BRB No. 08-0305 BLA

R.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	
	)	
	)	DATE ISSUED: 11/26/2008
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

R.S., Bolivar, Pennsylvania, *pro se*.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order and Decision and Order on Reconsideration (06-BLA-6148) of Administrative Law Judge

[1] Lynda D. Glagola, Program Director of Lungs at Work in McMurray, Pennsylvania, requested, on behalf of claimant, that the Board review the administrative law judge's decisions, but Ms. Glagola is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Daniel L. Leland 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 subsequent claim filed on October 20, 2004.[2] After crediting claimant with over thirty years of coal mine employment,[3] the administrative law judge found that that none of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant moved for reconsideration, arguing, *inter alia*, that the administrative law judge had erred in finding that the new x-ray evidence did not establish the existence of pneumoconiosis. In a Decision and Order on Reconsideration dated December 7, 2007, the administrative law judge granted reconsideration and found that both the new x-ray evidence and the new medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered the merits of claimant's 2004 claim. In his consideration of all of the evidence of record, the administrative law judge found that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge found that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits, but argues that the administrative law judge erred in finding clinical pneumoconiosis established. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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[2] Claimant's initial claim, filed on August 29, 1980, was finally denied on March 14, 1985, because claimant did not establish that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1.

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

[4] Because no party challenges the administrative law judge's finding that, on the merits of the claim, all the evidence established total disability pursuant to 20 C.F.R.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these conditions of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

A finding of either clinical or legal pneumoconiosis[5] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See* 20 C.F.R. §718.201(a)(1),(2). The United States Court of Appeals for the Third Circuit has held that although Section 718.202(a) provides four distinct methods of establishing the existence of pneumoconiosis, all types of relevant evidence must be weighed together to determine whether claimant suffers from the disease. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23, 21 BLR 2-104, 2-108 (3d Cir. 1997).

After finding the existence of clinical pneumoconiosis established, the administrative law judge reviewed the medical opinion evidence pursuant to Section 718.202(a)(4) and found that "[t]here is no evidence that the miner had legal

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§718.204(b)(2), this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] "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).

pneumoconiosis." Decision and Order on Reconsideration at 4. Substantial evidence does not support this finding. *See McFall*, 12 BLR at 1-177. The record reflects that Dr. Celko diagnosed "interstitial lung disease" and "chronic asthmatic bronchitis," both of which he attributed, in part, to "occupational dust exposure." Director's Exhibit 18 at 4. These diagnoses, if credited, could support a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). Because the administrative law judge erred in finding that there was no evidence of legal pneumoconiosis, and this error may have affected his analysis of whether the miner's total disability is due to pneumoconiosis, we must vacate the administrative law judge's finding as to the medical opinion evidence pursuant to Section 718.202(a)(4), and instruct him to reconsider whether the relevant evidence establishes the existence of legal pneumoconiosis.[6]

Because we must remand this case for the administrative law judge to reconsider the existence of legal pneumoconiosis, we will next address employer's challenges to the administrative law judge's finding of clinical pneumoconiosis. *See King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91 (1983). Employer contends that the administrative law judge erred in weighing a negative reading of an April 28, 2005, digital x-ray separately from the conventional chest x-ray readings. Employer's Brief at 13. Employer's contention lacks merit.

The administrative law judge initially weighed the conventional x-ray readings at 20 C.F.R. §718.202(a)(1), and found that a preponderance of the readings by the more qualified physicians was positive for pneumoconiosis.[7] Next, because digital x-rays constitute "other medical evidence" to be admitted and considered under 20 C.F.R. §718.107, the administrative law judge properly considered Dr. Fino's negative reading of the April 28, 2005, digital x-ray separately, under Section 718.107. *See Webber v. Peabody Coal Co.*, 24 BLR 1-5, 1-7 (*en banc*), *aff'g on recon. Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132 -33 (*en banc*)(Boggs, J., concurring). He found that the April 28, 2005, digital x-ray was negative for pneumoconiosis. However, contrary to employer's contention, after resolving the readings of both types of x-rays, the

[6] The record contains contrary evidence. Drs. Fino and Tuteur opined that claimant does not suffer from any coal mine dust-related lung disease. Employer's Exhibits 1, 4.

[7] Employer generally contends that the administrative law judge erred in finding that the positive interpretations of the conventional x-rays outweighed the negative interpretations, but specifies no error committed by the administrative law judge. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

administrative law judge then weighed the two different types of x-rays together. The administrative law judge resolved the conflict between the two types of x-rays based on the readers' radiological qualifications:

> Weighing all the medical evidence together, I find that the miner has established clinical pneumoconiosis. A preponderance of the [conventional] chest x-rays, read by dually-qualified physicians, are positive for pneumoconiosis. A digital x-ray, read by a B-reader, was determined to be negative for the disease. This single reading by a B-reader does not outweigh the positive readings of the [conventional] x-rays by dually-qualified physicians.

Decision and Order on Reconsideration at 4. Thus, contrary to employer's assertion, the administrative law judge considered all of the x-ray evidence, conventional and digital, together pursuant to 20 C.F.R. §718.202(a). Moreover, we find no error in the administrative law judge's decision to credit the conventional x-ray evidence over the digital x-ray evidence based upon the superior qualifications of the physicians interpreting the conventional x-rays. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). We therefore reject employer's argument and affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis.

Employer further asserts that the administrative law judge did not adequately explain his finding that Dr. Celko's opinion "supports a finding of clinical pneumoconiosis." Decision and Order on Reconsideration at 4. We disagree. The administrative law judge found that Dr. Celko had diagnosed pneumoconiosis based on a positive chest x-ray reading, an examination of the miner, and his occupational exposure. Decision and Order on Reconsideration at 3. Substantial evidence supports this finding. Director's Exhibit 18 at 3-4. Further, the administrative law judge permissibly accorded greater weight to Dr. Celko's opinion because the preponderance of the x-ray evidence established pneumoconiosis, and reasonably accorded less weight to the opinions of those doctors who stated that clinical pneumoconiosis was absent. *See Williams*, 114 F.3d at 24, 21 BLR at 2-111; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). We therefore reject employer's contention, and affirm the administrative law judge's finding that the medical opinion evidence supported a finding of clinical pneumoconiosis. Therefore, we also affirm the administrative law judge's finding that both the new x-ray evidence and the new medical opinion evidence established clinical pneumoconiosis, and thus a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d).

On remand, should the administrative law judge find that the medical opinion evidence also establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R.

§718.202(a)(4), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence establishes the existence of legal pneumoconiosis. *Williams*, 114 F.3d at 24, 21 BLR at 2-111.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that claimant is not totally disabled due to pneumoconiosis, as there was no convincing evidence that his pulmonary "abnormalities are not a result of [his] . . . heart disease." Decision and Order on Reconsideration at 5. The administrative law judge, however, made this finding without recognizing that Dr. Celko had diagnosed legal pneumoconiosis, that is, a chronic lung disease or impairment arising out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); Director's Exhibit 18 at 4. We must, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge must determine whether the evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and then reconsider whether the evidence establishes that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).[8]

[8] Section 718.204(c)(1) provides, in relevant part, that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i),(ii).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are 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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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