BRB No. 99-0247 BLA

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

Appeal of the Decision and Order on Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania,, for claimant.

Dorothy L. Page (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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-0796) of Administrative Law Judge Ainsworth H. Brown 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 is before the Board for the second time. Inititally, the administrative law judge credited claimant with four years of coal mine employment and accepted the parties' stipulation to the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). The administrative law judge concluded, however, that the medical evidence of record failed to establish the existence of pneumoconiosis pursuant to

20 C.F.R. §718.202(a)(1), (4), and accordingly, denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's decision in part and remanded the case for him to consider all of the x-ray readings pursuant to Section 718.202(a)(1) and (3), to reweigh the medical opinions pursuant to Section 718.202(a)(4), and to weigh all of the relevant evidence together to determine whether claimant established the existence of pneumoconiosis in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). *Herring v. Director, OWCP*, BRB No. 97-1051 BLA (Apr. 4, 1998)(unpub.). On remand, the administrative law judge found that the medical evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (3), (4) and therefore denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding an x-ray reading insufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(3)(A) of the Act, 30 U.S.C. §921(c)(3)(A). Claimant also asserts that the administrative law judge failed to consider all of the x-ray evidence relevant to the presence of simple pneumoconiosis pursuant to Section 718.202(a)(1). Additionally, claimant alleges that the administrative law judge erred in his weighing of the medical opinion evidence pursuant to Section 718.202(a)(4). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, asserting that the administrative law judge failed to consider all of the x-ray evidence pursuant to Section 718.202(a)(1) and did not provide a valid reason for his weighing of the medical opinions pursuant to Section 718.202(a)(4).

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).

Claimant contends that the administrative law judge erred by finding that Dr. Marshall's reading of the February 20, 1995 x-ray did not establish the existence of complicated pneumoconiosis and therefore erred by not invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3)(A). Claimant's Brief at 3. Section 411(c)(3)(A) provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which when diagnosed by chest x-ray, “yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization.” 30 U.S.C.

§921(c)(3)(A).

Of the twenty-two x-ray readings in the record, one reading bore a notation indicating the presence of one or more large opacities. Dr. Marshall, a Board-certified Radiologist and B-reader, read the February 20, 1995 x-ray as "1/1" for small opacities, but also checked box "B" in block 2C, the "Large Opacities" section of the ILO x-ray classification form. Claimant's Exhibit 3. The record indicates that several other qualified physicians read the February 20, 1995 x-ray but none of them checked any of the "Large Opacities" boxes on the ILO classification form. Director's Exhibits 13, 14, 24, 26, 34; Claimant's Exhibits 1, 2. Dr. Marshall subsequently read two separate x-rays taken on April 10, 1996 as "2/1" and "1/0" respectively for small opacities, but indicated the absence of large opacities by checking "O" in block 2C. Claimant's Exhibits 5, 8.

The administrative law judge considered Dr. Marshall's notation of one or more "B" grade opacities on the February 20, 1995 x-ray. Decision and Order on Remand at 2. He then noted accurately that "Dr. Marshall, however, did not see this large opacity when he inspected the film of April 10, 1996." *Id*. Although the administrative law judge might then have gone on to state his conclusion explicitly, his reasoning is sufficiently clear. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997). Specifically, the administrative law judge concluded that Dr. Marshall's initial reading of one or more "B" large opacities was called into question by his subsequent, inconsistent opinion that large opacities were absent from claimant's later chest x-rays. *See Usery v. Turner-Elkhorn Mining Co*., 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976)(Once contracted, both simple and complicated pneumoconiosis are irreversible). Therefore, we reject claimant's allegation of error and we affirm the administrative law judge's finding that complicated pneumoconiosis was not established by x-ray pursuant to Sections 718.202(a)(3), 718.304(a).

Pursuant to Section 718.202(a)(1), claimant and the Director contend that the administrative law judge overlooked an x-ray reading that was positive for simple pneumoconiosis. Claimant's Brief at 2; Director's Motion at 5-6. This contention has merit. In finding the x-ray evidence at best "evenly divided but more likely . . . negative," the administrative law judge did not consider Dr. Mathur's positive reading of the July 26, 1995 x-ray. Decision and Order on Remand at 3. The record indicates that Dr. Mathur is a Board-certified radiologist and B-reader. Claimant's Exhibit 19. Because the administrative law judge did not consider all of the x-ray readings, we must vacate his finding and remand the case for him to weigh Dr. Mathur's reading, determine whether the July 26, 1995 x-ray is positive or negative,

and then weigh the July 26, 1995 x-ray against the remaining three x-rays of record.[1]

[1] Claimant does not challenge the administrative law judge's analysis of the readings of the February 20, 1995 x-ray and of the two separate x-rays taken on April 10, 1996. There, the administrative law judge accorded greater weight to the negative readings of Board-certified Radiologists and B-readers who are also professors of radiology with extensive teaching experience. Decision and Order on Remand at 1-2; *see Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

Pursuant to Section 718.202(a)(4), claimant and the Director contend that the administrative law judge did not provide valid reasons for crediting Dr. Ahluwalia's opinion, that claimant has chronic obstructive pulmonary disease due to smoking, over the opinions of Drs. Kruk and Kraynak, that claimant has pneumoconiosis. Claimant's Brief at 4; Director's Motion at 9-10. These contentions also have merit. As claimant contends, substantial evidence does not support the administrative law judge's finding that Dr. Ahluwalia possesses superior credentials in pulmonary disease compared to Drs. Kruk and Kraynak. Decision and Order on Remand at 3. The record indicates that Dr. Kruk is Board-certified in Internal Medicine, and that Dr. Kraynak is Board-Eligible in Family Medicine and devotes approximately 50% of his practice to treating patients with pneumoconiosis. Director's Exhibit 19; Claimant's Exhibit 18 at 4. Dr. Ahluwalia's qualifications are not in the record. Additionally, as the Director contends, substantial evidence does not support the administrative law judge's finding that claimant provided Dr. Ahluwalia with a smoking history of twenty to twenty-five years but gave a shorter smoking history to Drs. Kruk and Kraynak.[2] Decision and Order on Remand at 3. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for him to reweigh the medical opinion evidence.

In sum, the administrative law judge on remand must weigh all of the x-ray readings and reweigh the medical opinions pursuant to Section 718.202(a)(1), (4). The administrative law judge must weigh all types of relevant evidence together to determine whether claimant has established the existence of pneumoconiosis in accordance with *Williams, supra*. If the administrative law judge determines that the

---

[2] The smoking histories in the record are as follows: During his March 30, 1995 examination, Dr. Ahluwalia recorded a history of one pack per day for five years, starting at age twenty and quitting at age twenty-four or twenty-five. Director's Exhibit 11 at 2. During his June 18, 1996 examination, Dr. Ahluwalia recorded a history of ½ pack per day for seven years, quitting thirty years ago. Director's Exhibit 35 at 2. Dr. Kruk took a history of one pack per day for five years ending twenty-five years ago. Director's Exhibit 19. Dr. Kraynak recorded a history of ½ pack per day off and on over a twenty-year period, quitting some time ago. Claimant's Exhibit 10. Dr. Kraynak testified that he believed that the smoking history claimant gave him is consistent with what he told Dr. Ahluwalia in 1996 because claimant's smoking history amounts to approximately ten pack years. Claimant's Exhibit 18 at 6-7. Dr. Cable administered a pulmonary function study in December of 1991. The computer printout generated by that test includes the entry "ex-Smoker: 1 Pk/Day, 10 Yrs not smoking." Director's Exhibit 19. At the hearing, claimant testified that he smoked ½ pack per day from age seventeen until he quit at the age of twenty or twenty-five. Hearing Transcript at 20.

existence of pneumoconiosis is established, he must then determine whether the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c) and whether the pneumoconiosis is a substantial contributor to claimant's total respiratory disability pursuant to Section 718.204(b). *See Bonessa v. United States Steel Corp*., 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge