BRB No. 02-0137 BLA

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| BILL HOLBROOK | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| GOLDEN OAK MINING COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| UNDERWRITER SAFETY & CLAIMS | ) | |
| | ) | DATE ISSUED: |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Timothy J. Wilson (Wilson, Sowards, Polites & McQueen), Lexington, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-BLA-0678) of Administrative Law Judge Joseph E. Kane awarding 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).[1] This case has been before the Board previously. In the original decision, the administrative law judge found twenty-four years of coal mine employment based upon the parties' stipulation. Decision and Order dated June 29, 1999 at 3. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant[2] established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b) (2000). Decision and Order dated June 29, 1999 at 28-32. The administrative law judge further found that the record evidence was also sufficient to establish that claimant suffered from a totally disabling respiratory impairment and that claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Decision and Order dated June 29, 1999 at 26, 33. Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings that claimant suffered from a totally disabling respiratory impairment, but vacated the administrative law judge's findings regarding the existence of pneumoconiosis arising out of coal mine employment and the cause of claimant's disability. *Holbrook v. Golden Oak Mining Co.*, BRB No. 99-1263 BLA (Nov. 30, 2000)(unpublished). Accordingly, the Board remanded the case for further consideration of the relevant evidence of record.

On remand, the administrative law judge considered the x-ray evidence and medical opinions of record and concluded that they were sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and that the miner's disability was due to pneumoconiosis. Decision and Order on Remand at 2-10. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4) (2000), that the pneumoconiosis arose out of coal mine employment and that the miner's totally disabling respiratory impairment was due to pneumoconiosis pursuant

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant, Bill Holbrook, filed his claim for benefits on February 15, 1997. Director's Exhibit 1.

to Section 718.204(b) (2000). Claimant responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. Employer filed a response brief reasserting its position. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge awarding benefits must be vacated and the case remanded to the administrative law judge for further consideration.[3] Employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

§919(d) and 5 U.S.C. §554(c)(2), in his consideration of the evidence and also erred in his failure to follow the Board's remand instructions.[4] Employer's Brief at 19-30. We agree.

Employer initially contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), asserting that the administrative law judge failed to specifically identify the pertinent x-rays and that he mischaracterized the qualifications of the physicians. Employer's contention has merit. The record contains over forty x-ray readings. The administrative law judge indicated that there were "thirty-one pertinent x-ray readings." Decision and Order on Remand at 2. The administrative law judge further found that twelve of the readings were classified as positive for pneumoconiosis, and of those, all but one reading was by a B-reader or B-reader/board-certified radiologist. Decision and Order on Remand at 2. The administrative law judge, in this instance, failed to explain the basis of his determination that only thirty-one x-rays were pertinent. Decision and Order on Remand at 2. Moreover, the record indicates, contrary to the administrative law judge's conclusion, that two of the positive interpretations are by readers with no specific qualifications. Director's Exhibit 23. Inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record and his basis for finding certain x-rays "pertinent" is not explained, the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis cannot be affirmed. As a result, the administrative law judge's findings pursuant to Section 718.202(a)(1) are vacated and we remand this case for further consideration. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 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).

Employer further contends that the administrative law judge erred in finding that "the presence of pneumoconiosis is not ruled out in those readings wherein the physicians found changes to be present and did not classify them in section 2 of the ILO form, yet specifically stated on the form that the changes were not coal workers' pneumoconiosis." Decision and Order on Remand at 2. We agree. The Department of Labor x-ray interpretation form utilized in black lung claims provides specific instructions for readers. *See* Form CM-954a. Based on the Department of Labor form, if a physician finds that the x-ray is not completely negative but otherwise opines that there are no abnormalities consistent with pneumoconiosis, the physicians is instructed to skip the classification requirements of section 2. Therefore, contrary to the administrative law judge's finding, the x-ray interpretations of Drs. Lockey, Poulos, Sargent, Westerfield and Halbert[5] were properly classified and are negative interpretations, based upon the reader's determination that the x-rays did not indicate any abnormalities consistent with pneumoconiosis. Director's Exhibits 20, 42, 46, 50, 54. Additionally, the physician's subsequent statement that the x-ray does not show coal workers' pneumoconiosis, based upon the circumstances of the instant case, does not create an internal inconsistency that detracts from the credibility of the x-ray interpretation. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Consequently, these negative interpretations should be accorded their appropriate weight on remand. *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*).

Employer further contends that the administrative law judge erred in his consideration of the medical opinion evidence of record. Specifically, employer argues that the administrative law judge failed to assess the quality of the physicians' reasoning as instructed by the Board. We agree. The administrative law judge was instructed to consider and discuss on remand the relevant evidence of record and to provide the rationale for his findings pursuant to Sections 718.202(a)(2), (4), 718.203 and 718.204(c). The Board specifically instructed the administrative law judge to determine whether each relevant medical report of record was reasoned and documented. In the instant case, the administrative law judge has not provided sufficient analysis of the evidence as instructed by the Board. As a result, the findings by the administrative law judge fail to satisfy the requirements of the APA. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999). Consequently, we vacate the administrative law judge's findings pursuant to Sections 718.202(a)(2), (4), 718.203 and 718.204(c) and remand the case for the administrative law judge to reconsider

[5]Although the administrative law judge refers to an interpretation by "Dr. Holbrook," the administrative law judge is clearly discussing the interpretation of Dr. Halbert. Director's Exhibit 42; Decision and Order on Remand at 2.

the credibility of all of the relevant medical opinion evidence. *See Muscar v. Director, OWCP*, 18 BLR 1-7 (1993).

Before addressing the factors relevant to determining the weight to be assigned a particular medical opinion, the administrative law judge must first determine, as instructed in our prior decision, if the opinions of record are reasoned and documented and therefore credible. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Additionally, the administrative law judge must specifically address each element of entitlement and determine if the evidence satisfies claimant's burden of proof and the applicable case law.[6] *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(on recon. *en banc*).

[6]In reconsidering the evidence pursuant to 20 C.F.R. §718.203, the administrative law judge must consider the comments on the x-ray reports that the diagnosed pneumoconiosis was not coal workers' pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(on recon. *en banc*).

Although, in our prior decision, we held that the administrative law judge properly found Dr. Caudill was claimant's treating physician and that his opinion may be accorded greater weight, on remand, the administrative law judge did not provide a basis for determining the credibility of Dr. Caudill's opinion. *See Trumbo, supra*. Furthermore, the United States Court of Appeals for the Sixth Circuit has recently held that factors, such as those set forth in 20 C.F.R. §718.104(d)(5), are relevant for determining the appropriate weight to be assigned to the opinions of treating physicians.[7] *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR 2- (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Further, the Court stated that "the same factors that justify placing greater weight on the opinions of a treating physician are appropriate considerations in determining the weight to be given an examining physician's views." *Napier, supra*. On remand, the administrative law judge should specifically address this authority in his consideration of the medical opinion evidence.

In considering the evidence of record on remand, the administrative law judge must include in his Decision and Order sufficient analysis and findings of fact to indicate that he has weighed all the relevant evidence of record pursuant to the appropriate standards and state the basis for his decision. *See Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983).

[7]While the Sixth Circuit has acknowledged that the revised regulation, 20 C.F.R. §718.104(d)(5), is inapplicable to claims such as this one, which were pending on January 19, 2001, *see Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 864, BLR 2- (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47, BLR 2- (D.D.C. 2001), it noted that the provision is instructive. *Wolf Creek Collieries v. Director, OWCP* [Stephens], 298 F.3d 511, BLR 2- (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR 2- (6th Cir. 2002).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge