BRB No. 07-0223 BLA

R.L. Claimant-Respondent v. APOGEE COAL COMPANY/ARCH OF KENTUCKY, INCORPORATED and UNDERWRITERS SAFETY & CLAIM Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/24/2007 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Sydney B. Douglass, Harlan, Kentucky, for claimant.

Ralph D. Carter (Barret, Haynes, May & Carter P.S.C.), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-6597) of Administrative Law Judge Richard K. Malamphy rendered 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). The administrative law judge credited

claimant with twenty years and six months of coal mine employment.[1] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence 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). The administrative law judge also found that the evidence established total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4). Employer further contends that the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) is not supported by substantial evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred in his weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered seven readings of four x-rays. The June 12, 2003 x-ray[2] was read as positive

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[2] The June 12, 2003 x-ray was read by Dr. Barrett for its quality only. Director's Exhibit 11.

for pneumoconiosis by Dr. Baker, a B reader, and as negative for pneumoconiosis by Dr. Wiot, a B reader and Board-certified radiologist. Director's Exhibits 10, 12. The January 7, 2004 x-ray was read as negative for pneumoconiosis by Dr. Jarboe, a B reader, and by Dr. Wiot, a B reader and Board-certified radiologist. Director's Exhibit 13. The same x-ray was read as positive for pneumoconiosis by Dr. Alexander, a B reader and Board-certified radiologist. Claimant's Exhibit 3. Dr. Tiu, whose radiological credentials are not of record, found emphysema on the September 18, 2003 x-ray. Employer's Exhibit 3. Dr. Desai, whose radiological credentials are likewise not of record, detected chronic obstructive pulmonary disease on the December 2, 2004 x-ray. Claimant's Exhibit 2.

The administrative law judge stated that he accorded greater weight to the interpretations by B readers, and concluded that the x-ray evidence established pneumoconiosis, as "[t]wo of the x-rays were read by B readers and these physicians have reported positive and negative readings of each film." Decision and Order at 4. As employer contends, the administrative law judge failed to weigh and resolve the conflicting x-ray evidence or explain his finding. *See* Administrative Procedure Act, 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. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, we agree with employer that the administrative law judge's finding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(1) is not supported by substantial evidence. Therefore, the administrative law judge's finding at Section 718.202(a)(1) is vacated, and the case is remanded for reconsideration of the x-ray evidence.

Employer contends that the administrative law judge erred in his weighing of the medical opinions pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Baker and Jarboe, and treatment notes from Drs. Almussady and Loqman. Director's Exhibits 9; 16; Claimant's Exhibit 2; Employer's Exhibits 1-3. Dr. Baker diagnosed coal workers' pneumoconiosis based on a chest x-ray, and diagnosed chronic obstructive pulmonary disease, bronchitis, and hypoxemia due to both smoking and coal dust exposure. Director's Exhibit 9 at 1-4. Dr. Almusaddy, claimant's treating physician since 2004 diagnosed chronic obstructive pulmonary disease caused by both smoking and coal dust exposure. Claimant's Exhibit 2. Treatment records by Dr. Loqman listed diagnoses of chronic obstructive pulmonary disease and emphysema. Employer's Exhibit 3; Claimant's Exhibit 2. Dr. Jarboe examined and tested claimant and concluded that he does not have pneumoconiosis. Employer's Exhibit 1.

After noting Dr. Baker's diagnosis of pneumoconiosis, Dr. Jarboe's finding of no pneumoconiosis, and that the treatment records by Drs. Loqman and Almusaddy "consistently" mentioned pneumoconiosis, the administrative law judge concluded, "[t]he undersigned defers to the treating physicians and concludes that §718.202(a)(4) has been

met." Decision and Order at 6. In so concluding, the administrative law judge failed to weigh the medical opinions, or explain his conclusion, beyond mechanically relying on the treating physician status of Drs. Loqman and Almusaddy. *See* 20 C.F.R. §718.104(d); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, we agree with employer's contention that the administrative law judge's finding that pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) is not supported by substantial evidence. Therefore, the administrative law judge's finding at Section 718.202(a)(4) is vacated, and the case is remanded for reconsideration of the medical opinion evidence. Director's Exhibits 9, 16; Employer's Exhibits 1, 3.

Turning to total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Almussady, and Jarboe. Director's Exhibits 9, 16; Employer's Exhibits 1, 2; Claimant's Exhibit 2. Dr. Baker diagnosed a mild impairment, but did not state whether claimant could return to coal mine employment. Director's Exhibit 9. Dr. Almusaddy opined that claimant could not return to coal mine employment. Employer's Exhibit 3. Dr. Jarboe opined that claimant has a totally and permanently disabling respiratory impairment. Director's Exhibit 16; Employer's Exhibits 1, 2; Claimant's Exhibit 2. Although the administrative law judge found that the objective studies were nonqualifying[3] pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), he found that the medical opinion evidence, including Dr. Jarboe's opinion, submitted by employer, established total disability pursuant to 20 C.F.R §718.204(b)(2)(iv). Decision and Order at 8.

Employer contends that the record does not support a finding of total disability. Employer's Brief at 12. Review of employer's brief, however, reveals no specific allegation of error in the administrative law judge's finding of total disability. Instead, employer alleges error in the finding that claimant's total disability is due to pneumoconiosis. Employer's Brief at 12-14. We therefore affirm the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b). *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); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

However, because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to C.F.R. §718.202(a), we must

[3] A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). If, on remand, the administrative law judge finds that the existence of pneumoconiosis has been established, the administrative law judge must then reconsider the relevant evidence and determine whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed in part, 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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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