BRB No. 07-0253 BLA

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| A.K. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| MAGNET COAL, INCORPORATED | ) | |
| | ) | DATE ISSUED: 10/29/2007 |
| Employer-Respondent | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

A.K., Hanover, West Virginia, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (04-BLA-5447) of Administrative Law Judge Daniel F. Solomon 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 February 2, 2002.[1] The administrative law judge found that

[1] Claimant initially filed a claim for benefits on November 5, 1998. Director's Exhibit 1. The district director denied benefits on May 4, 1999 because claimant did not establish that he was totally disabled due to pneumoconiosis. *Id.* There is no indication

the newly submitted evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1998 claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered claimant's 2002 claim on the merits. The administrative law judge found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 under Part 718 in a living miner's claim, a 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. 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*).

In considering the x-ray evidence, the administrative law judge considered six interpretations of four x-rays taken on March 7, 2002, April 22, 2003, August 25, 2004, and March 7, 2006. The administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 10-11.

Although Dr. Cappiello, a B reader and Board-certified radiologist, interpreted claimant's April 22, 2003 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, Dr. Scatarige, an equally qualified physician, interpreted this x-ray as negative for the disease. Employer's Exhibit 8. Because claimant's April 22, 2003 x-ray was read as

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that claimant took any further action in regard to his 1998 claim. Claimant filed a second claim on February 5, 2002. Director's Exhibit 1.

both positive and negative by equally qualified physicians, the administrative law judge acted within his discretion in finding that the interpretations of this x-ray are "in equipoise" and, therefore, insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 11.

Although Dr. Aycoth, a B reader, interpreted claimant's March 7, 2006 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, Dr. Wheeler, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease. Director's Exhibit 15. The administrative law judge acted within his discretion in crediting Dr. Wheeler's negative interpretation of claimant's March 7, 2006 x-ray, over Dr. Aycoth's positive interpretation, based upon Dr. Wheeler's superior qualifications. 20 C.F.R. §718.202(a)(1); *Sheckler*, 7 BLR at 1-131; Decision and Order at 11.

The administrative law judge next considered the interpretations of claimant's March 7, 2002 and August 25, 2004 x-rays. Dr. Wiot, a B reader and Board-certified radiologist, interpreted claimant's March 7, 2002 x-ray as negative for pneumoconiosis, Employer's Exhibit 1, while Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's August 25, 2004 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. The administrative law judge accorded greater weight to Dr. Patel's positive interpretation of claimant's August 25, 2004 x-ray than to Dr. Wiot's negative interpretation of claimant's March 7, 2002 x-ray, based upon the 2004 positive x-ray's recency. However, the administrative law judge found that the greater weight that he earlier accorded to Dr. Wheeler's negative reading of claimant's May 4, 2006 x-ray "mitigate[d] any weight [he] might give to Dr. Patel's [positive] reading." *Id.* The administrative law judge, therefore, found that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Although the administrative did not commit any error in regard to his consideration of the above-referenced x-ray interpretations, he failed to consider all of the relevant x-ray evidence of record. Specifically, the administrative law judge erred in not considering the x-ray submitted in connection with claimant's Department of Labor-sponsored pulmonary evaluation. Claimant selected Dr. Porterfield to conduct his Department of Labor-sponsored pulmonary evaluation. *See* Director's Exhibit 10. In connection with this evaluation, Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's March 7, 2002 x-ray as positive for pneumoconiosis.[2] *See* Director's Exhibit 11. An administrative law judge is required to consider all relevant

[2] The results of claimant's complete pulmonary evaluation are admissible evidence and are not counted as evidence submitted by claimant pursuant to the evidentiary limitations set forth at 20 C.F.R. §725.414. *See* 20 C.F.R. §725.406(b).

evidence in the record. *See* 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) and remand the case for further consideration.

The administrative law judge also reviewed the x-ray evidence submitted in connection with claimant's 1998 claim, finding that it was entitled to less weight than the more recent x-ray evidence. Decision and Order at 11. In *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an administrative law judge may not discredit positive x-ray evidence solely because later x-rays are interpreted as negative. The previously submitted x-ray evidence includes two positive interpretations of a January 13, 1999 film, one of which was rendered by Dr. Patel, a B reader and Board-certified radiologist.[3] Director's Exhibit 1. The administrative law judge erred in finding that the positive interpretations of claimant's January 13, 1999 x-ray were discredited solely because later x-rays were interpreted as negative. On remand, therefore, the administrative should reconsider the x-ray evidence submitted in connection with claimant's 1998 claim.

Because there is no biopsy evidence of record, the administrative law judge accurately found that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 10. Furthermore, the administrative law judge properly found that claimant was not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[4] *Id.*

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[5] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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[3] Dr. Cole, a B reader and Board-certified radiologist, interpreted claimant's January 13, 1999 x-ray as negative for the disease. Director's Exhibit 1. The other positive interpretation of claimant's January 13, 1999 x-ray was rendered by a physician who did not indicate that he possesses any radiological qualifications.

[4] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[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).

The record contains one medical report submitted in connection with claimant's prior 1998 claim. In a report dated January 13, 1999, Dr. Rasmussen diagnosed coal workers' pneumoconiosis.

The evidence submitted in connection with claimant's 2002 claim includes the reports and deposition testimony of Drs. Porterfield, Rasmussen, Hippensteel, and Castle. Dr. Porterfield diagnosed coal workers' pneumoconiosis and emphysema. Director's Exhibit 11. Dr. Rasmussen diagnosed coal workers' pneumoconiosis and "possible diffuse interstitial fibrosis." Claimant's Exhibit 1. Dr. Rasmussen also opined that claimant suffers from a coal mine dust-induced chronic lung disease. Claimant's Exhibit 4 at 20. Drs. Hippensteel and Castle opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibit 12; Employer's Exhibits 2-4.

In his consideration of the medical opinion evidence, the administrative law judge stated:

> I have reviewed the opinion of Dr. Patel in the prior record and the findings of Dr. Patel and Dr. Porterfield in the current record. Dr. Patel, who performed the [D]epartment sponsored pulmonary evaluation, did not submit FEV1 or FEVC results. Dr. Patel simply stated that Claimant was 35 % impaired. I cannot properly assess the probative value of Dr. Patel's test without additional information and test values and did not consider his pulmonary test analysis when determining total disability. Therefore, I cannot accept the reports as reasoned.

Decision and Order at 12.

Contrary to the administrative law judge's characterization, Dr. Porterfield, not Dr. Patel, performed the Department of Labor-sponsored pulmonary evaluation.[6] *See* Director's Exhibits 10, 11. Dr. Patel did not provide a medical report in this case.[7] Although the administrative law judge noted that he reviewed Dr. Porterfield's "findings," the administrative law judge did not list Dr. Porterfield's April 3, 2002 report in his summary of the medical opinion evidence. *See* Decision and Order at 6, 12. The administrative law judge also failed to address Dr. Porterfield's diagnoses of coal

[6] Dr. Rasmussen was the only physician to provide a medical report in connection with claimant's 1998 claim. *See* Director's Exhibit 1.

[7] As discussed, *supra*, Dr. Patel, a B reader and Board-certified radiologist, rendered positive interpretations of claimant's January 13, 1999, March 7, 2002, and August 25, 2004 x-rays. Director's Exhibits 1, 11; Claimant's Exhibit 1.

workers' pneumoconiosis and emphysema. Because the administrative law judge failed to consider all relevant evidence in the record, 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.

Additionally, the administrative law judge found that Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis was not well reasoned because it was based in part upon a positive x-ray interpretation that was called into question by the administrative law judge's earlier finding that the x-ray evidence was at best "in equipoise" and, therefore, insufficient to support a finding of pneumoconiosis. Decision and Order at 12; Claimant's Exhibit 1. In light of our decision to vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge's basis for discrediting Dr. Rasmussen's diagnosis of clinical pneumoconiosis cannot stand.

Dr. Rasmussen also testified that claimant's pulmonary function studies were consistent with a restrictive defect, including interstitial fibrosis. Claimant's Exhibit 4 at 7-8. Dr. Rasmussen concluded that claimant's coal mine dust exposure was "a significant, if not major, cause of his disabling lung disease." *Id.* at 10. Dr. Rasmussen based his opinion on the pattern of claimant's impairment demonstrated by the results of his pulmonary function and arterial blood gas study results. *Id.* at 6, 9-10. Noting that pulmonary function studies, in general, are not diagnostic of pneumoconiosis, the administrative law judge accorded less weight to Dr. Rasmussen's diagnosis of legal pneumoconiosis. Decision and Order at 12. However, the significance of claimant's pulmonary function and arterial blood gas studies is a medical determination. By concluding that the claimant's objective test results were not relevant in assessing the etiology of claimant's lung disease, the administrative law judge improperly substituted his opinion for that of Dr. Rasmussen. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

On remand, when reconsidering whether the medical opinion evidence is sufficient to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

On remand, should the administrative law judge find that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) or (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 pneumoconiosis. *See*

*Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Should the administrative law judge find that the evidence establishes the existence of pneumoconiosis, he must consider whether the evidence establishes that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203, and whether is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c).[8]

[8] Because no party challenges the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order denying benefits is 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