BRB No. 09-0331 BLA

R.D.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/28/2009
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5121) of Administrative Law Judge Robert B. Rae 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). This case involves a claim filed on January 29, 2007. After crediting claimant with over twenty-nine years of coal mine employment,[1] the administrative law

[1] The record reflects that claimant's coal mine employment occurred in West Virginia. Hearing Transcript at 17. Accordingly, this case arises within the jurisdiction

judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). The administrative law judge further found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer also argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). Employer further contends that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a 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*).

The Existence of Pneumoconiosis

Section 718.202(a)(1)

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of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] Because no party challenges the administrative law judge's findings that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii). *Id.*

Employer initially argues that the administrative law judge erred in finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The record contains eight interpretations of three x-rays taken on April 18, 2007, July 23, 2007, and March 24, 2008. While Dr. Rasmussen, a B reader, interpreted an April 18, 2007 x-ray as positive for pneumoconiosis, Director's Exhibit 10, Dr. Wiot, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease.[3] Employer's Exhibit 2.

Drs. Willis and Wiot, each dually qualified as a B reader and Board-certified radiologist, interpreted a July 23, 2007 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 3.

Although Drs. Ahmed and Pathak, each dually qualified as a B reader and Board-certified radiologist, interpreted a March 24, 2008 x-ray as positive for pneumoconiosis, Claimant's Exhibits 1, 2, two equally qualified physicians, Drs. Wiot and Meyer, interpreted this x-ray as negative for the disease. Employer's Exhibits 5, 6.

In his consideration of the x-ray evidence, the administrative law judge accorded the greatest weight to Dr. Rasmussen's x-ray interpretation, based upon the doctor's "long and distinguished academic and medical career; his documented history of association with the Black Lung studies; his practical medical experience; and his well-documented and well-reasoned reports in this case." Decision and Order at 13. The administrative law judge further stated that:

> I have also considered the credentials of Dr. Wiot, Dr. Willis and Dr. Meyer in deciding this matter with respect to the x-rays. I find, after review of the evidence as a whole, Dr. Rasmussen's opinions, taken in conjunction with Dr. Ahmed's and Dr. Pathak's, to be more credible and supported by the evidence. I give them greater weight.

Decision and Order at 14.

Employer contends that the administrative law judge erred in according greater weight to Dr. Rasmussen's positive interpretation of claimant's April 18, 2007 x-ray. We agree. The Board has held that, after an administrative law judge considers the B reader and Board-certified reader status of the x-ray readers, he is not barred from considering further factors "relevant to the level of radiological competence, such as a professorship in the field of radiology, in evaluating the relative weight of the x-ray readings." *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983). However, in this case, the administrative law judge failed to explain how the factors that he relied upon to credit Dr.

[3] Dr. Gaziano interpreted this x-ray for quality purposes only. Director's Exhibit 14.

Rasmussen's x-ray interpretation are relevant to the doctor's *radiological competence*. Moreover, the administrative law judge erred in failing to address the significance of the fact that Dr. Wiot, a physician with superior radiological qualifications, interpreted claimant's April 18, 2007 x-ray as negative for pneumoconiosis.[4]

The administrative law judge also failed to address the significance of the fact that the July 23, 2007 x-ray was uniformly interpreted as negative for pneumoconiosis.[5] The administrative law judge further failed to explain why the positive interpretations of the March 24, 2008 x-ray rendered by Drs. Ahmed and Pathak were entitled to greater weight than the negative interpretations of this x-ray by two equally qualified physicians, Drs. Wiot and Meyer. Consequently, the administrative law judge's analysis of the x-ray evidence does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the 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 30 U.S.C. §432(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).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). On remand, the administrative law judge must consider the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film, and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v.*

[4] The administrative law judge erred in not considering factors relevant to the radiological competence of the other physicians of record. For example, Drs. Wiot and Meyer are professors of radiology at the University of Cincinnati and Indiana University, respectively. Employer's Exhibits 5, 6.

[5] The administrative law judge stated that Drs. Willis and Wiot, in rendering interpretations of claimant's July 23, 2007 x-ray, "noted significant quality issues in their reports." Decision and Order at 14. The administrative law judge, however, failed to note that Drs. Willis and Wiot each reviewed three posteroanterior (PA) views and one lateral view of claimant's July 23, 2007 x-ray. Employer's Exhibits 1, 3. Although Drs. Willis and Wiot noted that one of the PA views was of questionable quality (Dr. Willis graded it a quality 3, while Dr. Wiot found that it was "totally unacceptable for evaluation by ILO standards"), both physicians found that the other views were of suitable quality for evaluation. *Id.*

Peabody Coal Co., 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988).

Section 718.202(a)(4)

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although Dr. Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibit 10; Claimant's Exhibit 4, Drs. Crisalli and Hippensteel opined that claimant does not suffer from the disease. Employer's Exhibits 1, 4, 7, 8. In his consideration of the conflicting medical opinion evidence, the administrative law judge stated:

> I find Dr. Rasmussen's opinions to be well-documented and well-reasoned and have given them greater weight. The doctor's physical examination and evaluation, together with his review and reliance on the testing performed convince me that his diagnosis is accurate and substantiated.
>
> I find Dr. Crisalli's opinions less supported by the evidence on the whole and find them entitled to less weight.
>
> I have also considered the opinions of Dr. Hippensteel and find them not generally supported by the evidence on the whole and give them less weight.

Decision and Order at 14-15 (footnotes omitted).

We agree with employer that the administrative law judge, in evaluating the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), erred in failing to provide a basis for his findings. The administrative law judge provided no explanation for finding that Dr. Rasmussen's diagnosis of pneumoconiosis was well-documented or well-reasoned. The administrative law judge also failed to explain his basis for finding that the opinions of Drs. Crisalli and Hippensteel, that claimant does not suffer from pneumoconiosis, are not supported "by the evidence on the whole." Consequently, the administrative law judge's analysis fails to comport with the APA. *Wojtowicz*, 12 BLR at 1-165. We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

On remand, when reconsidering whether the relevant medical opinion evidence establishes the existence of pneumoconiosis, 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. *Milburn Colliery Co. v. Hicks*, 138 F.3d

524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (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 at 20 C.F.R. §718.202(a), pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[6]

Because the administrative law judge must reevaluate whether the evidence establishes the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Total Disability

Section 718.204(b)(2)(ii)

Employer argues that the administrative law judge erred in finding that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The record contains two arterial blood gas studies conducted on April 18, 2007 and July 23, 2007. Dr. Rasmussen's April 18, 2007 study consists of both a resting and an exercise study, while Dr. Crisalli's subsequent July 23, 2007 study consists of only a resting study. Director's Exhibit 10; Employer's Exhibit 1. While the resting portion of both studies produced non-qualifying values, the exercise portion of Dr. Rasmussen's April 18, 2007 study produced qualifying values.[7]

In considering the arterial blood gas study evidence, the administrative law judge credited the qualifying exercise portion of Dr. Rasmussen's April 18, 2007 study, noting that it had "not been rebutted by any evidence produced by employer." Decision and Order at 15. We agree with employer that, to the extent that the administrative law judge believed that a qualifying arterial blood gas study entitled claimant to a presumption of

[6] In evaluating the relevant evidence pursuant to 20 C.F.R. §718.202(a), the administrative law judge should address the significance of the interpretations of claimant's May 8, 2008 CT scan, rendered by Drs. Cappiello and Wiot. *See* Claimant's Exhibit 3; Employer's Exhibit 10.

[7] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

total disability, he erred. Claimant has the burden of establishing all elements of entitlement by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994). Moreover, the administrative law judge erred in not explaining his basis for crediting the qualifying exercise blood gas study result over the two non-qualifying resting blood gas study results. *See generally Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). Therefore, the administrative law judge's analysis fails to comport with the APA. *Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(ii) is vacated.

Section 718.204(b)(2)(iv)

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In considering the medical opinion evidence, the administrative law judge accorded the greatest weight to "the well-reasoned and well-documented opinions of Drs. Rasmussen." Decision and Order at 15. Although Dr. Rasmussen opined that claimant suffers from a totally disabling respiratory impairment, the administrative law judge failed to explain his basis for finding that Dr. Rasmussen's opinion regarding the extent of claimant's respiratory impairment was well-reasoned. The administrative law judge also did not address whether the medical opinions of Drs. Crisalli and Hippensteel support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge's analysis, therefore, fails to comport with the APA. *Wojtowicz*, 12 BLR at 1-165. Accordingly, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).

On remand, when considering whether the medical evidence establishes total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv), 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 Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

If, on remand, the administrative law judge finds that the arterial blood gas study or medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iv), he must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and 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