BRB No. 12-0020 BLA

BILLY R. McCLANAHAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/18/2012
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5866) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30

[1] Claimant filed an initial claim for benefits on May 8, 1995, which was denied by the district director for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until filing his subsequent claim on November 2, 2007. Director's Exhibit 3.

U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with approximately eleven years of coal mine employment and adjudicated this claim under the regulations at 20 C.F.R. Part 718.[2] The administrative law judge determined that the newly submitted evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). In considering the merits of the claim, the administrative law judge found that claimant established the existence of legal pneumoconiosis[3] at 20 C.F.R. §718.202(a)(4), but that claimant did not prove total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding the x-ray evidence to be in equipoise as to the existence of clinical pneumoconiosis.[4] Claimant further argues that the administrative law judge applied the wrong legal standard in requiring him to prove that pneumoconiosis substantially contributed to his respiratory disability. In response, the Director, Office of Workers' Compensation Programs (the Director), argues that the administrative law judge applied the proper legal standard and reasonably concluded that the evidence was insufficient to establish that claimant is totally disabled due to legal pneumoconiosis. However, the Director also asserts that claimant did not receive a complete pulmonary evaluation and, thus, requests

[2] Because claimant established less than fifteen years of coal mine employment, the administrative law judge found that claimant was not eligible for the presumption at Section 411(c)(4) of the Act, *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[3] 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). A disease "arising out of coal mine employment" includes any "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[4] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

that the case be remanded to the district director in order for the Director to satisfy his statutory obligation under the Act.[5]

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.[6] 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).

The administrative law judge denied benefits because he found that claimant did not satisfy his burden to prove that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Director concedes that he has failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation relevant to the issue of disability causation. Specifically, the Director concedes that the opinion of Dr. Rasmussen, who performed the examination at the request of the Department of Labor, is inconsistent as to whether coal dust exposure substantially contributed to claimant's respiratory disability. The Director, therefore, requests remand of the case to the district director to allow for a complete pulmonary evaluation and for reconsideration of this claim in light of the new evidence. We grant the Director's request, given the Director's concession that the Department of Labor failed to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 642, 24 BLR 2-199, 2-221 (6th Cir. 2009); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Consequently, we vacate the administrative law judge's denial of benefits and remand the case to the district director for further development of the medical evidence.

In the interest of judicial economy, we also address claimant's arguments on appeal. In considering whether claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered five readings of two x-rays dated January 22, 2008 and March 5, 2010. Decision and Order at 5. As noted by the administrative law judge, the January 22, 2008 x-ray was

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established approximately eleven years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 7; Hearing Transcript at 10-11.

read by Dr. Rasmussen, a B reader, as negative for pneumoconiosis, while Dr. Alexander, dually-qualified as a Board-certified radiologist and a B reader, read the January 22, 2008 x-ray as positive for pneumoconiosis.[7] *See* Decision and Order at 5; Director's Exhibit 12; Claimant's Exhibit 1. The March 5, 2010 x-ray had only one reading by Dr. Ranavaya, a B reader, as negative for pneumoconiosis. *See* Decision and Order at 5; Director's Exhibit 71. Based on Dr. Alexander's qualifications, the administrative law judge found that the January 22, 2008 x-ray was positive for pneumoconiosis. Decision and Order at 16. The administrative law judge concluded that the x-ray evidence is in equipoise because "one [x]-ray is positive for pneumoconiosis and one [x]-ray is negative." *Id*. Thus, the administrative law judge found that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Claimant asserts that the administrative law judge erred in failing to resolve the conflict in the x-ray evidence by comparing the qualifications of Drs. Alexander and Ranavaya. Claimant argues that, based on Dr. Alexander's superior qualifications as a dually-qualified radiologist, the positive x-ray is entitled to greatest weight and the administrative law judge erred in finding that he did not establish the existence of clinical pneumoconiosis. Claimant's assertion of error has merit.

In his initial consideration of the x-ray evidence, the administrative law judge indicated that he accorded greatest weight to Dr. Alexander's readings because Dr. Alexander is a dually-qualified radiologist:

> I accord more weight to the interpretations of dually-qualified physicians than to interpretations by physicians who are B-readers. Thus, I rank Dr. Alexander ahead of Drs. Rasmussen and Ranavaya.

Decision and Order at 6. The administrative law judge's conclusion that the x-ray evidence is in equipoise does not account for this credibility determination with regard to Dr. Alexander's qualifications. Because the administrative law judge has not explained his findings with regard to the conflicting x-ray evidence, his Decision and Order does not satisfy the requirements of the Administrative Procedure Act.[8] Moreover, since the administrative law judge specifically determined that the January 22, 2008 x-ray was

[7] Dr. Gaziano read both x-rays for quality purposes only. Director's Exhibits 12, 17.

[8] The 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

positive for pneumoconiosis, he erred in failing to consider whether the later negative x-ray reading by Dr. Ranavaya is credible in light of the progressive nature of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Thus, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) and remand the case for further consideration of the x-ray evidence relevant to the existence of clinical pneumoconiosis. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

Claimant next argues that the administrative law judge erred in requiring him to establish that pneumoconiosis was a substantially contributing cause of his respiratory disability. Citing *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997), claimant maintains that he must prove only that there was more than a *de minimus* or infinitesimal contribution from pneumoconiosis to his respiratory disability. Contrary to claimant's argument, the United States Court of Appeals for the Sixth Circuit has held that in cases, such as this one, adjudicated under the revised 2001 regulations, the proper inquiry at 20 C.F.R. §718.204(c) is whether pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory or pulmonary impairment. *See Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 610-11, 22 BLR 2-288, 2-303 (6th Cir. 2001); *Island Creek Coal Co. v. Calloway*, No. 09-4589 (6th Cir. Feb 7, 2012). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1); *Kirk* 264 F.3d at 611, 22 BLR at 2-303. Thus, we reject claimant's assertion that the administrative law judge applied the wrong legal standard pursuant to 20 C.F.R. §718.204(c). On remand, following further medical development by the district director, the administrative law judge must determine whether the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor in claimant's totally disabling respiratory impairment.

Accordingly, the Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded to the district director for further development of the evidence and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge