BRB No. 98-1498 BLA

ALFIERO BERARDI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/28/99
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Harvey L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-1346) of Administrative Law Judge Ainsworth H. Brown 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). Claimant filed a claim on March 20, 1970. The Social Security Administration (SSA) denied the claim on January 26, 1971, and again on April 24, 1973. Director's Exhibits 6, 7. On October 26, 1978, claimant elected to have his claim reviewed by the SSA. Director's Exhibit 8. On April 25, 1979, the SSA again denied benefits, and referred the claim to the Department of Labor. Director's Exhibit 9. After the district director denied the claim on February 21, 1980, Director's Exhibit 11, Administrative Law Judge Anastasia T. Dunau held a formal hearing, and issued an Order of Remand dated June 17, 1981, remanding the case for further evidentiary development. Director's Exhibit 15. After developing the record further, the district director denied the claim, and referred it to the Office of Administrative Law Judges (OALJ) on November 4, 1982. Director's Exhibits 34, 35.

In a Decision and Order dated April 11, 1985, Administrative Law Judge Aaron Silverman credited claimant with nine and one-half years of coal mine employment, and found that the regulations under 20 C.F.R. Part 727 were, therefore, inapplicable to claimant's claim. Director's Exhibit 38. Judge Silverman then determined that claimant failed to establish entitlement to benefits pursuant to 20 C.F.R. Part 410, Subpart D, and denied benefits. *Id.* Claimant appealed. The Board affirmed Judge Silverman's length of coal mine employment finding, but, after noting that claimant's claim was also to be considered under 20 C.F.R. Part 718 pursuant to the decision of the United States Court of Appeals for the Third Circuit in *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987), the Board remanded the case for further consideration of the evidence under 20 C.F.R. §§718.202(a)(4), 718.203(c), and 718.204(b) and (c)(4). *Berardi v. Director, OWCP*, BRB No. 85-1230 BLA (Oct. 31, 1988)(unpublished). In a Decision and Order on Remand dated October 18, 1989, Judge Silverman found the evidence insufficient to establish total disability under Section 718.204(c)(4), and determined that, consequently, entitlement to benefits was not established under Part 718. Director's Exhibit 42. Accordingly, Judge Silverman again denied benefits. *Id.* Claimant appealed. In a Decision and Order dated December 3, 1991, the Board held that Judge Silverman properly found that claimant's entitlement to benefits was precluded because the evidence he was instructed to reconsider on remand was insufficient to establish total disability under Section 718.204(c), an essential element of entitlement under Part 718. *Berardi v. Director, OWCP*, BRB No. 89-3639 BLA (Dec. 3, 1991)(unpublished). The Board granted, however, the Motion to Remand this case filed by the Director, Office of Workers' Compensation Programs (the Director), and vacated Judge Silverman's denial of benefits, given the Director's concession that claimant had not received a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. *Id.* The Board thus remanded the case to the district director for claimant to be afforded such opportunity. *Id.*

After further evidentiary development, the district director denied benefits on October 23, 1992, Director's Exhibit 64, and referred the case to the OALJ. Director's Exhibit 67. After a hearing on April 21, 1993, Administrative Law Judge Ainsworth H. Brown (the administrative law judge), issued a Decision and Order dated June 21, 1993. After concluding that the Board's prior affirmance of Judge Silverman's finding that claimant established nine and one-half years of coal mine employment was the law of the case, the administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4). The administrative law judge, therefore, denied benefits.

Claimant appealed. After holding that the administrative law judge properly found the law of the case doctrine controlling on the issue of length of coal mine employment, the Board held that the administrative law judge should have first considered the claim pursuant to Section 410.490. *Berardi v. Director, OWCP*, BRB No. 93-2083 (Apr. 26, 1995)(unpublished). Applying the administrative law judge's findings under Part 718, however, the Board held that the administrative law judge properly found that the x-ray

evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). Transferring this finding, the Board also held that the x-ray evidence was insufficient to establish invocation of the presumption under Section 410.490(b)(1)(i).[1] *Id.* The Board held that claimant thus failed to establish entitlement pursuant to Section 410.490. *Id.* The Board then held that the administrative law judge properly found the medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). *Id.* The Board held that, inasmuch as claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a),[2] a requisite element of Part 718 entitlement, the administrative law judge properly denied benefits. *Id.* Claimant appealed to the United States Court of Appeals for the Third Circuit, which summarily denied claimant's appeal. *Berardi v. Director, OWCP*, No. 95-3332 (3d Cir. Jan. 31, 1996)(unpublished Order).

Subsequently, on January 10, 1997, claimant filed a request for modification. In his Decision and Order dated July 14, 1998, the administrative law judge initially determined that the Director conceded that the new evidence established a change in conditions and/or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and that, therefore, it

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[1]The Board also noted that the record did not contain autopsy or biopsy evidence, the only other means by which claimant could have established invocation pursuant to 20 C.F.R. §410.490(b)(1). *Berardi v. Director, OWCP*, BRB No. 93-2083 (Apr. 26, 1995)(unpublished).

[2]The Board noted that the administrative law judge did not make any findings under 20 C.F.R. §718.202(a)(3). *Berardi v. Director, OWCP*, BRB No. 93-2083 (Apr. 26, 1995)(unpublished). The Board held that claimant could not establish the existence of pneumoconiosis pursuant to that subsection, however, inasmuch as none of the presumptions set forth thereunder applied in this case. *Id.*

was necessary to consider the evidence of record as a whole. The administrative law judge then found that the x-ray evidence of record did not support a finding that claimant suffers from pneumoconiosis. The administrative law judge found that claimant thus was not entitled to invocation of the presumption at Section 410.490(b)(1)(i). Applying the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the administrative law judge further found that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a) and, accordingly, denied benefits.[3]

[3]In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the Third Circuit held that the fact-finder must first consider each of the four regulatory methods of establishing the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), and then weigh all of the conflicting evidence together under Section 718.202(a)(1)-(4) prior to making a finding regarding that element of entitlement.

On appeal, claimant argues that the administrative law judge erred in failing to find that the Director conceded that the x-ray evidence established the existence of pneumoconiosis, and that the administrative law judge thus erred in finding claimant did not establish entitlement to benefits under Section 410.490. Alternatively, claimant challenges the administrative law judge's weighing of the x-ray evidence under Section 410.490(b)(1)(i). Claimant also contends that the evidence has established that his pneumoconiosis was caused, at least in part, by his coal mine employment pursuant to Section 410.490(b)(2), and argues that the evidence of record is insufficient to establish rebuttal of the Section 410.490 presumption. The Director responds contending that the administrative law judge erred in concluding that the Director conceded that modification was established under Section 725.310. The Director also contends, however, that the administrative law judge's weighing of the x-ray evidence of record cannot withstand appellate review and that a remand is necessary for the administrative law judge to reconsider this evidence under Section 410.490(b)(1)(i).[4]

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).

Claimant first argues that the administrative law judge erred by failing to find that the district director's finding, in his Proposed Decision and Order Denying Modification, that the x-ray evidence established the existence of pneumoconiosis was a "binding judicial admission." Claimant's brief at 6. Claimant argues that, given the alleged concession and the regulatory presumption of total disability due to pneumoconiosis under Section 410.490, he was entitled to benefits. In support of his contention, claimant points to the district director's statement in the April 7, 1997 Proposed Decision and Order that "while the x-ray film evidence [submitted in support of modification] shows the existance [sic] of the disease, the claim remains denied as the evidence does not shoe\w [sic] that the claimant is totally disabled...." Director's Exhibit 85. Claimant's contention lacks merit. Contrary to claimant's assertion, a district director's initial finding in a Proposed Decision and Order is not binding on an administrative law judge. *See Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985); *see generally* 20 C.F.R. §725.463. There is thus no merit to claimant's suggestion that the district director's 1997 finding provided a basis for the administrative

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 8-10.

law judge to award benefits under Section 410.490.

We next address the Director's contention that the administrative law judge erred in finding that the Director conceded that modification was established. The administrative law judge found that the Director conceded modification because the issue was not check-marked by the Director as a contested issue in the transmittal form to the OALJ. Decision and Order at 4; Director's Exhibit 88. The Director argues that the omission was clearly at most a clerical error given that the Director, in fact, contested all of the elements of entitlement, which would be consistent with a challenge of modification as an issue. The Director asserts that, moreover, he attempted to clarify, before the administrative law judge issued his Decision and Order, that modification was, in fact, a disputed issue. Specifically, the Director filed with the administrative law judge a letter dated April 28, 1998, in which the Director offered Proposed Findings of Fact and Conclusions of Law. In the letter, the Director attempted to correct the transmittal form, stating that "[a]lthough Form CM-1025 at DX 88 does not list modification as a contested issue, the parties agree that this is a modification proceeding...." The administrative law judge apparently did not consider this statement in finding that the Director conceded modification. To the extent that the administrative law judge erred in finding that the Director conceded modification, however, the error was harmless since the administrative law judge considered all of the evidence of record, as required pursuant to *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).[5] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, remand for reconsideration of whether modification was conceded is not warranted in the instant case.

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[5]In *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit, under whose jurisdiction the instant case arises, held that 20 C.F.R. §725.310 requires the administrative law judge to review all of the evidence of record in considering whether any mistakes in a determination of fact were made in the previous adjudication of the case. *Keating,* 71 F.3d at 1123, 20 BLR at 2-62, 63.

Claimant also argues that the administrative law judge erred in rejecting his motion to exclude from the record the interpretations of the x-ray film dated November 26, 1997.[6] The film in question was taken at the time of Dr. Levinson's examination of claimant, which was conducted at the Director's request. Director's exhibit 89. The x-ray was read as negative four times, and Dr. Gaziano interpreted the film as showing pleural abnormalities consistent with pneumoconiosis. Director's Exhibits 90, 93, 99-101. Claimant moved for exclusion of this evidence in his written closing argument filed with the administrative law judge on April 30, 1998, contending that the district director inexcusably delayed forwarding the x-ray film to him, which consequently compromised his ability to have the film read before the record was closed. By letter dated January 13, 1998, claimant's counsel informed the administrative law judge that she and the Director agreed to a March 9, 1998 closing date for submitting all medical evidence, and a March 30, 1998 deadline for written arguments. In a subsequent letter to the administrative law judge dated March 2, 1998, claimant's counsel informed the administrative law judge that she proposed the March 9th closing date, having been assured by the district director's office on January 13, 1998 that the x-ray film would be forwarded to Dr. Smith for claimant to obtain a re-reading of the film. Also in her March 2, 1998 letter, claimant's counsel asserts that the film was never sent to Dr. Smith as promised by the district director, but rather forwarded to another physician, chosen by the Department of Labor. Claimant's counsel thus requested an additional thirty days in which to submit evidence. The administrative law judge granted this request in a letter to claimant dated March 6, 1998, and set April 30, 1998 as the closing date for the submission of all evidence. Subsequently, in April 1998,[7] the x-ray film was forwarded to Dr. Bassali for claimant to obtain a re-reading of the film, but claimant asserts that, by this time, Dr. Bassali had become ill and was unable to read the film.

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[6] A hearing was not held on claimant's request for modification. Although a hearing had been scheduled for December 8, 1997, the administrative law judge gave claimant, in an Order to Show Cause dated November 14, 1997, ten days to show cause as to why a hearing would be necessary. In a letter to the administrative law judge dated November 20, 1997, claimant's counsel initially requested a continuance of the hearing. Subsequently, in an Order dated November 25, 1997, the administrative law judge canceled the scheduled hearing, ordered both parties to submit a schedule for the submission of evidence and written argument, and informed the parties that no hearing would be rescheduled except for good cause shown and the agreement of both parties. Thereafter, by letter dated January 13, 1998, claimant's counsel informed the administrative law judge that she and the Director, Office of Workers' Compensation Programs, agreed to a March 9, 1998 closing date for submitting all medical evidence, and a March 30, 1998 deadline for written arguments. In his written argument, claimant argued that the administrative law judge should have excluded the interpretations of the November 26, 1997 x-ray.

[7] The record does not reflect what the precise date was in April on which the film was received in Dr. Bassali's office.

The Board has held that an administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst- Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In the instant case, we hold that, contrary to claimant's contention, the administrative law judge reasonably and within his discretion admitted the interpretations of the November 26, 1997 x-ray in his Decision and Order. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989)(*en banc*)(McGranery, J., concurring); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1984). Specifically, the administrative law judge found it significant that, although the district director was less than prompt in forwarding the film, claimant was aware of the delay, yet chose on March 2, 1998 to request an enlargement of time to submit his rereadings, as noted *supra*, rather than to make a motion at that time to exclude the film. Decision and Order at 5. Also noting that he granted claimant's request for an extension of time on March 6, 1998, as discussed *supra*, the administrative law judge further noted that claimant failed to make any additional requests for an enlargement of time. *Id*. Additionally, the administrative law judge explained that he could not discern whether Dr. Bassali would have been capable of timely rendering a reading of the film without the Director's delay. *Id*. We, therefore, reject claimant's contention that the administrative law judge erred in admitting the interpretations of the November 26, 1997 x-ray.

Claimant further argues that the multiple x-ray readings obtained by the Director were cumulative and should therefore, not have been accorded any weight. Claimant's suggestion that the administrative law judge was required to find the four negative readings of the November 26, 1997 film, and the three negative readings of the April 29, 1996 film, cumulative is without merit, however, since claimant himself submitted three readings of the April 29, 1996 x-ray. *See generally Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); Claimant's Exhibits 1-3. Moreover, an administrative law judge is not required to accord less weight to cumulative evidence. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997).

We agree with claimant's next contention, however, that the administrative law judge failed to provide an adequate rationale for discounting the three positive interpretations of the October 3, 1996 x-ray. *See Brewster v. Director, OWCP*, 7 BLR 1-120 (1984); *Ridings v. C & C Coal Co.*, 6 BLR 1-227 (1983). With regard to the readings, the administrative law judge merely stated:

> ...although the weight of evidence shows the October 3, 1996 film supports a finding of pneumoconiosis, an x-ray rendered merely five months prior is in equipoise on the issue (three positive, three negative), and does not support a conclusion in Claimant's favor.

Decision and Order at 7. In simply referring to the October 3, 1996 x-ray as supportive of a finding of pneumoconiosis and referring to the number of positive and negative readings of the prior, April 29, 1996 film, the administrative law judge not only failed to provide a complete and sufficiently specific quantitative analysis, but also did not analyze the readings of these two x-rays from a qualitative perspective by considering the qualifications

of the physicians interpreting the films.[8] Additionally, we note that the Director contends that the administrative law judge's weighing of the x-ray evidence cannot withstand appellate review in light of the administrative law judge's failure to address the issue of the re-reading prohibition pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b).[9]

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[8]The October 3, 1996 film was interpreted as positive by Drs. Smith and Bassali, both of whom possess the dual qualifications of B reader and Board-certified radiologist. Director's Exhibits 80, 83. There is one negative interpretation of this film in the record, which was submitted by Dr. Gaziano, a B reader. Director's Exhibit 84. The April 29, 1996 film was also read as positive by Drs. Smith and Bassali, and by Dr. Parillo, a B reader. Claimant's Exhibits 1-3. The April 29, 1996 film was read as negative by Dr. Lippman, a B reader, and Drs. Navani and Cole, who are B readers and Board-certified radiologists. Director's Exhibits 96-98.

[9]In all claims filed before January 1, 1982, Section 413(b) of the Act, 30 U.S.C. §923(b), prohibits the Director from re-reading an x-ray, except for purposes of determining quality, where there is other evidence of a pulmonary or respiratory impairment, the x-ray

Consequently, we vacate the administrative law judge's weighing of the x-ray evidence under Sections 410.490(b)(1)(i), and remand this case for further consideration of the x-ray evidence of record thereunder.[10]

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film was originally read by a Board-certified or Board-eligible radiologist and taken by a radiologist or qualified radiological technician, and there is no evidence that the claim has been fraudulently represented. *See* 20 C.F.R. §§727.206(b)(1) and 718.202(a)(1)(i).

[10]The Director also correctly notes that the administrative law judge applied the later evidence rule in weighing the x-ray evidence. Decision and Order at 6-7. In doing so, the administrative law judge credited later negative readings over earlier positive readings on the basis of recency. *Id.* Such a basis for resolving the conflict posed by the x-ray evidence has been criticized by the United States Courts of Appeals for the Fourth and Sixth Circuits in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 86-87 (6th Cir. 1993), respectively. While the United States Court of Appeals for the Third Circuit has not adopted the approach of the Fourth and Sixth Circuits, the administrative law judge should consider on remand the concerns raised in *Adkins* and *Woodward* when deciding whether to credit the later negative readings over earlier positive readings. *See Adkins, supra; Woodward, supra*.

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge