BRB No. 98-1522 BLA

NICK TEDESCO)
)
Claimant-Petitioner)
)
v.)
)
CONSOLIDATION COAL COMPANY) DATE ISSUED: 10/13/99
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Nick Tedesco, Hopwood, Pennsylvania, *pro se*.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (97-BLA-0836) of Administrative Law Judge Gerald M. Tierney 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). The instant case involves a claim filed on May 21, 1996.[1] After crediting claimant with at least twenty-

[1]Claimant filed an earlier claim on May 27, 1983. Director's Exhibit 38. The district director denied the claim on September 15, 1983. *Id.* At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal

seven years of coal mine employment, the administrative law judge found the evidence insufficient to 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 20 C.F.R. 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The record contains numerous x-ray interpretations. Drs. McMahon and Navani, each of whom is dually qualified as a B reader and Board-certified

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hearing. *Id.* After claimant failed to attend a scheduled June 13, 1986 hearing, Administrative Law Judge Michael F. Colligan issued an Order to Show Cause on June 24, 1986. *Id.* Claimant subsequently moved that his claim be withdrawn. *Id.* By Order dated July 17, 1986, Judge Colligan, finding good cause, granted claimant's motion for withdrawal of his 1983 claim. *Id.*

radiologist, interpreted claimant's June 17, 1996 x-ray as positive for pneumoconiosis.[2] Director's Exhibits 16, 17, 19. However, two B readers, Drs. Renn and Fino, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 33; Employer's Exhibit 5. Dr. Francke, a reader whose radiological qualifications are not found in the record, also interpreted claimant's June 17, 1996 x-ray as negative for pneumoconiosis. Director's Exhibit 18.

Claimant's September 17, 1996 x-ray was uniformly interpreted as negative for pneumoconiosis. Drs. Wiot and Wheeler, each of whom is dually qualified as a B reader and Board-certified radiologist, interpreted claimant's September 17, 1996 x-ray as negative for pneumoconiosis. Director's Exhibit 34. Two B readers, Drs. Renn and Fino, also interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 33; Employer's Exhibit 1.

Dr. McMahon, a B reader and Board-certified radiologist, interpreted claimant's most recent December 29, 1997 x-ray as positive for pneumoconiosis. Employer's Exhibit 6. There are no other interpretations of this x-ray in the record.

In his consideration of whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge noted that Drs. McMahon and Navani, each of whom is dually qualified as a B reader and Board-certified radiologist, interpreted claimant's June 17, 1996 x-ray as positive for pneumoconiosis. Decision and Order at 3-4; Director's Exhibits 16, 17, 19. However, the administrative law judge noted that two equally qualified physicians, Drs. Francke and Wiot, rendered negative interpretations of claimant's x-rays. Decision and Order at 4; Director's Exhibit 18, 34. The administrative law judge noted that two B readers, Drs. Renn and Fino, also rendered negative interpretations of claimant's x-rays. Decision and Order at 4; Director's Exhibit 33; Employer's Exhibits 1, 5. The administrative law judge discredited Dr. McMahon's positive interpretation of claimant's December 29, 1997 x-ray because it did "not represent a change in his opinion or progression of the disease since 1996." Decision and Order at 4; Employer's Exhibit 6. The administrative law judge, therefore, found that the x-ray evidence was insufficient to

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[2]The record also contains interpretations of x-rays taken in 1981, 1983 and 1984. None of these interpretations is properly classified as positive for pneumoconiosis. *See* Director's Exhibit 38.

establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 4.

We initially note that the administrative law judge did not provide a basis for characterizing Dr. Francke as a dually qualified B reader and Board-certified radiologist.[3] Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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[3]As noted in our summary of the x-ray evidence, Dr. Francke's radiological qualifications are not found in the record.

The administrative law judge also failed to provide an appropriate basis for discrediting Dr. McMahon's positive interpretation of claimant's most recent x-ray, a film taken on December 29, 1997 x-ray. The administrative law judge discredited Dr. McMahon's positive interpretation of claimant's December 29, 1997 x-ray because it was similar to Dr. McMahon's positive interpretation of claimant's June 17, 1996 x-ray. Decision and Order at 4. Even if the administrative law judge properly discredited Dr. McMahon's positive interpretation of claimant's June 17, 1996 x-ray, this would not serve to undermine Dr. McMahon's positive interpretation of claimant's December 29, 1997 x-ray. In light of the above-referenced errors,[4] we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) and remand the case for reconsideration.

Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

The administrative law judge also properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

The administrative law judge considered whether the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby entitling claimant to invocation of the irrebuttable presumption set out at 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

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[4]The administrative law judge also did not consider Dr. Wheeler's negative interpretation of claimant's September 17, 1996 x-ray. *See* Employer's Exhibit 3.

The administrative law judge observed that Dr. McMahon, in his interpretation of claimant's June 17, 1996 x-ray, raised the possibility of complicated pneumoconiosis and that Dr. Navani, in his interpretation of the same x-ray, also diagnosed a size B large opacity. Decision and Order at 3; Director's Exhibits 16, 17, 19. However, the administrative law judge stated that both physicians suggested that a CT scan be obtained and that none of the other physicians of record interpreted claimant's x-rays as revealing complicated pneumoconiosis.[5] Decision and Order at 3. In view of the equivocal nature of the positive x-ray evidence of complicated pneumoconiosis, the administrative law judge found that the preponderance of the x-ray evidence failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.* Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

The administrative law judge properly found that claimant's July 12, 1996, September 17, 1996 and January 22, 1998 CT scans were uniformly interpreted as negative for pneumoconiosis. Decision and Order at 6; Director's Exhibits 33, 34; Employer's Exhibits 1, 3, 6. Furthermore, the administrative law judge properly stated that none of the examining or reviewing physicians of record diagnosed the existence of complicated pneumoconiosis. Decision and Order at 6. Consequently, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption set out at

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[5]Drs. Francke, Renn and Fino found no evidence of complicated pneumoconiosis on claimant's June 17, 1996 x-ray, Director's Exhibits 18, 33; Employer's Exhibit 5, while Drs. Wiot, Renn, Fino and Wheeler found no evidence of complicated pneumoconiosis on claimant's September 17, 1996 x-ray. Director's Exhibits 33, 34; Employer's Exhibits 1, 3. Finally, although Dr. McMahon questioned whether claimant's June 17, 1996 x-ray revealed complicated pneumoconiosis, Dr. McMahon found no evidence of complicated pneumoconiosis on claimant's subsequent December 29, 1997 x-ray. Employer's Exhibit 6.

20 C.F.R. §718.304.

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly credited the opinions of Dr. Renn and Fino that claimant does not suffer from pneumoconiosis[6] based upon their superior

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[6]Dr. Renn examined claimant on June 18, 1984. In a report dated July 12, 1984, Dr. Renn opined that there was no pneumoconiosis or ventilatory impairment. Director's Exhibit 38. Dr. Renn reexamined claimant on September 17, 1996. In a report dated September 27, 1996, Dr. Renn opined that claimant did not have pneumoconiosis. Director's Exhibit 33. Dr. Renn further opined that claimant did not have a significant ventilatory impairment. *Id.* During a February 5, 1998 deposition, Dr. Renn indicated that he found no evidence of coal workers' pneumoconiosis. Employer's Exhibit 6.

Dr. Fino reviewed the medical evidence of record. In a report dated February

qualifications.[7] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 7-8; Director's Exhibits 33, 38; Employer's Exhibits 5, 6. Inasmuch as it is supported by substantial evidence,[8] the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

24, 1997, Dr. Fino opined that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 5. Dr. Fino further opined that claimant did not suffer from an occupationally acquired pulmonary condition. *Id.*

[7]Drs. Renn and Fino are Board-certified in Internal Medicine and Pulmonary Diseases. Director's Exhibit 38; Employer's Exhibit 2. The record does not indicate that any other physician is Board-certified in Internal Medicine and Pulmonary Diseases.

[8]Inasmuch as the administrative law judge provided a proper basis for crediting the opinions of Drs. Renn and Fino, the Board need not address the reasons which the administrative law judge provided for discrediting the opinions of Drs. Gabriel, Rectenwald, Leef, Cho, Laga and the West Virginia Occupational Pneumoconiosis Board. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Finally, the administrative law judge did not render a finding as to which Circuit Court law was applicable in the instant case. The Board has held that it will apply the law of the United States Court of Appeals for the Circuit in which the miner most recently performed coal mine employment. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). It is unclear whether claimant's last coal mine employment occurred in Pennsylvania or West Virginia.[9] Should the administrative law judge, on remand, find the x-ray evidence sufficient to establish the existence of pneumoconiosis, he must determine the state in which claimant performed his most recent coal mine employment. We note that the United Stated Court of Appeals for the Third Circuit has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be

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[9]At the hearing, the following exchange took place on cross examination:

Q. You last worked for Consolidation Coal Company?

A. Yep.

Q. You worked at Consol's Humphrey No. 7 mine?

A. Humphrey No. 7.

Q. And that's actually located in West Virginia?

A. Right on the line. I guess they call it West Virginia and in Penns -- Pennsylvania, I think.
Q. You filed a state Workmen's Compensation claim and you were awarded state benefits from West Virginia?

A. Yeah, back in 1980, I believe, or 81.

Q. Okay. Have you filed any other Workmen's Compensation claims?

A. Pennsylvania claim.

Q. Are you getting any benefits still?

A. I get -- I get a claim from Pennsylvania, $125 a month.

Transcript at 19.

weighed together to determine whether a claimant suffers from the disease. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Consequently, in cases arising within the jurisdiction of the Third Circuit, an administrative law judge must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4) together in determining whether a claimant suffers from pneumoconiosis.[10] *Williams*, *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.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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[10]The Board has consistently recognized that 20 C.F.R. §718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). No other Circuit Court has adopted the holding of the Third Circuit in *Williams* that all relevant evidence must be weighed together in determining whether a miner suffers from pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

REGINA C. McGRANERY
Administrative Appeals Judge