BRB No. 99-0639 BLA

HENRY STEVENSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
BISHOP COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Supplemental Decision and Order Denying Motion to Reopen the Record and Awarding Benefits and Supplemental Decision and Order Denying Motion to Reopen the Record and Awarding Benefits on Remand of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher (Wolfe & Farmer), Norton, Virginia, for claimant.

Mary Rich Malloy (Jackson & Kelly), Charleston West Virginia, for employer.

Jill M. Otte (Henry 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Second Supplemental Decision and Order Denying Motion to Reopen the Record and Awarding Benefits on Remand and Supplemental Decision and Order Denying Motion to Reopen the Record and Awarding Benefits on Remand (90-BLA-1915) of Administrative Law Judge Joan Huddy Rosenzweig with respect to 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*.[1] The case is before the Board for the second time. The relevant procedural history of this case is as follows: Claimant filed his original application for benefits on October 19, 1982, which was denied by Administrative Law Judge Henry W. Sayrs in a Decision and Order dated January 15, 1988. Director's Exhibit 62. Claimant thereafter filed a motion for modification which was denied on February 1, 1989. *Id.* Claimant took no further action on this claim and the denial became final.

Claimant then filed the instant claim on March 10, 1989. Director's Exhibit 1. Following a hearing, Administrative Law Judge Joan Huddy Rosenzweig (the administrative law judge) issued a Decision and Order awarding benefits dated August 19, 1992. On appeal by employer, the Board affirmed the administrative law judge's award of benefits, but vacated her finding as to the appropriate onset date and remanded the case to the administrative law judge. *Stevenson v. Bishop Coal Co.*, BRB No. 92-2587 BLA (Mar. 30, 1994)(unpub.). Employer then filed a motion for reconsideration with the Board. The Board modified its prior Decision and Order and vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) and remanded the case for further consideration in light of the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251, 18 BLR 2-2A-1 (1994), *aff'g, Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). *Stevenson v. Bishop Coal Co.*, BRB No. 92-2587 BLA (Feb. 1, 1995)(unpub.)(Decision and Order on Reconsideration).

[1]Claimant is Henry Stevenson, the miner.

On remand, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and entitlement to benefits with an onset date of January 1, 1990. On a motion for reconsideration from employer, the administrative law judge reconsidered her determination and altered her rationale slightly, but ultimately found the existence of pneumoconiosis established at Section 718.202(a)(1) and (a)(4) with the same onset date. On appeal, employer challenges the administrative law judge's consideration of the x-ray interpretations and medical opinions of record pursuant to Section 718.202(a)(1) and (a)(4). Claimant, in response, asserts that the administrative law judge's Decision and Order is supported by substantial evidence, and accordingly, urges affirmance. The Director, Office of Workers' Compensation Programs, urges the Board to apply the regulatory interpretation of Section 718.202(a) adopted by the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such

[2] We affirm as unchallenged the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b), (c), as well as the administrative law judge's findings that claimant's wife qualifies as a dependent for purposes of augmentation, that employer is the putative responsible operator, and her determination not to reopen the record on remand. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis is totally disabling. Failure to prove any one of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge failed to consider all of the x-ray interpretations of record to determine whether a preponderance of the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1). This contention has merit. The administrative law judge, in her Second Supplemental Decision and Order, found that of the readers with special qualifications, 23 proffered positive interpretations while 16 provided negative readings.[3] Second Supplemental Decision and Order at 6-7. The administrative law judge's arithmetic is incorrect. The administrative law judge did not consider all of the x-rays submitted with claimant's original filing, which included properly classified x-ray interpretations in addition to those that the administrative law judge expressly did not consider because they were not properly classified.[4] Director's Exhibit 62. Moreover, Employer's Exhibit 8 contains twelve interpretations that were not identified or considered in her Supplemental Decision and Order or her Second Supplemental Decision and Order. The administrative law judge's failure to consider relevant evidence mandates remand. *See Perry, supra; Tackett v. Director, OWCP*, 7 BLR 1-703(1985); *Brewster v. Director, OWCP,* 7 BLR 1-120 (1984). We vacate, therefore, the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis at Section 718.202(a)(1). When reconsidering the x-ray evidence on remand, the administrative law judge must identify the interpretations that she chooses to credit and the readings that she chooses to reject or discount and set forth her rationale. Moreover, in order to avoid resolving the conflicting evidence based solely upon the numerical split between positive and negative

[3]Readers with special qualifications are physicians who are B readers, Board-certified radiologists, or both.

[4]We reject, however, employer's contention that the administrative law judge erred in failing to consider x-ray reports that contain narrative comments pursuant to 20 C.F.R. §718.202(a)(1). The record reflects that the readings submitted by Drs. Milner, Dumic, Epling, and Shahan were not classified in accordance with the ILO system as is required under 20 C.F.R. §718.102. Director's Exhibit 62. The administrative law judge did not, therefore, err in declining to consider these readings under Section 718.202(a)(1). The comments made by these physicians are properly considered under 20 C.F.R. §718.203. *See infra* at 5.

readings proffered by physicians with special qualifications, the administrative law judge may wish to consider each film of record separately and determine whether it supports a finding of pneumoconiosis based upon a consideration of the respective qualifications of the readers. *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Employer also challenges the administrative law judge's determination that the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). As employer asserts, the administrative law judge's weighing of the evidence at Section 718.202(a)(4) does not comport with the requirements of the Administrative Procedure Act (APA), as she failed to indicate what weight, if any, she gave the opinions of Drs. Kress, Morgan, Bercher, Fino, Abernathy, Prince, Castle and Renn, all of whom concluded that claimant does not have pneumoconiosis. *See* 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. §923(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-62 (1989). Therefore, we vacate the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Employer finally contends that the administrative law judge must weigh all relevant evidence on the issue of the existence of pneumoconiosis together, regardless of category. The Director urges the Board to adopt the approach set forth by the Third Circuit in *Williams, supra.* Subsequent to the administrative law judge's Second Supplemental Decision and Order, the United States Court of Appeals for the Fourth Circuit issued *Island Creek Coal Company v. Compton,* 211 F.3d 203, BLR (4th Cir. 2000).[5] The holding set forth in *Compton* requires the administrative law judge to weigh all of the evidence supportive of a finding of the existence of pneumoconiosis against all of the contrary evidence, regardless of category. *Compton, supra.* On remand, therefore, the administrative law judge must weigh all of the relevant evidence at Section 718.202(a)(1)-(4) in accordance with the holding in *Compton* and the requirements of the APA.

Finally, if the administrative law judge finds on remand that claimant has established the existence of pneumoconiosis under Section 718.202(a)(1)-(4), she must reconsider her determination, pursuant to 20 C.F.R. §718.203(b), that

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mine industry in the Commonwealth of Virginia. Director's Exhibits 2, 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)*(en banc*).

claimant is entitled to the presumption that his pneumoconiosis arose out of coal mine employment. When doing so, the administrative law judge must determine whether the comments made in the non-classified x-ray interpretations offered by Drs. Milner, Dumic, Epling and Shahan are sufficient to establish rebuttal of the presumption. Director's Exhibit 62; *see Cranor v. Peabody Coal Co.,* 22 BLR 1-2 (1999).

Accordingly, the administrative law judge's Second Supplemental Decision and Order Denying Motion to Reopen the Record and Awarding Benefits and Supplemental Decision and Order Denying Motion to Reopen the Record and Awarding Benefits on Remand are affirmed in part, vacated in part, and remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge