BRB No. 00-1110 BLA

DENNIS BLANKENSHIP)
)
Claimant-Respondent)
)
v.)
)
CANNELTON INDUSTRIES,)
INCORPORATED)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Howard M. Radzely, Acting 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (99-BLA-1216) of Administrative Law Judge Edward Terhune Miller 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).[1]

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit

After holding a hearing, the administrative law judge issued his Decision and Order - Awarding Benefits.[2] The administrative law judge noted the discussion at the hearing indicating that claimant is basing his claim solely on the issue of complicated pneumoconiosis. The administrative law judge summarized the evidence of record, found at sufficient to establish the existence of complicated pneumoconiosis, and, therefore,

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would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]This case has an extensive procedural history. Claimant filed an application for benefits on May 25, 1973, which was denied by the claims examiner on February 27, 1981. Director's Exhibit 34. Claimant filed another application for benefits on April 15, 1986, which was denied by the claims examiner on June 9, 1986. Director's Exhibit 33. On May 22, 1988, claimant filed another application for benefits, which was denied by the claims examiner on September 7, 1988. Director's Exhibit 32. On September 23, 1998, claimant filed another application for benefits. Director's Exhibit 1. On June 4, 1999, the district director issued an initial finding of entitlement, Director's Exhibit 27, and employer requested a formal hearing, Director's Exhibit 28.

found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis. The administrative law judge awarded benefits commencing on December 1, 1998.

On appeal, employer asserts that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis. Specifically, employer asserts that the administrative law judge failed to consider all of the evidence and erred in his weighing of the evidence. In addition, employer asserts that the administrative law judge's date for the commencement of benefits is incorrect. Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not be participating in this appeal.

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).

Employer asserts that the administrative law judge failed to consider the multiple x-ray interpretations of Drs. Wheeler, Scott and Kim of the February 10, 1999, March 30, 1999 and June 9, 1994 films, in addition to the interpretations by Drs. Wheeler and Scott of the October 13, 1999 film. Further, employer asserts that the administrative law judge did not consider Dr. Scott's interpretation of the December 29, 1998, August 2, 1999 and August 5, 1999 CT scans.

A review of the record indicates that the administrative law judge did consider the interpretations by Drs. Wheeler, Scott and Kim of the February 10, 1999, March 30, 1999 and June 9, 1994 films, which are identified as physicians' interpretations of "minified digital images". *See* Decision and Order at 12. However, we agree with employer that the administrative law judge erred by neglecting to consider Dr. Scott's interpretation of the December 29, 1998, August 2, 1999 and August 5, 1999 CT scans. In describing the interpretations of the three CT scans, the administrative law judge quoted extensively from Dr. Wheeler's interpretations contained in Employer's Exhibit 10, and cites to Employer's Exhibits 10 and 11. *See* Decision and Order at 10-12. The administrative law judge did not specifically refer to Dr. Scott's interpretations of these three CT scans, which are contained in Employer's Exhibit 11.[3] The administrative law

[3] The evidence is confusing: Employer's Exhibit 11 is a letter written on Dr. Wheeler's stationery, but is signed by Dr. Scott. *See* Employer's Exhibit 11.

judge is required to consider all of the relevant evidence of record, *see* Administrative Procedure Act (APA), 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 generally U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). In view of this oversight, we remand the case for the administrative law judge to consider all of the evidence of record.

In addition, we note that the record received by the Board does not contain any interpretations of an October 13, 1999 film. Employer refers to interpretations of this film by Drs. Scott and Wheeler, and identifies them as being contained in Employer's Exhibits 10 and 11. Although these exhibits contain numerous interpretations by Drs. Scott and Wheeler, neither of these exhibits, submitted after the hearing, contains any interpretations of an October 13, 1999 film. In view of the fact that employer's letter submitting these exhibits does not specify the x-ray interpretations contained within these exhibits, on remand, the administrative law judge must identify exactly what evidence was submitted with Employer's Exhibits 10 and 11, and determine whether the interpretations of the October 13, 1999 film are a part of the record.

We now turn to employer's challenge to the administrative law judge's weighing of the evidence regarding complicated pneumoconiosis. Employer asserts that it was irrational for the administrative law judge to discredit the opinions of physicians who did not diagnose simple coal workers' pneumoconiosis when considering the issue of complicated pneumoconiosis. We disagree. The administrative law judge permissibly found that these opinions were based on an incorrect underlying premise, *i.e.,* the absence of simple coal workers' pneumoconiosis, and therefore, reasonably questioned their reliability regarding the issue of complicated pneumoconiosis. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

Employer also asserts that, contrary to the administrative law judge's finding, Dr. Wheeler did diagnose simple coal workers' pneumoconiosis. As employer asserts, the administrative law judge mischaracterized Dr. Wheeler's opinion on this regard. While Dr. Wheeler's x-ray interpretations would not support a diagnosis of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), *see* 20 C.F.R. §§718.102, 718.202(a)(1); Director's Exhibits 25, 31; Employer's Exhibit 13, Dr. Wheeler stated, in his deposition, that claimant has "microscopic evidence of, apparently, simple coal worker's (sic) pneumoconiosis." Employer's Exhibit 13 at 39. Inasmuch as the administrative law judge's description of Dr. Wheeler's opinion regarding the existence of simple coal workers' pneumoconiosis differs from Dr. Wheeler's deposition testimony, the administrative law judge must reconsider Dr. Wheeler's opinion on remand. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In addition, employer contends that the administrative law judge erred by failing to consider Dr. Wheeler's qualifications. The administrative law judge did not note Dr. Wheeler's credentials, nor did he address the qualifications of any of the physicians in rendering his findings regarding complicated pneumoconiosis. On remand, the administrative law judge should consider the physicians' credentials in analyzing the medical evidence of record. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Employer also asserts that the administrative law judge failed to consider certain flaws it identifies in Dr. Cappiello's opinion, and employer maintains that this opinion should be given less weight.[4] Inasmuch as this case is being remanded to the administrative law judge for further consideration, employer may raise these assertions regarding the weighing of the medical opinion evidence with the administrative law judge on remand.

Employer challenges the administrative law judge's finding that Dr. Naeye "did not state what pathological criteria he applied nor what he specifically found that negated complicated pneumoconiosis." *See* Decision and Order at 19. Employer asserts that Dr. Naeye adequately explained how he reached his conclusion that complicated pneumoconiosis is absent, as well as the pathological criteria he used.

Dr. Naeye reviewed claimant's biopsy slide, and other medical evidence, and opined that "[m]ultiple anthracotic macules are identified that touch each other, forming a conglomerate mass with 8-9 centers. This finding meets the minimal criteria for the diagnosis of mild, simple coal worker's pneumoconiosis." Employer's Exhibit 8. Dr. Naeye also states:

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[4] Specifically, employer asserts that Dr. Capiello's opinion should be accorded less weight because he did not interpret the December 1998 CAT scan, because he did not compare claimant's films to the standard NIOSH films, because he failed to use a ruler to measure the critical mass he interpreted, and because he conceded his limitations "as to the pathological criteria for diagnosing complicated pneumoconiosis as well as pathological expertise." Employer's Brief at 8.

> The tissue in this biopsy specimen is lung tissue. It has mostly been replaced by 8-9 individual anthracotic macules that touch each other and are thus partially confluent. Each is 0.1-0.2 mm in width and separated from adjacent black deposits by fibrous tissue, often rather loose in its organization. The black pigment itself has a few admixed birefringent crystals of all sizes. There is absolutely nothing about these multiple adjacent anthracotic macules that bears any resemblance to complicated coal workers (sic) pneumoconiosis or progressive massive fibrosis (PMF).

Employer's Exhibit 8. We agree with employer that Dr. Naeye has provided a basis for his opinion that claimant does not have complicated pneumoconiosis, and therefore we hold that it was error for the administrative law judge to find that Dr. Naeye did not explain his conclusions.

Employer also challenges the administrative law judge's discrediting of medical opinions which consider the absence of a pulmonary impairment in addressing whether claimant has complicated pneumoconiosis. Inasmuch as evidence of disability is not probative on the issue of complicated pneumoconiosis, we hold that it is inappropriate for the administrative law judge to rely on this aspect of a physician's opinion in discrediting medical opinions. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987). On remand, the administrative law judge must reweigh each medical opinion without considering the physicians' findings as to existence of a pulmonary impairment.

Finally, employer challenges the administrative law judge's determination that claimant was entitled to benefits commencing on December 1, 1998. If a miner is found entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP,* 12 BLR 1-181 (1989). Consequently, should an administrative law judge find a miner entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota,* 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *see also Williams v. Director, OWCP,* 13 BLR 1-28 (1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins, supra.* If, on remand, the administrative law judge again awards benefits, he must render appropriate findings on this issue.

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge