BRB No. 07-0137 BLA

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<tr><td>A.P.

Claimant-Petitioner

v.

LANCASHIRE COAL COMPANY

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DATE ISSUED: 09/28/2007

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order on Remand – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair W. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (04-BLA-5088) of Administrative Law Judge Daniel L. Leland rendered 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). This case is before the Board for the second time and involves a subsequent claim filed on June 14, 2002.[1] In his prior

[1] Claimant filed his initial claim for benefits on June 5, 1984, which was denied by the district director on September 17, 1984 on the grounds that he failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. On February 8, 1988, Administrative Law Judge Daniel A. Sarno, Jr., issued a Decision and Order denying

Decision and Order, the administrative law judge credited claimant with thirty-four and one-half years of coal mine employment, based on employer's concession, and found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, reviewing the case on the merits, the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Claimant appealed, and the Board affirmed, as unchallenged by the parties, the administrative law judge's finding as to the length of claimant's coal mine employment, his determination that claimant established a change in an applicable condition of entitlement under Section 725.309, and his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). [*A.P.*] *v. Lancashire Coal Co*., BRB No. 05-0633 BLA, slip op. at 2 n.3 (Apr. 28, 2006) (unpub.). The Board, however, vacated the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The Board specifically held that the administrative law judge erred in the method by which he weighed the conflicting x-ray evidence. [*A.P.*], slip op. at 4. In view of the Board's decision to vacate the administrative law judge's finding at Section 718.202(a)(1), the Board also vacated the administrative law judge's findings at Section 718.202(a)(4) because the administrative law judge had discounted "Dr. Schaaf's opinion on the sole ground that it is based on a positive x-ray that is against the weight of the x-ray evidence." [*A.P.*], slip op. at 5. The Board rejected claimant's assertion that the administrative law judge erred in discounting Dr. Malhotra's opinion that he suffered from pneumoconiosis. [*A.P.*], slip op. at 6. The Board, however, agreed with claimant that the administrative law judge erred in selectively analyzing Dr. Fino's opinion to support his finding that claimant failed to establish legal pneumoconiosis. [*A.P.*], slip op. at 6-7. Therefore, the Board remanded the case for further consideration of the x-ray evidence at Section 718.202(a)(1) and further consideration of the medical opinion evidence as to the existence of pneumoconiosis at Section 718.202(a)(4). [*A.P.*], slip op. at 7. Furthermore, the Board directed the administrative law judge to determine, as necessary, whether the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.203, 718.204(b)(2) and 718.204(c).

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benefits on the ground that claimant failed to establish the existence of pneumoconiosis. *Id*. Claimant took no further action until he filed the instant, subsequent claim on June 14, 2002. Director's Exhibit 3.

On remand, the administrative law judge found that the x-ray and medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in evaluating the x-ray evidence and finding it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also contends that the administrative law judge erred in failing to explain the weight he accorded to the medical opinions diagnosing pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to filed a brief.

The Board 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, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.201, 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant's Brief at 2-3 (unpaginated). We disagree. On remand, the administrative law judge complied with the Board's directive that he weigh the conflicting x-ray readings and not just count the number of qualified physicians rendering positive versus negative readings. [*A.P.*], slip op. at 4. In accordance with the Board's directive, the administrative law judge considered each x-ray individually to determine whether that x-ray was positive or negative for pneumoconiosis. The administrative law judge properly noted that Drs. Abrahams and Wiot, who are both Board-certified radiologists and B readers, interpreted the August 5, 2002 x-ray as negative for pneumoconiosis,[2] whereas Dr. Harron, who is also a Board-certified radiologist and a B reader, interpreted the same x-ray as positive. Decision and Order on Remand at 2; Director's Exhibit's 16, 38; Claimant's Exhibit 3. The administrative law judge determined that since the physicians were equally qualified, "the August 5, 2002 x-ray is

[2] Dr. Barrett, a Board-certified radiologist and B reader, read the August 5, 2002 x-ray for quality only. Director's Exhibit 17.

negative by preponderance." Decision and Order on Remand at 2. The administrative law judge also found that the December 12, 2002 x-ray was negative for pneumoconiosis based on the sole negative reading of that film by Dr. Castle, a B reader. Decision and Order on Remand at 2; Director's Exhibit 42; Employer's Exhibit 4.

Although the administrative law judge found the February 13, 2003 x-ray to be positive for pneumoconiosis, he permissibly determined that the x-ray was entitled to "minimal weight" since that film had only one reading, by Dr. Schaaf, a physician who possessed no radiological qualifications for interpreting the presence or absence of pneumoconiosis. Decision and Order on Remand at 2-3; Director's Exhibit 42. The administrative law judge next determined that the May 2, 2003 x-ray was positive for pneumoconiosis based on a positive reading by Dr. Harron, a dually qualified physician, in comparison to a negative reading of that x-ray by Dr. Fino, a B reader. Decision and Order on Remand at 2; Director's Exhibit 49; Claimant's Exhibit 5. Finally, the administrative law judge found that the October 27, 2003 x-ray was positive for pneumoconiosis based on the sole positive reading by Dr. Harron of that film. Decision and Order on Remand at 3; Claimant's Exhibit 6.

Thus, of the five x-rays of record, the administrative law judge found only four x-rays to be credible based on the qualifications of the readers interpreting the films. Of those four x-rays, he concluded that there were two positive x-rays for pneumoconiosis and two negative x-rays for pneumoconiosis. The administrative law judge therefore concluded that a preponderance of the x-ray evidence failed to establish the existence of pneumoconiosis. Decision and Order on Remand at 3; *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*); Decision and Order on Remand at 3. Because the administrative law judge performed a qualitative and quantitative analysis of the x-ray evidence, and basically found that the x-ray evidence was in equipoise as to the presence of absence of pneumoconiosis,[3] *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred by failing to explain, in accordance with the 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)

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[3] Contrary to claimant's contention, the regulations state that an interpretation of 0/1 does not constitute evidence of pneumoconiosis. 20 C.F.R. §§718.102(b), 718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Canton v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-475 (1986); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984); *Preston v. Director, OWCP*, 6 BLR 1-1229 (1984).

and 30 U.S.C. §932(a), the basis for his decision not to credit Dr. Schaaf's diagnosis of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant's assertion of error is without merit. The record contains medical opinions by Drs. Castle, Fino, Munoz, Malhotra, and Schaaf, relevant to the existence of pneumoconiosis. The Board previously affirmed the administrative law judge's determination to assign no weight to Dr. Malhotra's opinion at Section 718.202(a)(4) as the administrative law judge found that his opinion was tainted by his review of inadmissible x-ray readings. The Board also affirmed the administrative law judge's finding that Dr. Munoz's opinion, that claimant suffered from pneumoconiosis, was not sufficiently reasoned. Thus, on remand, the administrative law judge was required to weigh the medical opinion of Dr. Schaaf, that claimant had pneumoconiosis, against the contrary opinions of Drs. Castle and Fino, that claimant did not suffer from the disease.

The administrative law judge rejected the opinions of both Dr. Fino and Dr. Schaaf, and chose to rely on the documented and reasoned opinion of Dr. Castle pursuant to Section 718.202(a)(4). With respect to Dr. Schaaf, the administrative law judge found that the doctor "based his diagnosis of pneumoconiosis on his positive x-ray interpretation, his physical examination of [c]laimant, and [c]laimant's history of occupational coal dust exposure." Decision and Order on Remand at 3. The administrative law judge permissibly considered Dr. Schaaf's diagnosis of pneumoconiosis to be less credible, since it was based, in part, on the doctor's own positive reading of the February 13, 2003 x-ray. As noted by the administrative law judge, Dr. Schaaf is neither a B reader nor a Board-certified radiologist. *Id.* The administrative law judge further found that Dr. Schaaf's deposition testimony clarified that his diagnosis of pneumoconiosis was limited to a diagnosis of clinical pneumoconiosis, based on his review of claimant's x-ray.[4] The administrative law judge further noted that Dr. Schaaf failed to provide a diagnosis that would establish that claimant suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.201. Thus, because the administrative law judge complied with the APA, by providing an explanation for why he chose not to credit Dr. Schaaf's opinion that claimant has pneumoconiosis, we reject claimant's contention that the administrative law judge did not explain the basis for his rejection of Dr. Schaaf's opinion at Section 718.202(a)(4).

In this case, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis because the x-ray evidence was in equipoise and he found the reasoned and documented opinion of Dr. Castle, that claimant did not

[4] Dr. Schaaf testified that he attributed the reduction in claimant's pulmonary function (restrictive respiratory condition) to the abnormal findings seen on claimant's x-ray, which he diagnosed as coal workers' pneumoconiosis. Claimant's Exhibit 33-35.

suffer from either clinical or legal pneumoconiosis, to be persuasive.[5] The administrative law judge is empowered to weigh the medical evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We therefore affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and that claimant failed to establish the existence of pneumoconiosis overall at 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Since claimant failed to establish that he suffers from pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, benefits are precluded. *Trent,* 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR at 1-2.

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[5] Dr. Castle attributed claimant's restrictive respiratory condition to extrinsic factors such as obesity, age, alveolar hypoventilation, and probable sleep apnea. He specifically opined that coal dust exposure did not cause or aggravate claimant's respiratory condition. Employer's Exhibits 4, 5, 7.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge