

BRB No. 94-0672 BLA

GEORGE DUFOUR)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
DUQUESNE LIGHT COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand of George P. Morin, Administrative Law Judge, United States Department of Labor.

Susan Foster Blank (United Mine Workers of America), Masontown, Pennsylvania, for claimant.

Daniel J. Iler (Ceisler, Richman, Smith), Washington, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand (85-BLA-7498) of Administrative Law Judge George P. Morin awarding 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 procedural history of this case, now before the Board for the second time, is as follows.

Claimant's application for benefits, filed on January 6, 1983, was granted in a Decision and Order issued on May 16, 1988.¹ At that time, employer was barred from submitting evidence or participating in the hearing because the administrative law judge found its controversion to be untimely. Hearing Transcript at 9.

Employer filed a motion for reconsideration, contending that it had not received notice of the hearing and that extraordinary circumstances existed to excuse its failure to controvert the claim. The administrative law judge issued an Order Reopening Record for Receipt of Additional Evidence, rejecting employer's assertion that it had not received notice of the hearing, but finding that he had erred in failing to allow employer to address the issue of its failure to controvert. The administrative law judge, finding that extraordinary circumstances existed, vacated the award of benefits and allowed employer to submit specific medical evidence. See Order Reopening Record.

On reconsideration, the administrative law judge reversed his credibility determinations and found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, benefits were denied.

Claimant appealed, and in *Dufour v. Duquesne Light Co.*, BRB No. 89-0487

¹ The administrative law judge credited claimant with forty years of coal mine employment and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1), 718.203. [1988] Decision and Order at 3-4. The administrative law judge found Dr. Martin's opinion unreasoned and accorded Dr. Levine's opinion greater weight as most persuasive, well-explained, and the most recent to find that the preponderance of the medical opinions established total disability due to pneumoconiosis pursuant to Section 718.204. [1988] Decision and Order at 6.

BLA (May 27, 1993)(unpub.), the Board vacated the administrative law judge's finding at Section 718.202(a)(1) because he failed to consider all the evidence and at Section 718.202(a)(4) because he violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); see *Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). *Dufour*, slip op. at 3-4. The Board remanded the case for the administrative law judge to reconsider the relevant evidence and provide an adequate rationale for his weighing of the evidence and his changed credibility determinations.²

On remand, the administrative law judge considered all the evidence in accordance with the Board's order and credited the B-readers' x-ray interpretations to find that pneumoconiosis was not established at Section 718.202(a)(1). Decision and Order on Remand at 3. According the greatest weight to Dr. Levine's opinion based on its recency by four years and its thoroughness, the administrative law judge found the existence of pneumoconiosis and total disability due to pneumoconiosis established at Sections 718.202(a)(4) and 718.204. Decision and Order on Remand at 3-6. Accordingly, benefits were awarded.

² The Board affirmed as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and pursuant to Section §718.202(a)(2)-(3). *Dufour*, slip op. at 2 n.1.

On appeal, employer does not challenge the administrative law judge's weighing of the evidence, but argues only that the Board's remand order to the administrative law judge was improper and that reversal of the award is required. Specifically, employer contends that the Board "virtually compelled Judge Morin to award benefits, by ruling that he had no reason to reverse his credibility determination made in his initial decision." Employer's Brief at 2, 8-9. Employer argues that the administrative law judge in fact "[had] reason to change his credibility determination . . . because for the first time, he was considering [the evidence] in light of" employer's contravening evidence. *Id.* Thus, employer requests that the Board reverse the administrative law judge's 1993 Decision and Order and reinstate his 1988 order denying benefits. Employer's Brief at 9-10. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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's arguments are without merit. The Board did not hold, as employer asserts, that the administrative law judge had no reason to reverse his credibility determination. Rather, the Board remanded the case for the administrative law judge to explain why he credited Dr. Kalla and why he found Dr. Martin's opinion, also credited, to be reasoned when he had initially found the report to be unreasoned. *Dufour*, slip op. at 4. Thus, the Board, under its standard of review, determined that the administrative law judge violated the APA because he failed to provide a rationale for crediting Dr. Kalla's report. *Dufour*, slip op. at 4.; Order Granting Reconsideration at 4.

Moreover, remand was required because the administrative law judge erred in discrediting Dr. Levine simply because his positive x-ray was reread negative, see

³ We affirm as unchallenged on appeal and supported by substantial evidence the administrative law judge's findings regarding entitlement date and pursuant to Sections 718.202(a) and 718.204. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Taylor v. Director, OWCP, 9 BLR 1-22 (1986), and in crediting Dr. Martin because he examined claimant for the Department of Labor, see *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). *Dufour*, slip op. at 4; Order Granting Reconsideration at 4. Finally, the administrative law judge overlooked an x-ray reading and erroneously relied on a physician's status as board-certified in nuclear medicine in weighing the x-rays. *Dufour*, slip op. at 3; Order Granting Reconsideration at 2; see *Melnick, supra*.

The Board applied its standard of review, see *Smith, Hinchman, supra*, determined that the administrative law judge's Decision and Order was not supported by substantial evidence or in accordance with law, and remanded the case for further proceedings, as the Board's standard of review requires it to do. 20 C.F.R. §§802.404(a), 802.405(a); see *Director, OWCP v. U.S. Steel Corp.* [Baluh], 606 F.2d 53, 2 BLR 2-25 (3d Cir. 1979)(when administrative law judge erroneously interprets the evidence, his decision is subject to reversal by the Board and the proper course is for the Board to remand rather than make independent factual findings).

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

_____NANCY S.
DOLDER
Administrative Appeals Judge

_____REGINA C.
McGRANERY
Administrative Appeals Judge