BRB No. 95-0479 BLA

JOSEPH HENTOSH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
JEDDO-HIGHLAND COAL COMPANY	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

James E. Pocius (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (93-BLA-1601) of Administrative Law Judge Robert D. Kaplan 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 administrative law judge credited

[1] Claimant is Joseph Hentosh, the miner, who filed a claim for benefits on December 31, 1991. Director's Exhibit 1.

claimant with three years of coal mine employment, found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge erred at Section 718.202(a)(1) by relying solely on the numerical superiority of the negative x-ray interpretations to find that the existence of pneumoconiosis was not established. Claimant's Brief

at 3-4. Claimant further contends that the administrative law judge erred in his weighing of the medical opinions at Section 718.202(a)(4) and failed to discuss all of the employment evidence of record. Claimant's Brief at 2-5. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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).

Pursuant to Section 718.202(a)(1), the administrative law judge considered sixty-four interpretations of the six x-ray films of record. The administrative law judge converted five positive readings[3] into negative interpretations because he found that the readers attributed their findings to asbestos exposure, Decision and Order at 6 n.2, and concluded that the x-ray evidence was negative for pneumoconiosis because the "negative interpretations of each of the films exceed the positive interpretations." Decision and Order at 7.

A positive x-ray interpretation properly classified pursuant to Section 718.102 is evidence of pneumoconiosis. 20 C.F.R. §718.102; *see Handy v. Director, OWCP*,

[2] We affirm as unchallenged on appeal the administrative law judge's findings that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2) and that the presumptions listed at Section 718.202(a)(3) are inapplicable to this claim. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Drs. Cole and Bassali read the January 22, 1992 film as 1/1, while Dr. Kaplan read it as 1/0. Director's Exhibits 25, 64; Claimant's Exhibit 22. Dr. Kaplan read the March 9 and October 28, 1992 films as 1/1. Director's Exhibits 54, 65.

16 BLR 1-73 (1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). Because the administrative law judge mischaracterized five positive x-ray readings, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*); Section 718.102(b), by concluding that the readers' notations converted them into negative interpretations, *see Valazak v. Bethlehem Mines Corp*., 6 BLR 1-282 (1983), we vacate his finding at Section 718.202(a)(1) and remand the case for him to reweigh the x-ray evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cochran v. Consolidation Coal Co*., 12 BLR 1-136 (1989).

Claimant contends that the administrative law judge erred in crediting him with only three years of coal mine employment. Claimant's Brief at 2-3. The administrative law judge considered claimant's employment history forms and Social Security earnings records in crediting him with three years of coal mine employment. Decision and Order at 3; Director's Exhibits 2, 3, 5. The record, however, also contains claimant's testimony regarding his employment with Biros Coal Company for periods that claimant contends total three years and three months which was not considered by the administrative law judge. Hearing Transcript at 17-21; Claimant's Brief at 2.

In determining the length of coal mine employment, the administrative law judge must discuss all relevant evidence. *Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988)(*en banc*); *Dawson v. Old Ben Coal Co*., 11 BLR 1-58 (1988). Because the administrative law judge failed to discuss all the relevant employment evidence, we vacate the administrative law judge's finding on the issue of the miner's years of coal mine employment and remand the case for consideration of claimant's testimony.[4] *See Tackett, supra*; *Dawson, supra*; *Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989)(absence of social security records does not necessarily prove that claimant was not employed in coal mines).

The administrative law judge relied on his finding of three years of coal mine employment to determine the weight to be accorded the medical opinions pursuant to Section 718.202(a)(4); the administrative law judge discredited the opinions of

[4] We also note that the administrative law judge erred in finding twelve quarters of coal mine employment established when the sum of the quarters that he credited is actually fourteen. Decision and Order at 3. Claimant further contends that the administrative law judge also ignored claimant's testimony that he worked for Sky Top Coal Company part-time for one year, and his testimony that his Social Security records do not accurately reflect his work for employer and Yaccino Coal Company. Claimant's Brief at 3. The record reveals no such testimony or other evidence regarding these issues.

Drs. Kraynak and Kruk because their diagnoses were based upon a "greatly inflated coal mine employment history of between ten and thirteen and one-half years, versus the three years which I have found established by the record." Decision and Order at 9.

The administrative law judge's determination to accord these opinions less weight is not affirmable because the administrative law judge erred in determining the length of claimant's coal mine employment, see discussion, *supra*, and because the other physicians of record also relied on coal mine employment histories of ten to eleven years. *See Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co*., 7 BLR 1-295 (1984); Director's Exhibits 14, 54; Employer's Exhibits 12, 14. Therefore, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for him to reconsider the relevant evidence. *See Wensel*, 888 F.2d at 16, 13 BLR at 2-92 (bare statement that items of medical evidence pointing one way outnumber or outweigh others pointing in different direction does not demonstrate reasoned choice).

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge