BRB No. 95-1835 BLA

JOHNNIE TYLER)
)
Claimant-Petitioner)
)
v.)
)
ISLAND CREEK COAL COMPANY)
) DATE ISSUED:
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Randall W. Galford, Richwood, West Virginia, for claimant.

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

Before: , Chief Administrative Appeals Judge, and , Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (94-BLA-1407) of Administrative Law Judge Jeffrey Tureck denying benefits on a claim filed pursuant to the

[1]Claimant is Johnnie Tyler, the miner, whose first claim for benefits, which was filed on May 11, 1973, was ultimately denied on May 26, 1981. Director's Exhibit 52.

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 involves a duplicate claim. Claimant filed the present claim on July 2, 1993. Director's Exhibit 1. The administrative law judge found that claimant established forty-six years of qualifying coal mine employment, a material change in condition pursuant to 20 C.F.R. §725.309[2] and that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in weighing the x-ray and medical opinion evidence pursuant to Section

---

[2]Subsequent to the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case arises, adopted a new standard for establishing a material change in conditions pursuant to 20 C.F.R. §725.309. *Lisa Lee Mines v. Director, OWCP* [Rutter], 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted*, No. 94-2523 (November 16, 1995). While the Petition for Rehearing was granted in *Rutter*, rendering the earlier decision null and void, *Rutter* does not affect our disposition of this case because the administrative law judge considered all of the evidence of record in making his finding on the merits of the claim.

718.202(a)(1), (4).[3] Employer responds, urging affirmance. No response has been received from the Director, Office of Workers' Compensation Programs (the Director).

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).

Claimant first contends that the administrative law judge erred in weighing the opinions of the B-readers of record pursuant to Section 718.202(a)(1). Claimant's Brief at 6. Pursuant to Section 718.202(a)(1), the administrative law judge considered twenty-two interpretations of nine x-rays and found that seven of these interpretations are positive for the existence of pneumoconiosis and fifteen are negative. Decision and Order at 4; Director's Exhibits 24, 31, 32, 42, 52; Employer's Exhibits 1, 3, 5, 7, 10, 11, 14, 16. The administrative law judge then found that the weight of the x-ray evidence was negative for the existence of pneumoconiosis, that

---

[3] We affirm the administrative law judge's finding regarding the length of claimant's coal mine employment as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

all of the negative interpretations were read by B-readers, and that only one of the positive interpretations was read by a B-reader. Decision and Order at 5.

Inasmuch as the administrative law judge may rely on the numerical superiority of the x-ray evidence, *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), and may assign more weight to the readers with superior qualifications, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987), the administrative law judge permissibly found that the weight of the x-ray evidence is negative for the existence of pneumoconiosis. Thus, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Claimant next generally contends that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to Section 718.202(a)(4). The administrative law judge noted that only the opinions of Drs. Wall, Honrado and Rasmussen support a finding of the existence of pneumoconiosis. Decision and Order at 5; Director's Exhibits 27-29; Employer's Exhibit 3. In according Dr. Wall's opinion less weight, the administrative law judge states:

> Dr. Wall's conclusion that the obstructive ventilatory impairment evident from the pulmonary function study is a manifestation of pneumoconiosis is outweighed by the opinions of Drs. Castle and Bellotte...and Dr. Loudon... who believe that such a defect indicates instead that claimant suffers from a disease such as emphysema. Pneumoconiosis, in their opinions, produces a purely restrictive impairment.

Decision and Order at 5; Director's Exhibit 27.

The administrative law judge's reason for assigning Dr. Wall's opinion less weight is in error, however, because the Court of Appeals for the Fourth Circuit stated, in *Warth v. Southern Ohio Coal Co.*, F.3d , No. 94-2635 (4th Cir. July 31, 1995), that it is an erroneous assumption that obstructive disorders could not be caused by coal mine employment. Thus, we vacate the administrative law judge's findings regarding Dr. Wall's opinion.

The administrative law judge next considered the opinions of Drs. Honrado and Rasmussen and found that these opinions are not credible because these physicians relied on positive x-rays when the weight of the x-ray evidence is negative for the existence of pneumoconiosis. Decision and Order at 5-7; Director's Exhibits 28, 29; Employer's Exhibit 3. The administrative law judge's finding is in error, however, as the Board has consistently held that, under Section 718.202(a)(4), an administrative law judge may not discredit a medical opinion merely because it relies, *inter alia*, on a positive x-ray interpretation that has been discredited or outweighed under Section 718.202(a)(1). *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-109-110 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984). Thus, we vacate the administrative law judge's findings regarding the opinions of Drs. Honrado and Rasmussen and remand the case for reconsideration of the medical opinion evidence pursuant to Section 718.202(a)(4).

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

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge