BRB No. 07-0148 BLA

J.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/25/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (05-BLA-6251) of Administrative Law Judge Ralph A. Romano rendered on a subsequent 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] Claimant filed this claim on

[1] Claimant's first claim for benefits, filed on August 3, 1978, was denied on June 27, 1979, because claimant did not establish the existence of pneumoconiosis and that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant's second claim, filed on February 26, 1981, was denied on March 3, 1981, for the same reasons as the first claim. *Id.* Since claimant did not pursue this claim further, the denial became final.

December 17, 2004. Director's Exhibit 3. The administrative law judge credited claimant with 10.37 years of coal mine employment, as stipulated. After excluding one of claimant's three positive x-ray readings as in excess of the evidentiary limitations of 20 C.F.R. §725.414, the administrative law judge found that the new medical evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because pneumoconiosis was an element of entitlement previously adjudicated against claimant, the administrative law judge found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). Upon review of the entire record, the administrative law judge found that claimant did not establish total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in excluding the x-ray reading. Claimant further contends that the administrative law judge erred in his analysis of the evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b),(c), and failed to address whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits.[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 rational, supported by substantial evidence, and 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

20 C.F.R. §725.414

Claimant first contends that the administrative law judge erred by excluding one of claimant's positive x-ray readings. The Director agrees, but urges that the error was harmless, because the administrative law judge found that the x-ray evidence established

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and §718.204(b)(2)(ii),(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

clinical pneumoconiosis. The Director concedes that the record supports the administrative law judge's finding.

Upon review, we agree with the parties that all three of claimant's readings of the March 3, 2005 x-ray were submitted in compliance with the evidentiary limits at 20 C.F.R. §725.414(a)(2)(i),(ii), and that the administrative law judge therefore erred in excluding the third reading as in excess of those limitations.[3] We also agree with the Director that the error was harmless, because the administrative law judge found that clinical pneumoconiosis was established by the x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

20 C.F.R. §718.202(a)(4)

Claimant next contends that the administrative law judge erred in finding that Dr. Kraynak's opinion diagnosing clinical coal workers' pneumoconiosis was not well reasoned. The administrative law judge stated that Dr. Kraynak did not perform a blood gas study, that the pulmonary function study he administered was invalidated, and that Dr. Kraynak's opinion was merely a restatement of an x-ray reading. The Director responds that the administrative law judge reasonably declined to accord any additional weight to Dr. Kraynak's diagnosis of clinical pneumoconiosis, because it was a restatement of an x-ray reading, and Dr. Kraynak did not diagnose "the broader condition known as legal pneumoconiosis." Director's Brief at 3.

The record reflects that Dr. Kraynak diagnosed claimant with clinical coal workers' pneumoconiosis. Claimant's Exhibit 10 at 12, 14. Although the administrative law judge discounted Dr. Kraynak's diagnosis as a restatement of an x-ray,[4] ultimately, he weighed the x-ray evidence and medical opinions together and found that claimant established the existence of clinical pneumoconiosis. As the Director notes, Dr. Kraynak did not diagnose legal pneumoconiosis. Consequently, any error by the administrative

[3] Specifically, the record reflects that claimant submitted two x-ray readings in support of his affirmative case, in compliance with 20 C.F.R. §725.414(a)(2)(i), and one reading in rebuttal of the Director's affirmative-case x-ray reading, in compliance with 20 C.F.R. §725.414(a)(2)(ii). Claimant's Exhibits 5, 9 (excluded); Claimant's Pre-Hearing Statement, Feb. 10, 2006 at 1-2; Tr. at 7-9. The administrative law judge therefore erred in treating the third, rebuttal reading as excess evidence. Decision and Order at 8.

[4] Claimant disputes this characterization of the basis of Dr. Kraynak's opinion, and he argues that it was irrational to discredit Dr. Kraynak's opinion as an unreasoned restatement of an x-ray, when Dr. Kraynak's diagnosis was in agreement with the administrative law judge's finding that the x-rays established clinical pneumoconiosis.

law judge in finding Dr. Kraynak's diagnosis of clinical pneumoconiosis to be unreasoned does not affect the disposition of this appeal. *Larioni*, 6 BLR at 1-1278.

20 C.F.R. §718.203(b)

Claimant additionally argues that the administrative law judge erred by failing to determine whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). The Director responds that:

> Implicit in the [administrative law judge's] decision is the finding that claimant has coal workers' pneumoconiosis. The [administrative law judge] found claimant has clinical pneumoconiosis and more than ten years of coal mine employment; therefore, by operation of the [S]ection 718.203(b) presumption, it is presumed that claimant's clinical pneumoconiosis arose out [of] that coal mine employment and the Director submitted no evidence to rebut that presumption.

Director's Brief at 3-4. Although the administrative law judge did not determine whether claimant's pneumoconiosis arose out of his coal mine employment, because the Director has conceded that claimant is entitled to the presumption at Section 718.203(b), and the record contains no evidence to rebut the presumption, claimant has established that his pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b).

20 C.F.R. §718.204(b)(2)(i)

Claimant contends that the administrative law judge erred in finding that claimant did not establish total disability at Section 718.204(b)(2)(i), because he provided no reason for accepting Dr. Rashid's non-qualifying[5] pulmonary function study over Dr. Kraynak's qualifying pulmonary function study, in that he provided no reason for crediting Dr. Michos's invalidation of Dr. Kraynak's pulmonary function study. Claimant further contends that the administrative law judge provided no rationale for rejecting Dr. Kraynak's invalidation of Dr. Rashid's pulmonary function study.

The record contains two pulmonary function studies: a non-qualifying pulmonary function study, dated March 3, 2005, administered by Dr. Rashid, and a qualifying pulmonary function study, dated December 20, 2005, administered by Dr. Kraynak. Director's Exhibit 8; Claimant's Exhibit 2. The December 20, 2005 pulmonary function study was invalidated by Dr. Michos, because he found less than optimal effort,

[5] A "qualifying" pulmonary function study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

cooperation, and comprehension, and noted erratic flow volume loops and MVV, as well as excessive variation in peak flows. Director's Exhibit 18. Dr. Kraynak disagreed with Dr. Michos's invalidation of his pulmonary function study. Claimant's Exhibit 8; Claimant's Exhibit 10 at 10. Additionally, Dr. Kraynak testified that Dr. Rashid's pulmonary function study exhibited "erratic" tracings, lacked sufficient flow-volume loops, and had "technical problems" that detracted from its value. Claimant's Exhibit 10 at 11.

The administrative law judge found that:

> [T]he pulmonary function study conducted by Dr. Rashid failed to establish total disability. The study conducted by Dr. Kraynak did. However, it has been found to be invalid. I do not credit Dr. Kraynak's opinion of the validity of his test or that performed by Dr. Rashid. Based upon the testing performed by Dr. Rashid and the invalidation of Dr. Kraynak's study by Dr. Michos, I find that total disability has not been established pursuant to 20 C.F.R. §718.204(b)(2)(i).

Decision and Order at 10.[6]

The Administrative Procedure Act (APA) requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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 Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge provided no reason for crediting Dr. Michos's opinion and for declining to accept Dr. Kraynak's opinion, we vacate the administrative law judge's finding pursuant to Section 718.204(b)(2)(i). On remand, the administrative law judge should discuss all relevant evidence and give his reasons for crediting and discrediting the pulmonary function study evidence. *See* Director's Exhibits 8, 18; Claimant's Exhibits 2, 8, 10 at 11.

20 C.F.R. §718.204(b)(2)(iv)

[6] The Director argues that the administrative law judge "permissibly accepted Dr. Michos' invalidation . . . because Dr. Michos is board certified in internal medicine and pulmonary disease while Dr. Kraynak is board eligible in family medicine," and "rationally required more than Dr. Kraynak's bald assertion of validity to counter Dr. Michos' opinion . . . ." Director's Brief at 5-6. Review of the administrative law judge's Decision and Order, however, does not disclose the rationales cited by the Director.

Claimant contends that the administrative law judge erred in rejecting Dr. Kraynak's opinion because he relied on an invalidated pulmonary function study and did not perform a blood gas study. Claimant also contends that the administrative law judge erred in crediting Dr. Rashid's opinion as better reasoned and better supported by the objective laboratory data of record. The Director responds in support of the administrative law judge's rationale, stating that, the administrative law judge "permissibly determined that Dr. Kraynak's summary conclusion that claimant has a totally disabling respiratory impairment . . . is unexplained and poorly documented by only an invalid pulmonary function study." Director's Brief at 7.

Dr. Kraynak found that claimant is totally disabled based in part on a qualifying pulmonary function study, which was invalidated by Dr. Michos, while Dr. Rashid found that claimant is not totally disabled due to pneumoconiosis based in part on a non-qualifying pulmonary function study, which Dr. Kraynak believed had "technical" problems.[7] Director's Exhibits 8, 18; Claimant's Exhibits 2, 8, 10 at 11-13. The administrative law judge found that Dr. Kraynak "relies upon a pulmonary function study which has been invalidated and he did not have the benefit of having conducted a blood gas study." Decision and Order at 10. Consequently, the administrative law judge found that Dr. Rashid's opinion was "better-reasoned and better-supported . . . ." *Id.*

Because we have vacated the administrative law judge's finding concerning the validity of the pulmonary function studies at Section 718.204(b)(2)(i), we also vacate the administrative law judge's finding at Section 718.204(b)(2)(iv). Consequently, we remand the case to the administrative law judge for reconsideration of the medical opinions. On remand, the administrative law judge must discuss and weigh all relevant evidence, including Dr. Kraynak's opinion that he would still diagnose claimant as totally disabled, even if he did not rely on the pulmonary function study that he had administered. Claimant's Exhibit 10 at 14.

20 C.F.R. §718.204(c)

Claimant contends that the administrative law judge erred by determining that claimant's total disability is not due to pneumoconiosis pursuant to Section 718.204(c) because claimant did not establish a totally disabling respiratory or pulmonary impairment. The administrative law judge found that claimant is not totally disabled due to pneumoconiosis based on the finding that claimant is not totally disabled. Decision and Order at 11. Because we have vacated the administrative law judge's finding

[7] Additionally, Dr. Kraynak opined that, assuming *arguendo* that Dr. Rashid's pulmonary function study is valid, its values indicate that claimant is totally disabled. Claimant's Exhibit 10 at 12, 14.

pursuant to Section 718.204(b), we also vacate the administrative law judge's finding pursuant to Section 718.204(c). On remand, the administrative law judge must reconsider his causation finding, upon his reweighing of the medical evidence, if, on remand, he finds that claimant has established a totally disabling respiratory or pulmonary impairment.

Accordingly, the administrative law judge's Decision and Order-Denial of 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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge