

BRB No. 88-2597 BLA

JOHN PETRISEK)
)
 Claimant-Respondent)
)
 v.)
)
 LTV STEEL COMPANY)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
) DECISION and ORDER on MOTION
 Party-in-Interest) for RECONSIDERATION En Banc

Before: STAGE, Chief Administrative Appeals Judge, SMITH, BROWN,
DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

By Motion for Reconsideration, employer seeks en banc review of the Board's Decision and Order in Petrissek v. LTV Steel Co., BRB No. 88-2597 BLA (March 28, 1990)(Dolder, J., dissenting) (unpublished). In that decision, the Board's majority affirmed the administrative law judge's Decision and Order awarding benefits, based on his finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304, and that claimant

established that his complicated pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). On reconsideration, employer contends that the Board erred in affirming the administrative law judge's findings of fact and conclusions of law under Section 718.304, as they are not supported by substantial evidence, and are neither rational nor consistent with applicable law. Claimant and the Director, Office of Workers' Compensation Programs, did not respond. We hereby grant employer's Motion for Reconsideration en banc, vacate the Board's previous Decision and Order herein, and remand this case to the administrative law judge.

Employer contends that the administrative law judge erred in weighing the x-ray evidence of record and finding complicated pneumoconiosis established under Section 718.304. A review of the record, however, indicates that the administrative law judge failed to resolve the conflict between Dr. Yarussi's classification of Type A large opacities, see Director's Exhibit 14, and his narrative finding of ILO Classification: q/r, 1/2, and a "poorly defined nodular density, approximately 1 cm in diameter...which probably represents a larger conglomerate nodule", see Director's Exhibit 15. This is especially critical since this narrative finding is insufficient as a matter of law to establish complicated pneumoconiosis, which is defined in 30 U.S.C. §921(c)(3)(B) as one or more opacities greater than one centimeter in diameter. See also 20 C.F.R. §718.304(c); see generally Gaudiano v. United States Steel

Corp., 1 BLR 1-949 (1978). We therefore vacate the administrative law judge's findings under Section 718.304 and remand this case for the administrative law judge to reconsider the x-ray evidence of record.

Employer further contends that the administrative law judge failed to state a proper reason for according greater weight to the opinion of Dr. Yarussi. Employer notes that Dr. Gardner's serial interpretations were consistent with the interpretations of the most recent films by Drs. Wald and Levine, whereas Dr. Yarussi's opinion, taken out of chronological sequence, was uncorroborated. See generally Hoffman v. Peabody Coal Co., 3 BLR 1-678 (1981). Nevertheless, without any specific finding of bias, the administrative law judge gave greater weight to the "independent" professional judgment of Dr. Yarussi, whose services were obtained by the Department of Labor, over the opinion of Dr. Gardner, whose services were solicited by employer. Decision and Order at 5. Cf. Saginaw Mining Co. v. Ferda, 879 F.2d 198, 201, 12 BLR 2-376, 2-379 at n.2 (1989). Absent a foundation in the record for a finding that the Department of Labor's expert is independent, the administrative law judge may not accord his opinion greater weight on that basis alone. See Stanford v. Valley Camp Coal Co., 7 BLR 1-906 (1985); Brown v. Director, OWCP, 7 BLR 1-730 (1985); Chancey v. Consolidation Coal Co., 7 BLR 1-240 (1984).

Accordingly, we vacate the Board's Decision and Order affirming the

administrative law judge's award of benefits, affirm in part¹ and vacate in part the administrative law judge's Decision and Order awarding benefits, and remand this case to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

¹ The administrative law judge's findings under Section 718.203(b) and with regard to the establishment of approximately 40 years of qualifying coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge