

BRB No. 09-0496 BLA

| | | |
|-------------------------------|---|-------------------------|
| EDWARD J. KINLEY |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 02/18/2010 |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Ann Marie Scarpino (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-5522) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) rendered 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 initially determined that claimant's former employer, Old Ben Coal Company, was incorrectly designated as the responsible operator, and that, therefore, the Black Lung Disability Trust Fund would bear the liability for any benefits awarded.¹ Decision

¹ On June 24, 2009, Old Ben Coal Company (employer) filed with the Board a Motion to Dismiss and to Reform Caption, requesting that it be dismissed as the responsible operator in this case and that its name be removed from the case caption. By

and Order at 9. On the merits of entitlement, the administrative law judge observed that the Director, Office of Workers' Compensation Programs (the Director), stipulated to sixteen years of coal mine employment.² Further, the administrative law judge found that, although claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his consideration of the medical opinion evidence as to the existence of legal pneumoconiosis³ at 20 C.F.R. §718.202(a)(4). In a Motion to Remand, the Director agrees with claimant that the administrative law judge erred in his consideration of the medical opinion evidence. Further, the Director asserts that he failed to satisfy his statutory obligation to provide claimant with a complete pulmonary evaluation. Director's Motion to Remand at 4-8.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

order dated July 20, 2009, the Board, noting no objection to the responsible operator issue, dismissed employer as a party in the case before the Board, and amended the caption to reflect the Director, Office of Workers' Compensation Programs (the Director), as the respondent. *Kinley v. Director, OWCP*, 09-0496 BLA (July 20, 2009) (unpub. Order).

² The record indicates that claimant's last coal mine employment was in Illinois. Director's Exhibits 3, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Cohen,⁴ Istanbuly,⁵ and Tuteur⁶ as to the existence of legal pneumoconiosis. The administrative law judge credited Dr. Tuteur's opinion over the opinions of Drs. Cohen and Istanbuly, finding that Dr. Tuteur reviewed extensive medical records and "clearly articulated the relationship between [claimant's] pulmonary illness, previous surgical intervention, pneumothoraces and his smoking history." Decision and Order at 8. By contrast, the administrative law judge found Dr. Cohen's opinion entitled to "no weight" because his opinion was based on a single examination and an erroneous x-ray reading. Further, the administrative law judge rejected Dr. Istanbuly's opinion, finding that Dr. Istanbuly merely relied on Dr. Cohen's diagnosis of pneumoconiosis, without making an independent assessment of claimant's condition.⁷ *Id.*

Both claimant and the Director assert that the administrative law judge failed to provide a valid reason for discrediting Dr. Istanbuly's opinion, and failed to address whether Dr. Tuteur's opinion, that claimant does not have legal pneumoconiosis, is reasoned and documented. These assertions have merit.

⁴ Dr. Cohen provided the pulmonary evaluation on behalf of the Department of Labor. Dr. Cohen diagnosed coal workers' pneumoconiosis, based on x-ray evidence; chronic bronchitis due to coal mine employment, based on claimant's history of chronic productive cough and seventeen years of coal mine dust exposure; and, pleural disease secondary to spontaneous pneumothoraces. Director's Exhibit 10.

⁵ Dr. Istanbuly, claimant's treating physician, diagnosed chronic obstructive pulmonary disease, allergic rhinitis, and coal workers' pneumoconiosis. At his deposition, Dr. Istanbuly stated that he agreed with Dr. Cohen's conclusion, that claimant has pneumoconiosis, and stated that his opinion is based on claimant's history, x-ray findings, and pulmonary function studies. Claimant's Exhibit 1.

⁶ Dr. Tuteur opined that claimant does not have legal pneumoconiosis because bullous emphysema is not caused by the inhalation of coal dust. Dr. Tuteur explained that claimant's bullae are "most likely" congenital, but "they may have had some etiologic relationship to the inhalation of cigarette smoke." Employer's Exhibit 9 at 4, 11.

⁷ Although the administrative law judge additionally considered the opinions of Drs. Wheeler and Rosenberg under 20 C.F.R. §718.202(a)(4), Dr. Wheeler's report does not address legal pneumoconiosis, and the Director, as the respondent in this case, has declined to adopt Dr. Rosenberg's opinion. Director's Motion to Remand at 6; Employer's Exhibit 3.

Although the administrative law judge found Dr. Istanbuly's diagnosis of pneumoconiosis to be premised on Dr. Cohen's opinion, as the Director and claimant assert, the record reflects that Dr. Istanbuly independently formed his opinion regarding claimant's pulmonary condition. Dr. Istanbuly testified that his opinion was based on claimant's history, x-ray findings, and pulmonary function studies. Claimant's Exhibit 1. Also, Dr. Istanbuly diagnosed an obstructive impairment, whereas Dr. Cohen diagnosed a restrictive impairment. Compare Claimant's Exhibit 1 at 23, 62, with Director's Exhibit 10 at 7. Thus, substantial evidence does not support the administrative law judge's basis for discounting Dr. Istanbuly's opinion.⁸ See *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). Moreover, claimant correctly asserts that the administrative law judge failed to consider the opinion of Dr. Istanbuly, claimant's treating physician, in light of the factors outlined at 20 C.F.R. §718.104(d). See 20 C.F.R. §718.104(d).

Further, as claimant and the Director state, the administrative law judge did not assess whether Dr. Tuteur's conclusion, that claimant does not have legal pneumoconiosis because coal mine dust cannot cause bullous emphysema, is supported by Dr. Tuteur's underlying reasoning. See *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Burns*, 855 F.2d at 501. In light of these errors, we vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Additionally, because the Director acknowledges the inadequacy of Dr. Cohen's opinion, the Director concedes that he has not satisfied his statutory obligation to provide claimant with a complete pulmonary evaluation. Specifically, the Director states that Dr. Cohen's report is incomplete because it fails to fully address the cause of claimant's lung disease and whether it is related to coal dust exposure, in that Dr. Cohen diagnosed pleural disease secondary to spontaneous pneumothoraces, but did not address the cause of the pneumothoraces. Director's Motion to Remand at 7. The Director states that "[t]his flaw is significant since Dr. Cohen found that the pleural disease contributed to [c]laimant's totally disabling impairment." *Id.* The Director requests that we remand this case to the administrative law judge, and that, "if the [administrative law judge] again denies benefits on remand, he must remand the case to the district director so that Dr. Cohen can provide a supplemental report in which he explains the cause of claimant's pneumothoraces." *Id.* at 8.

⁸ The Director argues that the administrative law judge, on remand, should reject Dr. Istanbuly's diagnosis of legal pneumoconiosis because it is internally inconsistent and against the weight of evidence. Director's Motion to Remand at 5.

The Act requires that “[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1984). We agree with the Director that he has failed to provide claimant with a complete pulmonary evaluation, however, in the interest of judicial economy, we have determined to remand this case to the district director to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate his claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.406; *see Hodges*, 18 BLR at 1-93. Consequently, we vacate the administrative law judge’s denial of benefits.

Accordingly, the administrative law judge’s Decision and Order Denying Benefits is vacated, and this case is remanded to the district director to allow for a complete pulmonary evaluation of claimant, and for reconsideration of the merits of his claim in light of the new evidence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge