BRB No. 05-0129 BLA

BEN L. STEPHENSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 06/22/2005
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2003-BLA-6405) of Administrative Law Judge Michael P. Lesniak with respect to 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 accepted the

parties' stipulation to at least thirty years of coal mine employment and noted that the claim before him, filed on August 21, 2001, was a subsequent claim pursuant to 20 C.F.R. §725.309(d).[1] The administrative law judge considered the newly submitted evidence and determined that it was sufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2). With respect to the merits of entitlement, the administrative law judge found that claimant established that he has pneumoconiosis arising out of coal mine employment and is totally disabled by it. Accordingly, benefits were awarded.

Employer argues on appeal that the administrative law judge erred in excluding certain x-ray readings from the record under 20 C.F.R. §§725.414 and 725.456. Employer also contends that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(c). Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting that the Board reject employer's argument that the x-ray readings excluded by the administrative law judge should have been admitted because they are relevant.[2]

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).

With respect to the administrative law judge's evidentiary rulings, employer argues that the administrative law judge erred in excluding Dr. Wiot's rereading of an x-ray dated November 2, 2001 pursuant to 20 C.F.R. §725.456(b)(3). Employer concedes that it submitted Dr. Wiot's reading to claimant less than twenty days before the hearing, held on January 24, 2004, but maintains that good cause existed for its untimely proffer

[1] Claimant filed an application for benefits with the Department of Labor (DOL) on August 9, 1974. This claim was denied by DOL on September 10, 1974. Director's Exhibit 1. Claimant filed a second application for benefits on July 31, 1984. In a Decision and Order dated April 18, 1988, Administrative Law Judge Frank J. Marcellino determined that claimant established the existence of pneumoconiosis but failed to prove that he was totally disabled. Accordingly, benefits were denied. Claimant filed a third application for benefits on August 21, 2001. Director's Exhibit 3.

[2] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b)(2), and 725.309(d), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

of this evidence. In support of its argument, employer states that Dr. Wiot read the film on December 10, 2003, but employer did not receive his report until January 8, 2005. Employer also maintains that it notified claimant in its prehearing evidence summary that it would be submitting Dr. Wiot's interpretation of the film at the hearing.

We reject employer's allegation of error. The administrative law judge noted that employer previously had Dr. Bellotte interpret the November 2, 2001 film in 2002 but chose not to seek admission of this reading because it favored claimant. The administrative law judge stated that "this fact reveals that employer received the x-ray in ample time to have it read by a physician of its choosing." Decision and Order at 3. The administrative law judge concluded, therefore, that employer did not establish good cause for its failure to comply with the twenty-day rule. *Id*. Under these circumstances, the administrative law judge acted within the broad discretion granted him in ruling upon procedural issues in determining that employer did not establish good cause for failing to comply with the twenty-day rule. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986).

Employer also contends that the administrative law judge erred in excluding, pursuant to the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3)(i), the negative x-ray readings by Dr. Spitz of the films dated July 7, 2003 and November 5, 2003. Hearing Transcript at 7-8, 34-35. Employer asserts that these interpretations should have been admitted into the record, as the administrative law judge is required to consider all relevant evidence in assessing a claim. Employer notes that a number of physicians stated that having several x-rays to examine assists in determining the etiology of pulmonary fibrosis. The administrative law judge did not, however, abuse his discretion in excluding these x-ray interpretations, as he rationally treated employer's assertion of relevance as insufficient to support a finding of good cause pursuant to Sections 725.414(d) and 725.456(b)(1). *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

We will now address employer's contentions regarding the administrative law judge's findings on the merits of entitlement. With respect to the administrative law judge's consideration of the x-ray evidence admitted into the record, employer argues that the administrative law judge did not provide an adequate explanation for his finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(1). Employer also maintains that the administrative law judge erred in failing to address the dates on which the x-rays were obtained, the interpretations by individual readers, the qualifications of the readers, and the findings of pulmonary fibrosis, rather than pneumoconiosis. In addition, employer contends that the administrative law judge erred in determining that Dr. Zaldivar was not a B reader at the time he performed his reading of the x-ray dated November 15, 2003.

These contentions have merit. The administrative law judge used three separate methods to assess the x-ray evidence. He first discussed each x-ray separately, considering the qualifications of the readers, and made a determination as to whether it was positive or negative for pneumoconiosis or not classified under the ILO-UC or UICC/Cincinnati systems. Decision and Order at 17-18. The administrative law judge then identified the total number of positive and negative readings. *Id*. at 18. Finally, the administrative law judge set forth the number of positive and negative readings done by each category of physician. The administrative law judge concluded, without elaboration, that "claimant has established, by a preponderance of the evidence, the existence of pneumoconiosis." *Id*.

Because the administrative law judge did not actually identify which method of weighing the x-ray evidence provided the basis for his ultimate finding, as is required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), we cannot ascertain whether his ultimate finding is rational and supported by substantial evidence. Accordingly, we must vacate the administrative law judge's determination that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and remand this case to the administrative law judge for reconsideration of the x-ray evidence. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). On remand, the administrative law judge should address both the quantity and quality of the films of record, including the qualifications of the physicians providing the readings, and provide the rationale underlying his findings. In addition, the administrative law judge must address the deposition testimony in which Dr. Zaldivar indicated that he has been certified as a B reader since 1976. Employer's Exhibit 12 at 5.

Pursuant to Section 718.202(a)(4), employer alleges that the administrative law judge erred in relying upon Dr. Rasmussen's opinion to determine that the CT scan interpretation in which Dr. Wiot ruled out the presence of pneumoconiosis was entitled to little weight. Employer also raises allegations of error regarding the administrative law judge's findings under Section 718.204(c) that are relevant to the administrative law judge's determination that claimant established that he is suffering from legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2).[3] Employer maintains that the administrative law judge mischaracterized Dr. Bellotte's opinion regarding whether coal dust exposure can cause pulmonary fibrosis and did not provide a rational explanation for

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

his decision to accord greater weight to Dr. Rasmussen's opinion regarding the source of claimant's respiratory and pulmonary impairments.

These contentions have merit. Pursuant to Section 718.202(a)(4), the administrative law judge determined that the opinions in which Drs. Walker, Olson, Bellotte, and Rasmussen diagnosed clinical pneumoconiosis outweighed the opinion in which Dr. Zaldivar diagnosed idiopathic pulmonary fibrosis, as their opinions were supported by the x-ray evidence of record. Decision and Order at 19; Director's Exhibit 14; Claimant's Exhibits 1, 4; Employer's Exhibits 11, 12.

Regarding the CT scan evidence, the administrative law judge indicated that Dr. Patel read the scan dated December 4, 2003, as showing end-stage pneumoconiosis, while Dr. Wiot stated that the CT scan showed pulmonary fibrosis which is not caused by coal workers' pneumoconiosis. After noting that both physicians were Board-certified radiologists, the administrative law judge stated:

> However, Dr. Wiot opined that coal workers' pneumoconiosis is not a cause of basilar interstitial fibrosis, and I find this statement to be contrary to the medical article cited by Dr. Rasmussen. Dr. Rasmussen opined that it can be a cause and cited to an article that at least suggests further study of the issue. Even Dr. Bellotte allowed that there may be a connection between the two.[4]

Decision and Order at 19.

As employer contends, however, the administrative law judge did not acknowledge Dr. Zaldivar's statement that the authors of the article reported that they could not reach a definitive conclusion about the causal relationship between pulmonary fibrosis and coal dust exposure and were only able to ascertain the prevalence of the condition among coal miners. Employer's Exhibit 12 at 36, 39. In addition, as employer asserts, the administrative law judge did not accurately characterize Dr. Bellotte's view of the article cited by Dr. Rasmussen. The administrative law judge suggested that Dr. Bellotte agreed, based upon the article, that there might be a causal relationship between coal dust exposure and pulmonary fibrosis. The record indicates, however, that Dr. Bellotte stated that the authors of the article concluded that the causal relationship was unknown and that they merely documented the incidence of pulmonary fibrosis in coal miners. Employer's Exhibit 11 at 25-26. Finally, employer is correct in arguing that the

[4] The article in question is McConnochie K., Green, F.H.Y., Vallyathan, V., Wagner, J.C., Seal, R.M.E., and Lyons, J.P., "Interstitial Fibrosis In Coal Workers – Experience In Wales and West Virginia," *Annals of Occupational Hygiene*, Vol. 32, pp. 553-560, Supplement 1 (1988).

administrative law judge did not explain his rationale for according greatest weight to Dr. Rasmussen's opinion after specifically stating that Dr. Rasmussen was not as expert as Drs. Bellotte and Zaldivar. Decision and Order at 21.

Because the administrative law judge did not accurately characterize the relevant evidence and did not provide an adequate rationale for all of his findings, we must vacate the administrative law judge's determination that claimant established the existence of pneumoconiosis under Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).[5] On remand, the administrative law judge should reconsider the medical opinions and CT scan readings, in addition to the x-ray evidence, and determine whether claimant has established the existence of either clinical or legal pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If he determines that claimant has met his burden under Section 718.202(a), the administrative law judge must then consider whether claimant has established that he is totally disabled due to pneumoconiosis in accordance with Section 718.204(c).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment took place in the State of West Virginia. Director's Exhibits 1, 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge