BRB No. 99-0767 BLA

VINCENT ROSSI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
READING ANTHRACITE CO., INC.	)	
	)	
and	)	DATE ISSUED: _____
	)	
INTERNATIONAL BUSINESS & MERCANTILE REASSURANCE CO.	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

W. William Prochot (Arter & Hadden, LLP), Washington, D.C., for employer.

Rita Roppolo (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Reconsideration (97-BLA-00100) of Administrative Law Judge Ainsworth H. Brown awarding benefits 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 found that claimant demonstrated a long time exposure in the Nation's coal mines and, based on the date of filing, adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] Decision and Order at 2-3. Considering the x-ray evidence of record, the administrative law judge concluded that it was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[2] Accordingly, benefits were awarded beginning February 1, 1996, the month in which the claim was filed. On appeal, employer contends that the administrative law judge erred in failing to conduct the required duplicate claims analysis, in finding the existence of complicated pneumoconiosis established without considering all of the evidence of record and in determining the date of filing to be the proper onset date. Claimant has not filed a response brief on appeal. The Director responds asserting that the administrative law judge properly found that the x-ray evidence relied upon by employer was not admitted into the record and that the instant case is not a duplicate claim as the original claim was withdrawn. Employer filed a reply brief asserting that the x-ray evidence was admitted and that liability should be transferred to the Trust Fund.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30

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[1]Claimant filed an initial claim for benefits on January 15, 1985, which claimant withdrew on April 30, 1987, as he was still working. Director's Exhibit 32. Claimant filed the instant claim on February 9, 1996. Director's Exhibit 1.

[2]The parties stipulated to twenty-seven years of coal mine employment, the existence of simple pneumoconiosis and that the pneumoconiosis arose out of claimant's coal dust exposure. *See* Hearing Transcript at 14. These findings are not challenged on appeal, and are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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*).

Initially, we address the procedural questions raised in this case. The record reflects that claimant filed an earlier claim on January 15, 1985, which was subsequently withdrawn on April 30, 1987. Director's Exhibit 32. Claimant filed the instant claim on February 9, 1996. Director's Exhibit 1. Employer argues that the administrative law judge erred in failing to conduct the required duplicate claims analysis as this is the second claim filed by claimant and the administrative law judge did not determine if a material change in conditions had occurred. We disagree with employer's contention. Although claimant filed a claim in 1985, that claim was withdrawn by claimant, through counsel, and approved by an administrative law judge. Director's Exhibit 32. The regulations clearly state that when a claim is withdrawn, the claim will be considered not to have been filed. *See* 20 C.F.R. §725.306(b). Consequently, the only claim before the administrative law judge for consideration is the application filed on February 9, 1996 as the 1985 application is considered not to have been filed and thus the administrative law judge was not required to consider whether the medical evidence established a material change in conditions.[3] *See* 20 C.F.R. §725.306(b); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). We therefore hold that the administrative law judge did not err in failing to address whether a material change in conditions was established.

Employer further contends that if the instant claim was not a duplicate claim, then its due process rights were violated as employer was deprived of the opportunity to challenge the filing of the claim based upon timeliness. *See* 20 C.F.R. §725.308; Employer's Reply Brief at 3-8. We disagree. The record in the instant case indicates that the issue of timeliness was not contested in this claim. Director's Exhibit 33. The issues to be considered by the

[3]Since the instance claim is not a duplicate claim we will not address the other issues raised by employer concerning the procedures for determining a material change in conditions.

administrative law judge are generally restricted to those identified by the district director, raised in writing before the district director or not reasonably ascertainable by the parties at the time the claim was before the district director. *See* 20 C.F.R. §725.463; *Mullins v. Director, OWCP*, 11 BLR 1-132 (1988)(*en banc*, Ramsey, C.J., dissenting). Whether the claim was timely filed is an issue that was reasonably ascertainable based upon the record as Director's Exhibit 32 clearly indicates that the prior claim was withdrawn. As the issue of timeliness was reasonably ascertainable at the district director level, this issue is deemed conceded by the employer. *See Mullins, supra*; *see also Linton v. Director, OWCP*, No. 85-3547 (3d Cir. June 10, 1986)(unpublished). Failure to avail oneself of the opportunity to raise an issue may result in a waiver of the right to review of that issue and does not constitute a denial of due process. *See Martin v. Island Creek Coal Co.*, 2 BLR 1-276 (1979). Consequently, as the issue of timeliness was reasonably ascertainable while the case was before the district director, we hold that this issue has been waived and employer's due process rights have not been violated.

Employer also contends that the administrative law judge erred in finding that the x-ray evidence that employer now seeks to rely upon was not admitted into the record. Employer's Brief at 15-17; Employer's Reply Brief at 2-3. Employer asserts that claimant's attorney admitted this evidence into the record. We disagree. At the hearing, claimant's attorney stated: "Now, I see he's not offering any of them. If he's not, I'm going to want to put all those positive x-ray readings into the record, but before I do that...." Hearing Transcript at 10. Claimant, however, never subsequently moved for their inclusion. The record also indicates that the administrative law judge held the record open for the inclusion of Dr. Levinson's deposition and for claimant's rebuttal evidence to that deposition as well as for claimant to submit his own readings of the x-ray films that employer had in its possession. Hearing Transcript at 21-22. The administrative law judge admitted Employer's Exhibits 1-6 into the record, Hearing Transcript at 27, but employer did not offer the x-ray interpretations into the record. Employer also relies on the fact that claimant included the x-ray readings in his pre-hearing report as proof that claimant offered the interpretations into the record. Employer's Brief at 16. However, a review of the record indicates that although these readings were in existence at the time of the hearing, employer did not include them in his own pre-hearing report. It is the responsibility of each party to introduce its medical evidence into the record. *See generally White v. Director, OWCP*, 6 BLR 1-368 (1983). As employer was offered an opportunity to admit these readings into the record but failed to do so, we affirm the administrative law judge's determination that this evidence was not made part of the record.

With respect to the merits, employer contends that the administrative law judge's finding of complicated pneumoconiosis at Section 718.304 was based solely on an inadequate analysis of the x-ray evidence and that the administrative law judge erred in failing to address all the evidence which does not support the finding of complicated

pneumoconiosis. We agree with employer that the administrative law judge violated the Administrative Procedure Act (APA), 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), in finding that the evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304 in that he failed to specifically address all the relevant evidence of record.[4]

Dr. Gaziano read an x-ray dated April 23, 1996, and found pneumoconiosis 3/2, and large opacities size A. Director's Exhibit 14. On the x-ray form, Dr. Gaziano noted "? mass right infrahilar area need rule out lung cancer." Director's Exhibit 14. Additionally, Dr. Cappiello found complicated pneumoconiosis with large opacity A, small opacities r/q, perfusion of 2/3. Claimant's Exhibit 24. Dr. Cappiello also stated "right infrahilar mass may easily represent neoplasm and if warranted CT of thorax may be contemplated." Claimant's Exhibit 24. It is unclear from the record whether the physician's comments constitute an alternative diagnosis, thereby calling into question their diagnosis of complicated pneumoconiosis, or merely represents an additional diagnosis. Additionally, the record includes Dr. Levinson's opinion that claimant has simple pneumoconiosis and does not suffer from complicated pneumoconiosis. Employer's Exhibits 4, 6.

[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefore, on all 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 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Inasmuch as the administrative law judge did not explicitly address whether the foregoing evidence of record is sufficient to establish the existence of complicated pneumoconiosis, we must vacate the administrative law judge's award of benefits and remand the case for further consideration of this issue under Section 718.304. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). On remand, the administrative law judge must first determine whether the evidence establishes the existence of complicated pneumoconiosis pursuant to Section 718.3074(a)-(c), and then weigh the evidence supportive of a finding of complicated pneumoconiosis against the contrary probative evidence. *See Melnick, supra*. If the administrative law judge finds the evidence insufficient to establish the existence of complicated pneumoconiosis, then he must determine if the evidence of record is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) in accordance with the holding of the United States Court of Appeals for the Third Circuit in *Bonnessa v. United States Steel* Corp., 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).[5]

Employer finally contends that the administrative law judge erred in his finding with respect to the onset date of claimant's total disability pursuant to 20 C.F.R. §725.503. In this case, the administrative law judge found entitlement as of February, 1996, the month in which claimant filed for benefits. Decision and Order on Reconsideration at 2-3. The administrative law judge, however, did not specifically state a medical basis for his onset date determination. Decision and Order at 4; Decision and Order on Reconsideration at 2-3. Inasmuch as he did not provide an analysis of what evidence he relied on in reaching his conclusion and failed to provide any basis or rationale for finding that benefits commence as of February, 1996, the administrative law judge's determination cannot be affirmed since his explanation fails to comply with the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). Where the administrative law judge finds the existence of complicated pneumoconiosis demonstrated, the month in which complicated pneumoconiosis was first diagnosed generally governs the onset date. *Truitt v. North American Coal Corp*., 2 BLR 1-199 (1979). If the evidence does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month during which the claim was filed, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing, in which case benefits must commence following the

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

period of simple pneumoconiosis. 20 C.F.R. §725.503(b). In the instant case, there is conflicting evidence regarding the onset date which must be addressed and resolved by the administrative law judge. *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Consequently, we vacate the administrative law judge's onset date determination and, on remand, if entitlement is again established, the administrative law judge is instructed to reconsider the evidence relevant to this issue and to make a specific finding with regard to the date of onset of total disability due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Owens, supra*; *see also Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration awarding benefits are affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge