BRB No. 04-0301 BLA

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| JIMMIE JACKSON | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| JIM WALTERS RESOURCES, INCORPORATED | ) | DATE ISSUED: 12/28/2004 |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Thomas J. Skinner, IV and Legrand H. Amberson, Jr. (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-0090) of Administrative Law Judge Gerald M. Tierney 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).[1] This case involves a duplicate claim filed on September 29,

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726

2000.[2] The district director denied the claim on March 28, 2001. Director's Exhibit 16. Claimant subsequently filed a request for modification. Director's Exhibit 17. In a Proposed Decision and Order dated September 10, 2002, the district director found that the evidence was sufficient to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 30. The district director, however, found that the evidence was still insufficient to establish that claimant suffered from pneumoconiosis arising out of his coal mine employment. *Id.* The district director, therefore, denied benefits. *Id.* The case was subsequently forwarded to the Office of Administrative Law Judges for a hearing. Director's Exhibit 34.

The administrative law judge found that the issue before him was whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000). After crediting claimant with fourteen years and two months of coal mine employment, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). After noting that employer did not contest the issue of total disability, the administrative law judge found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that claimant established that the district director made a mistake in a determination of fact in denying his 2000 duplicate claim. Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also argues that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on May 6, 1991. Director's Exhibit 1. In a Decision and Order dated November 29, 1993, Administrative Law Judge Lee J. Romero, Jr. found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Romero also found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. *Id.* Judge Romero, therefore, denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a second claim on September 29, 2000. Director's Exhibit 1.

C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In considering this claim, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), rather than determining whether claimant established a basis for modification of the district director's denial of his 2000 duplicate claim.[4] *See Hess v. Director, OWCP*, 21 BLR 1-141 (1999). In this case, the administrative law judge did not address whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). However, because employer does not contest the issue of total disability, an element of entitlement previously adjudicated against claimant, the evidence is sufficient, as a matter of law, to support a finding of a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *See Allen v. Mead Corp.*, 22 BLR 1-63 (2000).[5] Consequently, the administrative law judge properly addressed the merits of claimant's 2000 duplicate claim.

Employer contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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[3] Because no party challenges the administrative law judge's finding regarding the length of claimant's coal mine employment, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The Board has held that any party dissatisfied with a district director's determination on a duplicate claim is entitled to have the matter considered by the Office of Administrative Law Judges. *See Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1991) (*en banc*). Moreover, an administrative law judge must review, *de novo*, the issue of whether the evidence establishes a material change in conditions. *Id.*

[5] The Board has held that in cases arising in circuits where the United States Courts of Appeals have not yet addressed the standard applicable under Section 725.309 (2000), a claimant, in order to establish a material change in conditions, must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. *See Allen v. Mead Corp.*, 22 BLR 1-63 (2000) (*en banc*).

§718.202(a)(1). In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge stated:

> I rely on the opinion [sic] of the more qualified readers, the readers who are both [B]oard certified radiologists and B-readers. I rely on the new chest x-ray evidence as I find it more probative of [c]laimant's current condition. Two of the three dually-qualified readers of [c]laimant's new chest x-ray, Drs. Miller and Ahemd [sic], identified pneumoconiosis. I find that [c]laimant has proved, by a preponderance of the chest x-ray evidence overall, the existence of pneumoconiosis at §718.202(a)(1).

Decision and Order at 3.

The administrative law judge acted within his discretion in according greater weight to x-ray interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 3. The administrative law judge also acted within his discretion in according greater weight to the interpretations of claimant's most recent x-ray films. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); Decision and Order at 3. However, in doing so, the administrative law judge considered only the interpretations of x-rays taken on August 21, 2001, May 17, 2002 and January 14, 2003.[6] Employer argues that "it is not clear why the [administrative law judge] choose [sic] 2001 as the cut-off date for determining when an x-ray became 'more probative.'" Employer's Brief at 11. Employer specifically argues that the administrative law judge erred in failing to explain why he did not consider the x-ray taken on November 8, 2000 x-ray to be among claimant's most recent x-ray films.[7]

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[6] Although Dr. Sargent, a B reader and Board-certified radiologist, interpreted claimant's August 21, 2001 x-ray as negative for pneumoconiosis, Director's Exhibit 24, two equally qualified physicians, Drs. Miller and Ahmed, interpreted this film as positive for the disease. Claimant's Exhibits 1, 2. Dr. Sargent, the only dually qualified physician to render an interpretation of claimant's May 17, 2002 x-ray, interpreted this film as negative for pneumoconiosis. Director's Exhibit 27. However, Drs. Miller and Ahmed, the only dually qualified physicians to render interpretations of claimant's January 14, 2003 x-ray, interpreted the x-ray as positive for pneumoconiosis. Claimant's Exhibits 1, 2.

[7] Two dually qualified physicians, Drs. Nath and Sargent, interpreted claimant's November 8, 2000 x-ray as negative for pneumoconiosis. Director's Exhibits 14, 15. There are no other interpretations of this film in the record.

The administrative law judge stated that he considered the "new chest x-ray readings" to be those that had been "submitted since the denial of [c]laimant's second claim." Decision and Order at 3. The administrative law judge, therefore, limited his consideration of the x-ray evidence to a review of the interpretations of x-rays taken subsequent to the *district director's initial denial of claimant's 2000 duplicate claim*. As discussed, *supra*, because the administrative law judge's review of the instant 2000 duplicate claim is a *de novo* review, *see Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1991) (*en banc*), he erred in limiting his consideration of the x-ray evidence to the interpretations of x-rays taken subsequent to the district director's initial denial of the claim. Moreover, claimant's November 8, 2000 x-ray was taken less than one year prior to claimant's August 21, 2001 x-ray, a film which the administrative law judge found entitled to greater weight based upon its recency. Consequently, we vacate the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and remand the case for further consideration. On remand, the administrative law judge is instructed to determine whether or not claimant's November 8, 2000 x-ray should also be considered as one of the most recent x-ray films of record.[8]

On remand, should the administrative law judge find the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), he must address whether the evidence is sufficient to establish the existence of pneumoconiosis pursuant to any of the other relevant subsections. *See* 20 C.F.R. §718.202(a)(2)-(4).

In light of our decision to vacate the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and remand the

[8] The administrative law judge also erred in focusing exclusively on the number of dually qualified physicians who rendered positive and negative x-ray interpretations. In evaluating x-ray evidence, an administrative law judge should focus on the number of x-ray interpretations, along with the readers' qualifications, dates of films, quality of films and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988).

case for further consideration thereunder.[9] *See Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[9] Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).