BRB No. 05-0596 BLA

MAURICE D. ROSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/23/2005
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C. for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6474) of Administrative Law Judge Daniel J. Roketenetz rendered on a subsequent 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] The administrative law judge accepted the parties stipulation of twenty-two years of coal mine employment[2] and found that the x-ray evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Turning to the merits of the claim, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but failed to establish a totally disabling respiratory impairment arising out of coal mine employment pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his consideration of the pulmonary function studies and medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv) when he found that claimant did not establish that he is totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director) responds that the administrative law judge erred in his analysis of the medical evidence regarding total disability, and he urges the Board to vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv) and to remand the case for further consideration of the evidence.[3]

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

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[1] Claimant filed his first claim on December 9, 1986 and the claim was ultimately denied on July 7, 1987 because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed this claim on March 12, 2002. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 18.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(b)(2)(i), the administrative law judge accorded greater weight to the more recent pulmonary function studies of record and found that the record contains four recent pulmonary function studies. The administrative law judge found that a November 8, 2004 pulmonary function study administered by Dr. Repsher was not in compliance with the quality standards of Section 718.103(b). Finding that claimant's height is sixty-seven inches, the administrative law judge further determined that the three remaining studies produced non-qualifying values.[4] The administrative law judge concluded that a preponderance of the pulmonary function study evidence failed to establish total disability pursuant to Section 718.204(b)(2)(i).

Both claimant and the Director contend that, contrary to the administrative law judge's analysis, the September 16, 2002 pulmonary function study, administered when claimant was seventy-two, and the July 31, 2004 pulmonary function study, administered when he was seventy-four, are qualifying based on the FEV1 values[5] and the FEV1/FVC

[4] The record reflects that when claimant took these pulmonary function tests, he was older than the maximum age of seventy-one listed in the 20 C.F.R. Part 718, Appendix B tables for assessing whether pulmonary function studies are qualifying. Director's Exhibit 11; Claimant's Exhibits 2, 3.

[5] Claimant's height of 67" falls between the two applicable table heights, which are 66.9" and 67.3." The September 16, 2002 FEV1 is qualifying for a seventy-one year old male if assessed under the greater height of 67.3 inches, but non-qualifying under the lesser height of 66.9 inches. Director's Exhibit 11. Accordingly, we infer that claimant and the Director are using the greater table height. The July 31, 2004 FEV1 is qualifying for a 71 year old at either height. Claimant's Exhibit 2. In *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84 n.6 (4th Cir. 1995), the Director stated his position that the Black Lung Program Manual requires using the closest greater height when a miner's actual height falls between two listed heights, but the court did not decide the issue. Employer counters that a different methodology is required by the Black Lung Program Manual. Employer's Brief at 13. The administrative law judge should address this issue on remand.

ratios produced.[6] 20 C.F.R. Part 718, Appendix B; 20 C.F.R. §718.204(b)(2)(i)(C); Director's Exhibit 11; Claimant's Exhibit 2. The Director asserts that absent evidence that the values produced on claimant's pulmonary function studies are not indicative of total disability in light of claimant's age, the values obtained on both studies must be considered qualifying because they are qualifying for a seventy-one year-old miner. Director's Brief at 2, n.2. Employer counters that there are no qualifying values for claimant's tests because it is presumed that a miner who is older than seventy-one would either be incapable of performing coal mine work because of old age, or would not want to be in the workforce. Employer's Brief at 12.

Contrary to employer's argument, an administrative law judge is not precluded from finding total disability established based on a pulmonary function study where a miner is older than seventy-one, so long as the administrative law judge reasonably explains his findings. *See generally Calfee v. Director,* OWCP, 8 BLR 1-7, 1-10 (1985). In the case at bar, however, the administrative law judge has not explained his determination that claimant's pulmonary function study results are non-qualifying for a miner of claimant's age and height. Because the administrative law judge has not provided the bases for his determination that the September 16, 2002 and July 31, 2004 pulmonary function studies are non-qualifying, we must vacate his determination that the preponderance of the pulmonary function study evidence fails to establish total disability pursuant to Section 718.204(b)(2)(i) and remand the case to him for further analysis of the pulmonary function studies. *See Director, OWCP v. Rowe,* 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). On remand, the administrative law judge must explain how he evaluates the pulmonary function evidence where claimant is older than seventy-one and his height falls between the values listed in the Appendix B table.

Pursuant to Section 718.204(b)(2)(iv), claimant and the Director contend that the administrative law judge erred in finding that Drs. Simpao, Baker, and O'Bryan provided unreasoned opinions that claimant is totally disabled from a pulmonary standpoint. As claimant and the Director argue, the administrative law judge relied on his finding that the pulmonary function studies were non-qualifying to determine that these physicians' opinions were "unreasoned." Decision and Order at 13. Because we have vacated the

[6] If pulmonary function study results show an FEV1 result equal to or less than those listed in Appendix B, Table B1, Section 718.204(b)(2)(i)(C) provides that a percentage of 55 or less when the results of the FEV1 test are divided by the results of the FVC test demonstrates that the miner is totally disabled. As noted by the Director, the FEV1/FVC ratios are 47.4% pre-bronchodilator and 42.1% post-bronchodilator for the July 31, 2004 pulmonary function study, and 50.3% for the September 16, 2002 pulmonary function study, although not listed on the form. Director's Brief at 2 n.3; Claimant's Exhibit 2.

administrative law judge's findings regarding the pulmonary function studies, we also vacate the administrative law judge's finding regarding the medical opinions. On remand, the administrative law judge should reconsider the medical opinions after he has reassessed the pulmonary function studies.

Additionally, since the administrative law judge found that claimant did not establish total disability due to pneumoconiosis because "the record is void of any well-reasoned opinions regarding total disability," Decision and Order at 13, we also vacate the administrative law judge's finding pursuant to Section 718.204(c). On remand, if reached, the administrative law judge should reconsider whether the evidence establishes total disability due to pneumoconiosis pursuant to Section 718.204(c).

Lastly, employer argues that claimant did not establish a change in an applicable condition of entitlement, mandating a denial of the claim under Section 725.309(d). Employer's Brief at 16-17. Because employer argues in support of the ultimate result reached by the administrative law judge--a denial of benefits--employer's argument is properly before the Board. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364-69, 18 BLR 2-113, 2-117-21 (4th Cir. 1994); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-90-92 (1983)(Miller, J., dissenting).

Pursuant to Section 718.202(a)(1), employer contends that the administrative law judge did not consider that Drs. Spitz and Wiot are professors of radiology when he considered the x-ray readers' radiological credentials. Employer's Brief at at 16-17. Although an administrative law judge need not give greater weight to the readings by professors of radiology, the Board has recognized that an administrative law judge should at least consider those additional radiological credentials. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003). The record documents that Drs. Spitz and Wiot are professors of radiology. Employer's Exhibits 1-3. The administrative law judge did not consider those credentials. We therefore vacate the administrative law judge's finding pursuant to Section 718.202(a)(1). Employer further contends that Drs. Spitz and Wiot are Board-certified radiologists, not merely B-readers as stated by the administrative law judge. Review of the record reflects that the x-ray classification forms filled out by these physicians state that each is a "certified B-reader." Employer's Exhibits 1-3. Employer states that this notation means "Board-certified radiologist and B-reader," and states further that it spelled out these physicians' "dual" qualifications in its closing brief to the administrative law judge. Review of the record does not disclose that brief. On remand, the administrative law judge should determine whether Drs. Spitz and Wiot are documented in the record as Board-certified radiologists. Additionally, employer contends that the administrative law judge did not consider a negative x-ray reading by Dr. Schultheis, and thus erred in finding that the existence of pneumoconiosis was established. Employer's Brief at 16. The record indicates that Dr. Schultheis, whose radiological credentials are not of record, found "no infiltrate or significant pleural or

interstitial findings" on a November 8, 2004 x-ray. Employer's Exhibit 2. Since the administrative law judge expressly relied on the readings by physicians possessing radiological credentials, Decision and Order at 7, it is difficult to see how the administrative law judge's omission affected his determination. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Nevertheless, as we are remanding this case for further consideration, we instruct the administrative law judge to consider Dr. Schulteis's reading, to the extent it is admissible.[7]

Finally, there is merit in employer's argument that the administrative law judge did not address whether the new x-ray readings submitted with the subsequent claim differed qualitatively from the x-ray readings that were submitted in claimant's prior claim and which were found insufficient to establish the existence of pneumoconiosis. Employer's Brief at 17; *see Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, we vacate the administrative law judge's finding pursuant to Section 725.309(d) and instruct him to consider whether the new x-ray evidence was qualitatively different from that submitted in the original claim.

[7] Dr. Schulteis's reading was admitted into the record. Hearing Tr. at 35. However, the record also reflects that employer did not designate in what category of evidence under 20 C.F.R. §725.414 the administrative law judge should consider Dr. Schulteis's reading. Employer's Evidence Summary Form, Dec. 14, 2004.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration 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