BRB No. 07-0483 BLA

D.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KITCHEKAN FUEL CORPORATION	)	
	)	DATE ISSUED: 02/28/2008
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

D.C., Matoaka, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (04-BLA-6619) of Administrative Law Judge Edward Terhune Miller denying 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). This case involves a claim filed on July 29, 2002. After crediting claimant with twelve and one-half years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Although the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R.

§718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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 order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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), implemented by 20 C.F.R. §§718.101(a), 725.406. Claimant initially selected Dr. Mullins to conduct his Department of Labor (DOL)-sponsored medical evaluation. Director's Exhibit 12. Dr. Mullins examined claimant on September 16, 2002 and submitted a report dated September 26, 2002. Director's Exhibit 13. Based in part upon Dr. Patel's positive interpretation of claimant's September 16, 2002 x-ray, Dr. Mullins diagnosed coal workers' pneumoconiosis. Director's Exhibits 13, 18. In a Proposed Decision and Order dated July 3, 2003, the district director awarded benefits. Director's Exhibit 26. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 27, 35.

After referral of the case to the Office of Administrative Law Judges, employer attempted to obtain the September 16, 2002 x-ray so that other physicians could interpret the film. On October 14, 2003, the DOL informed employer that the September 16, 2002 x-ray could not be located. Director's Exhibit 39. On January 6, 2004, Administrative Law Judge Richard T. Stansell-Gamm issued a Show Cause Order providing the parties with an opportunity to show cause regarding whether the case should be remanded to the

district director for development of a complete pulmonary evaluation in accordance with 20 C.F.R. §725.406(a). No party responded to the Order. By Order dated January 22, 2004, Judge Stansell-Gamm remanded the case to the district director for a complete pulmonary evaluation, including a chest x-ray that would be made available to employer for an additional interpretation. Director's Exhibit 47.

Claimant selected Dr. Porterfield to perform his second DOL-sponsored pulmonary evaluation. Director's Exhibit 48. Dr. Porterfield examined claimant on April 19, 2004, and submitted a report dated April 28, 2004. Director's Exhibit 49.

Section 718.202(a)(1)

The x-ray evidence consists of eight interpretations of four x-rays. Dr. Hippensteel, a B reader, interpreted claimant's October 13, 2003 x-ray as negative for pneumoconiosis.[1] Employer's Exhibit 2.

Although Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's April 19, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 49, Dr. Wheeler, an equally qualified physician, interpreted this x-ray as negative for the disease.[2] Director's Exhibit 50.

Dr. Castle, a B reader, interpreted claimant's October 27, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 7.

Although Dr. Pathak, a B reader,[3] and Dr. Miller, a B reader and Board-certified radiologist, interpreted claimant's December 8, 2004 x-ray as positive for pneumoconiosis, Claimant's Exhibits 1, 2, Dr. Wiot, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease. Employer's Exhibit 10.

---

[1] In his summary of the x-ray evidence, the administrative law judge also listed Dr. Wheeler's negative interpretation of claimant's October 13, 2003 x-ray. Decision and Order at 4; Employer's Exhibit 2. However, at the January 11, 2005 hearing, the administrative law judge had excluded this x-ray interpretation as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414. *See* Transcript at 24.

[2] Dr. Binns, a B reader and Board-certified radiologist, interpreted claimant's April 19, 2004 x-ray for quality purposes only. Director's Exhibit 49.

[3] Noting that Dr. Pathak was a B reader and board-certified in radiology in Great Britain, the administrative law judge found that "Dr. Pathak's credentials [were] deemed to exceed those of a B-reader in evaluating the x-ray evidence." Decision and Order at 14 n.9.

In his consideration of whether the x-ray evidence established the existence of pneumoconiosis, the administrative law judge noted, *inter alia*, that an x-ray interpretation by a dually qualified B reader and Board-certified radiologist could be accorded greater weight than that of a B reader. Decision and Order at 13. The administrative law judge found that:

> The record contains nine x-ray interpretations of four films that have been submitted for this claim. Qualitative as well as a quantitative evaluation of the x-ray evidence as a whole does not establish the existence of pneumoconiosis under §718.202(a)(1). The x-ray evidence is in equipoise. The April 19, 2004, chest x-ray interpreted as positive by Dr. Patel and reread as negative by Dr. Wheeler does not prove pneumoconiosis. Both doctors are dually qualified as board-certified radiologists and B-readers. The chest x-rays of October 13 and 27, 2004, were interpreted as negative.
>
> The positive readings of the December 8, 2004 chest x-ray by Drs. Pathak and Miller outweigh the contrary interpretation of this film by Dr. Wiot. Dr. Thomas Miller is a board-certified radiologist and a B-reader; Dr. Pathak is board-certified in Great Britain, but not in the United States, and a B-reader. Dr. Wiot is a board-certified radiologist and B-reader. This x-ray evidence evaluated as whole does not establish a preponderance of positive x-ray evidence of pneumoconiosis.

Decision and Order at 13-14 (case citations and footnote omitted).

Despite finding that claimant's December 8, 2004 x-ray, the most recent x-ray of record, was positive for pneumoconiosis, the administrative law judge found that the "x-ray evidence, evaluated as a whole [did] not establish a preponderance of positive x-ray evidence of pneumoconiosis." *Id.* at 14. The administrative law judge failed to explain the basis for his finding that the x-ray evidence, as a whole, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, the administrative law judge's analysis of the x-ray evidence does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the 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 30 U.S.C. §432(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The administrative law judge also erred in considering Dr. Wheeler's negative

interpretation of claimant's October 13, 2003 x-ray, *see* Decision and Order at 4; Employer's Exhibit 2, since the administrative law judge excluded this evidence at the hearing as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414.[4] *See* Transcript at 24.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). On remand, the administrative law judge must consider the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film, and the actual reading. *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).

Section 718.202(a)(2) and (3)

Because there is no biopsy evidence of record, we affirm the administrative law judge's finding that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 12. Furthermore, the administrative law judge properly found that claimant was not entitled to any of the presumptions arising under 20 C.F.R. §718.202(a)(3).[5] *Id.*

Section 718.202(a)(4)

The record contains four medical reports. While the West Virginia Occupational Pneumoconiosis Board (OPB) and Dr. Porterfield opined that claimant suffered from coal workers' pneumoconiosis,[6] Director's Exhibits 20, 49, Drs. Hippensteel and Castle

[4] The administrative law judge stated that the "chest x-rays of October 13 and 27, 2004, were interpreted as negative." Decision and Order at 13. The record contains a negative interpretation of an October 13, *2003* x-ray, not an October 13, *2004* x-ray. *See* Employer's Exhibit 2.

[5] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[6] On February 11, 1992, the West Virginia Occupational Pneumoconiosis Board (OPB) found "sufficient evidence to justify a diagnosis of occupational pneumoconiosis with 30% pulmonary functional impairment attributable to the disease." Director's

opined that claimant did not suffer from the disease.[7] Employer's Exhibits 1, 4, 8, 9.

In his consideration of whether the medical opinion evidence established the existence of pneumoconiosis, the administrative law judge initially found that the diagnosis of pneumoconiosis rendered by the OPB had "little probative value." Decision and Order at 15; Director's Exhibit 20. The administrative law judge found that the OPB's "analysis [was] brief, its conclusion [was] not adequately explained in light of the record, and the standard of entitlement it applied [was] unclear, and in any event involve[d] different law." *Id.*

The administrative law judge further found that Dr. Porterfield's diagnosis of pneumoconiosis was weakened by his reliance on a positive x-ray that had been reread as negative.[8] Decision and Order at 15. The administrative law judge further found that the opinions of Drs. Castle and Hippensteel were better reasoned than Dr. Porterfield's opinion and precluded a finding of legal pneumoconiosis. *Id.* at 16. The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Exhibit 20.

Dr. Porterfield conducted the Department of Labor-sponsored evaluation on April 19, 2004. Based upon Dr. Patel's positive interpretation of claimant's April 19, 2004 x-ray, Dr. Porterfield diagnosed coal workers' pneumoconiosis. Director's Exhibit 49.

[7] Dr. Hippensteel examined claimant on October 13, 2003. In a report dated January 5, 2004, Dr. Hippensteel opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Hippensteel opined that claimant suffered from obstructive lung disease due to cigarette smoking. *Id.* Dr. Hippensteel reiterated his opinions during a December 20, 2004 deposition. Employer's Exhibit 8.

Dr. Castle examined claimant on October 27, 2004. Dr. Castle also reviewed the medical evidence. In a report dated December 6, 2004, Dr. Castle opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 4. Dr. Castle opined that claimant suffered from tobacco smoke-induced chronic obstructive pulmonary disease. *Id.* Dr. Castle reiterated his opinions during a January 5, 2005 deposition. Employer's Exhibit 9.

[8] We note that the administrative law judge misidentified Dr. Porterfield as Dr. Mullins. *See* Decision and Order at 6; Director's Exhibit 49.

The administrative law judge initially found, as was within his discretion, that because the OPB report did not indicate the criteria for its finding of occupational pneumoconiosis, the report was entitled to little weight. *See Schegan v. Waste Mgmt. & Processors, Inc.*, 18 BLR 1-41 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 15; Director's Exhibit 20.

The administrative law judge discredited Dr. Porterfield's diagnosis of pneumoconiosis because the doctor relied upon a positive x-ray that was "reread as negative." Decision and Order at 15. In light of our decision to vacate the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge's basis for according less weight to Dr. Porterfield's opinion cannot stand. We, therefore, vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[9]

[9] Because the x-ray upon which Dr. Mullins relied was lost, the administrative law judge did not consider Dr. Mullins' September 26, 2002 report with respect to whether claimant established the existence of clinical pneumoconiosis. *See* Decision and Order at 6 n.6; Director's Exhibit 13. However, Dr. Mullins also diagnosed chronic obstructive pulmonary disease attributable in part to coal workers' pneumoconiosis. *See* Director's Exhibit 13. On remand, the administrative law judge should address whether Dr. Mullins' report is properly admissible and, if so, should weigh it along with all of the other relevant medical opinion evidence at 20 C.F.R. §718.202(a)(4).

On remand, should the administrative law judge find that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and/or (a)(4), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence establishes the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Because the administrative law judge must reevaluate whether the medical opinion evidence establishes the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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