BRB No. 88-1160 BLA-A

EARNEST E. JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Sustaining Benefits of John S. Patton, Administrative Law Judge, United States Department of Labor.

Gregory R. Herrell (Arrington, Schelin & Herrell), Lebanon, Virginia, for claimant.

Michelle S. Gerdano (Marvin Krislov, Deputy Solicitor for National Operations; 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, the United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Sustaining Benefits (86-BLA-3862) of Administrative Law Judge John S. Patton 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] The administrative law judge found that the evidence of record failed to

[1] Claimant filed a claim on October 23, 1984, Director's Exhibit 1, which was referred to the Office of Administrative Law Judges. The administrative law judge issued his Decision and Order Sustaining Benefits on January 21, 1988, Director's Exhibit 30. The employer identified as the responsible operator in this case appealed (BRB No. 88-1160

establish that claimant worked as much as ten years in coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant suffers from disabling pneumoconiosis which was caused by work in the coal mines. Accordingly, benefits were awarded. On appeal, the Director contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a). Claimant responds, urging that the Decision and Order Sustaining Benefits be affirmed.

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).

BLA) and the Director filed a cross-appeal (BRB No. 88-1160 BLA-A). By Order issued June 18, 1992, the Board dismissed, without prejudice, prior to issuing a decision on the merits, both the employer's and the Director's appeals and remanded the case to the Office of Administrative Law Judges for a proper determination of the party liable for the payment of benefits. Subsequently, in light of concessions by the Director that the Black Lung Disability Trust Fund is the party liable for the payment of benefits in this case, the Board granted, by Order issued June 27, 1997, the Director's motion to reinstate its appeal, BRB No. 88-1160 BLA-A, and to amend the caption to reflect the dismissal of employer as a party in this case.

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).[2] Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Moreover, pursuant to Section 718.204(b), in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment, *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

The administrative law judge found that the pulmonary function study results of record, *see* Director's Exhibits 10, 16, 25, meet "the level of impairment," Decision and Order at 2-4. The administrative law judge gave little weight to the opinion of Dr. Bassham, who read an x-ray as revealing interstitial pulmonary fibrosis, but no acute process, *see* Director's Exhibit 16, because it was not consistent "with said ventilatory test," Decision and Order at 4. The administrative law judge next found that "it does appear" from the opinion of Dr. Robinette, *see* Director's Exhibit 16, who diagnosed mild obstructive airways disease and moderately severe restrictive airways disease and read an x-ray as revealing 1/0 coal workers' pneumoconiosis, which he believed was contributing to claimant's respiratory problems, that "Claimant suffers from pneumoconiosis which is severe enough to materially contribute to Claimant's pulmonary disability," Decision and Order at 5. The administrative law judge concluded that "the finding by several physicians, not only of a lack of pneumoconiosis, but a lack of any serious pulmonary impairment cast doubt on their conclusion of an absence of pneumoconiosis," *id*. Resolving doubt in favor of the claimant, the administrative law judge held that claimant suffers from disabling pneumoconiosis which was caused by work in coal mines.

[2] The presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim, filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1.

Pursuant to Section 718.202(a), the Director contends that the administrative law judge failed to resolve the conflict between the negative readings of the November 30, 1984, x-ray from Drs. Gaziano and Wilner, Director's Exhibits 13-15, as well as Dr. Bassham's reading of the July 10, 1984, x-ray, which does not mention pneumoconiosis, Director's Exhibit 16, and Dr. Robinette's positive, 1/0, reading of the July 10, 1984, x-ray, Director's Exhibit 16. In addition, the Director contends that the administrative law judge failed to determine whether Dr. Robinette's opinion was documented and reasoned.

Initially, the administrative law judge erred in discrediting Dr. Bassham's x-ray reading, *see* 20 C.F.R. §718.202(a)(1), because it was not consistent with claimant's pulmonary function study results and in finding opinions of physicians that claimant did not have a pulmonary impairment cast doubt on their conclusion that he also did not have pneumoconiosis. Pulmonary function study results are primarily probative to the issue of total disability and not the existence of pneumoconiosis, *see Trent, supra*. In addition, while the administrative law judge apparently found the existence of pneumoconiosis established based on Dr. Robinette's opinion and/or positive 1/0 x-ray reading, *see* 20 C.F.R. §718.202(a)(1), (4), the administrative law judge did not specifically consider the opinion of Dr. Taylor, *see* Director's Exhibit 11, who found that claimant's pulmonary or respiratory condition was not related to his coal mine employment, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), nor resolve the conflict in the relevant x-ray and medical opinion evidence as to the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). The administrative law judge's function is to resolve the conflicts in the medical evidence, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989). Moreover, pursuant to Section 718.202(a)(4), the administrative law judge must discuss and weigh all relevant medical evidence to ascertain whether claimant has established the presence of pneumoconiosis by a preponderance of the evidence, *see Perry, supra*; *see generally Beatty v. Danri Corp.*, 16 BLR 1-11 (1991).

Next, while the administrative law judge apparently found that claimant established less than ten years of coal mine employment, he failed to specifically consider whether the evidence of record established whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Moreover, while the administrative law judge apparently found total disability established by the qualifying pulmonary function study evidence of record, *see* 20 C.F.R. §718.204(c)(1),[3] the administrative law judge failed to note and/or

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718,

consider the contrary probative evidence of record. The administrative law judge failed to consider that Dr. Robinette's qualifying pre-bronchodilator pulmonary function study result, Director's Exhibit 16, was found invalid by Dr. Zaldivar, *see* Director's Exhibit 17, and that the record also contains a non-qualifying post-bronchodilator pulmonary function study result from Dr. Robinette, *see* Director's Exhibit 16, a non-qualifying blood gas study result from Dr. Taylor, *see* Director's Exhibit 12, and the medical opinion of Dr. Taylor, *see* Director's Exhibit 11. *See Tackett, supra*. The administrative law judge must weigh all relevant evidence, like and unlike, pursuant to Section 718.204(c), with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash, supra*; *Fields, supra; Rafferty, supra*; *Shedlock, supra*.

In addition, the administrative law judge did not specifically determine whether Dr. Robinette's opinion that claimant had mild obstructive airways disease and moderately severe restrictive airways disease, *see* Director's Exhibit 16, was sufficient to establish total disability. Where the record contains an opinion providing an assessment of physical limitations due to pulmonary disease or an assessment of a miner's impairment, as well as evidence of the exertional requirements of the miner's usual coal mine employment, the evidence may be sufficient to allow the administrative law judge to infer a finding on the issue of total disability, by comparing the physician's opinion as to the miner's physical limitations or extent of impairment to the exertional requirements of the miner's usual coal mine employment, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Parson v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1987); *Ridings v. C & C Coal Co.*, 6 BLR 1-227 (1983). The ultimate finding regarding total disability is a legal determination to be made by the administrative law judge, not the physician, through consideration of the exertional requirements of the miner's usual coal mine employment in conjunction with the physician's opinion regarding the miner's physical abilities, *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Aleshire, supra*.

Ultimately, as the Director contends, the administrative law judge erred in resolving the doubt raised by the conflicting evidence of record in favor of claimant in order to find that claimant suffers from disabling pneumoconiosis which was caused by his coal mine employment. The United States Supreme Court held in *Director,*

Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

OWCP v. Greenwich Collieries [Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), that the reference to the "burden of proof" in Section 7(c) of the Administrative Procedure Act [APA], 5 U.S.C. §556(d), refers to the burden of persuasion, and therefore held that when the evidence is evenly balanced, the claimant must lose pursuant to Section 7(c). Thus, the Supreme Court held that the true doubt rule violates Section 7(c) of the APA, *id*. Although claimant contends that the administrative law judge did not find "true doubt," *i.e.*, apparently, did not find that the evidence was evenly balanced in this case, the administrative law judge failed to discuss or weigh all of the relevant evidence of record and/or properly resolve the conflicts in the evidence of record. An administrative law judge must provide a full detailed opinion which complies with the APA, 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), and which fully explains the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Thus, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a) and that total disability due to pneumoconiosis was established pursuant to Section 718.204(b), (c), and remand the case for reconsideration of all relevant evidence. On remand, the administrative law judge should make a specific finding as to the length of claimant's coal mine employment and determine, if reached, whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b), (c). Moreover, the administrative law judge should determine on remand, if reached, whether claimant established total disability pursuant to Section 718.204(c) and total disability due to pneumoconiosis pursuant to Section 718.204(b) in accordance with the standard enunciated by the Fourth Circuit court, *see Hobbs, supra; Robinson, supra*.[4]

Accordingly, the Decision and Order Sustaining Benefits of the administrative law judge awarding benefits is vacated and this case is remanded for further consideration consistent with this opinion.

[4] If the administrative law judge concludes that the documentary evidence is insufficient to make a necessary determination on remand, the administrative law judge may, within his discretion, reopen the record if he finds that further development of the evidence is warranted, *see Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992) (Brown, J., concurring; Smith, J., dissenting); *Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge