

BRB No. 06-0737 BLA

LIBERO MANCINI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 07/27/2007
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Denying Benefits (04-BLA-05882) of Administrative Law Judge Robert D. Kaplan 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 the parties stipulated to five years of coal mine employment. Decision and Order at 2; Hearing Transcript at 14-16. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. After determining that the instant claim was a subsequent claim,<sup>1</sup> the administrative law judge found that

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<sup>1</sup> Claimant filed his first claim for benefits on October 21, 1980. That claim was denied by the district director on August 14, 1981 because, although claimant established

the newly submitted evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 because the evidence failed to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c) or that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b), elements previously adjudicated against claimant. Decision and Order at 2-4, 7-9; Director's Exhibit 1. The administrative law judge further determined that the newly submitted evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, and that claimant was not, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3). Decision and Order at 4-7. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the evidence on the issue of complicated pneumoconiosis and total disability. 20 C.F.R. §§718.304; 718.204(b). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, arguing that the case should be remanded to the administrative law judge because the administrative law judge did not correctly evaluate the x-ray evidence with respect the issue of complicated pneumoconiosis. Specifically, the Director contends that the administrative law judge's evaluation of the readings of the August 2002 and October 2002 x-rays was flawed because the administrative law judge's treatment of the readings was inconsistent and the administrative law judge did not consider the narrative comments on the readings that the nodules seen might not be complicated pneumoconiosis. The Director further asserts that if, on remand, the administrative law judge finds that claimant is not entitled to the irrebuttable presumption of total disability pursuant to Section 718.304, then the case must be remanded to the district director for further development of the evidence because the Director has failed to provide claimant with a credible medical opinion on the issue of total disability, as required by the Act.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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the existence of pneumoconiosis, he failed to establish that his pneumoconiosis arose out of coal mine employment or that he was totally disabled. Director's Exhibit 1. Claimant took no further action until he filed this subsequent claim on April 17, 2002.

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one 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*).

Claimant and the Director contend that the administrative law judge erred in his weighing of the x-ray evidence to find that it was insufficient to establish complicated pneumoconiosis. We agree. The administrative law judge considered the four newly submitted readings of the two x-rays of record in light of the readers' radiological qualifications. Decision and Order at 5-6. The administrative law judge noted that the August 20, 2002 x-ray was interpreted as positive for simple pneumoconiosis, 1/0, and as showing complicated pneumoconiosis with large opacities, size A, by Dr. Sweet, who has no specialized qualifications for the interpretation of x-rays. Decision and Order at 5; Director's Exhibit 11. Taking into account that the August 20, 2002 x-ray was interpreted as unreadable by Dr. Goldstein, a B reader, the administrative law judge found that the August 20, 2002 x-ray was not probative evidence. Decision and Order at 5; Director's Exhibit 11. Considering the October 15, 2002 x-ray, the administrative law judge noted that Dr. Goldstein, a B reader, interpreted the x-ray as negative.<sup>2</sup> Decision and Order at 5; Director's Exhibit 11. The administrative law judge further noted that Dr. Cappiello, a B reader and Board-certified radiologist, interpreted the October 15, 2002 x-ray as positive for simple pneumoconiosis, 1/1, and as showing complicated pneumoconiosis with large opacities, size A. Decision and Order at 5; Director's Exhibit 19. Based on the qualifications of the x-ray readers, the administrative law judge found that the readings of the October 15, 2002 x-ray were in equipoise and that the x-ray evidence did not therefore establish the existence of either simple or complicated pneumoconiosis. Decision and Order at 5-6; Director's Exhibits 11, 19.

The administrative law judge's weighing of the x-ray evidence in the instant case cannot be affirmed as it violates 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).<sup>3</sup> The administrative law judge accorded greater weight

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<sup>2</sup> The administrative law judge, acting within his broad discretion to resolve procedural matters, permissibly determined that Dr. Goldstein's interpretation of the October 15, 2002 x-ray was part of the record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); Hearing Transcript at 5-8; Director's Exhibit 11. The Director states that no physician read the October 15, 2002 x-ray prior to Dr. Goldstein and that the "rereading" stamp was an inadvertent error. Director's Brief at 2.

<sup>3</sup> 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.

to the superior qualifications of Dr. Goldstein in finding that the August 20, 2002 x-ray was insufficient to establish the existence of complicated pneumoconiosis but in his analysis of the October 15, 2002 x-ray he did not apply the same rationale, *i.e.*, he did not accord greater weight to the positive reading of Dr. Cappiello, the better qualified physician. Decision and Order at 5-6. Although the administrative law judge is empowered to weigh the evidence, because the administrative law judge's evidentiary analysis reflects inconsistent consideration of the x-ray evidence, the basis for the administrative law judge's assessment of the credibility of the evidence cannot be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We, therefore, vacate the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of complicated pneumoconiosis and we remand the case to the administrative law judge for reconsideration of all evidence relevant to the issue of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *see Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989); *Webber v. Peabody Coal Co.*, 23 BLR 1-127 (2006)(*en banc*) (Boggs, J., concurring); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc recon.*); *Brewster v. Director, OWCP*, 7 BLR 1-120, 1-123 (1984). If the administrative law judge finds that claimant is not entitled to the irrebuttable presumption, then the case must be remanded to the district director for further development of a credible pulmonary evaluation on the issue of total disability since the Director concedes that he has not fulfilled his statutory obligation to provide claimant with a credible pulmonary evaluation on the issue of total disability. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*). We also vacate the administrative law judge's finding that pneumoconiosis arose out of coal mine employment and remand the case for reconsideration of that issue as it was affected by the administrative law judge's analysis of the medical opinion evidence.

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§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).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated and the case is remanded to the administrative law judge for reconsideration of the issue of complicated pneumoconiosis. If the administrative law judge finds that complicated pneumoconiosis is not established, the case must be remanded to the district director to provide claimant with a complete credible pulmonary evaluation on the issue of total disability.

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