BRB No. 05-0732 BLA

ANDREW M. COMBS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/31/2006
McCOY 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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Andrew M. Combs, London, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6377) of Administrative Law Judge Pamela Lakes Wood 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). Pursuant to the parties' stipulation, the administrative law judge

credited claimant with "19 plus" years of coal mine employment[1] and found that employer is the responsible operator. Decision and Order at 3; Hearing Transcript at 6-7. 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 1. After determining that this claim is a subsequent claim,[2] the administrative law judge found that the evidence developed since the denial of claimant's prior claim established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and thus established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Decision and Order at 2, 7-9. Considering the record *de novo*, the administrative law judge found that claimant established the existence of simple pneumoconiosis by biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), but did not establish the existence of pneumoconiosis by either the x-ray or medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1), (a)(4). The administrative law judge then weighed together the biopsy, x-rays, and medical opinions and found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, asserting that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

---

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 1, 4, 6. 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 (1989)(*en banc*).

[2] Claimant's initial claim for benefits, filed on April 12, 1994, was denied on September 20, 1996 because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant took no further action until he filed the current claim on January 3, 2002. Director's Exhibit 3.

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 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered nine readings of four x-rays in light of the readers' radiological credentials. Decision and Order at 10-13. The administrative law judge considered the four[3] readings of the February 16, 2002 x-ray and accorded greater weight to the negative reading by Dr. Wheeler because he possessed superior radiological credentials as a Board-certified radiologist and B-reader. Decision and Order at 12. The administrative law judge then considered the three x-rays submitted in the previous claim and noted that the May 27, 1994 x-ray was read as positive by Dr. Baker, a B-reader, and as negative for pneumoconiosis by Drs. Barrett and Sargent, who are Board-certified radiologists and B-readers. Decision and Order at 12; Director's Exhibit 1. The administrative law judge further noted that Dr. Broudy, a B-reader, read the June 30, 1994 x-ray as negative and Dr. Vuskovich, a B-reader, read the September 1, 1994 x-ray as negative. Decision and Order at 12-13; Director's Exhibit 1. Because the February 16, 2002 and May 20, 1994 x-rays were read as negative by physicians who possessed superior radiological qualifications, and because the remaining x-rays were read by B-readers as negative for pneumoconiosis, the administrative law judge found that the preponderance of the x-ray evidence did not support a finding of the existence of pneumoconiosis. A review of the record reflects that the administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings, and substantial evidence supports her finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge correctly found that claimant could not avail himself of any of the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306, by which the existence of pneumoconiosis may be established in certain claims. *See* 20 C.F.R. §§718.202(a)(3); Decision and Order at 17-19. Specifically, the presumption at 20 C.F.R. §718.305 is inapplicable because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 3.

[3] Dr. Sargent interpreted the February 16, 2002 x-ray for quality purposes only. Director's Exhibit 11; Decision and Order at 11-12.

Additionally, as this claim was not filed prior to June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

With respect to the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304, the administrative law judge considered all of the relevant x-ray, biopsy, and medical opinion evidence and concluded that it did not establish the existence of complicated pneumoconiosis and that claimant was therefore not entitled to invocation of the irrebuttable presumption. Decision and Order at 17-19; Director's Exhibits 1, 10, 11, 22; Employer's Exhibits 1-4. The administrative law judge accurately noted that there were no x-ray readings diagnosing Category A, B, or C large opacities. 20 C.F.R. §718.304(a). The administrative law judge additionally found, within her discretion, that Dr. VanBuskirk's biopsy diagnosis of "progressive massive fibrosis," Director's Exhibit 10, was conclusory and unclear, and therefore insufficient to satisfy the regulatory requirement of a chronic dust disease yielding "massive lesions in the lung" when diagnosed by biopsy.[4] 20 C.F.R. §718.304(b); *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Additionally, the administrative law judge found that the only medical report addressing the issue of complicated pneumoconiosis, Dr. Jarboe's report, stated that the 1.5-centimeter biopsy lesion that Dr. VanBuskirk described was too small to justify a diagnosis of complicated pneumoconiosis or progressive massive fibrosis. Employer's Exhibit 4. Substantial evidence supports the administrative law judge's finding that all of the relevant evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The finding is therefore affirmed.

Pursuant to 20 C.F.R. §§718.202(a)(2) and 718.202(a)(4), the administrative law judge's findings thereunder can not be affirmed. In finding that claimant established the existence of simple pneumoconiosis by the biopsy evidence pursuant to Section 718.202(a)(2), the administrative law judge found that although Dr. VanBuskirk's biopsy report was difficult to interpret, it established the existence of anthrasilicosis because Dr. Naeye's criticisms of the report lacked substance or rationale and Dr. Naeye did not explain how the biopsy findings were inconsistent with silicosis or anthrasilicosis.

[4] The administrative law judge noted that Dr. VanBuskirk's diagnosis of progressive massive fibrosis appeared to be based on Dr. VanBuskirk's description of an "area of white-tan firm consolidation measuring roughly 1.5 cms." Decision and Order at 18; Director's Exhibit 10. However, because Dr. VanBuskirk later referred to this same area as an "Organizing scar with granulomatous inflammation," the administrative law judge found that Dr. VanBuskirk's reference made "the etiology of this mass unclear." Decision and Order at 18.

Decision and Order at 14, 17. In addressing the medical opinion evidence, including Dr. VanBuskirk's biopsy report, pursuant to Section 718.202(a)(4), the administrative law judge found that although all of the medical opinions were flawed or deficient, Dr. Jarboe's analysis was the most persuasive and therefore the preponderance of the medical opinion evidence did not support a finding of pneumoconiosis. Decision and Order at 23. The administrative law judge then concluded that although she found the existence of pneumoconiosis established pursuant to Section 718.202(a)(2), when she weighed all of the evidence together, the evidence did not establish the existence of pneumoconiosis. Decision and Order at 23.

In finding that the existence of pneumoconiosis was not established, the administrative law judge weighed all of the relevant evidence pursuant to the holdings of the United States Courts of Appeals for the Fourth and Third Circuits. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d. Cir. 1997). Contrary to the administrative law judge's analysis, however, this case arises within the jurisdiction of the Sixth Circuit, n.1, *supra*, which has not adopted the reasoning of the Fourth and Third Circuits. Consequently, the holdings of *Compton* and *Williams* are not applicable in this case. We therefore vacate the administrative law judge's finding that all of the evidence weighed together did not establish the existence of pneumoconiosis under Section 718.202(a).

Ordinarily, we would simply affirm the administrative law judge's finding that the existence of simple pneumoconiosis was established by the biopsy evidence pursuant to Section 718.202(a)(2), and remand this case for her to consider the remaining elements of entitlement. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case the administrative law judge's belief that she had to weigh together all of the categories of evidence led her to offer a conflicting analysis of the biopsy evidence, which casts doubt on her finding as to the weight and sufficiency of the biopsy evidence under Section 718.202(a)(2). Specifically, the administrative law judge noted that the biopsy report by Dr. VanBuskirk was confusing and difficult to interpret, but she found it sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2) because Dr. Naeye's contrary report was not compelling.

Decision and Order at 17. The administrative law judge then, in her consideration of the medical opinion evidence, concluded that Dr. VanBuskirk's biopsy report was outweighed by Dr. Jarboe's opinion, even though she found Dr. Jarboe's opinion to be flawed and conclusory. Decision and Order at 23. These findings leave unclear whether the administrative law judge actually found that the biopsy evidence constituted a sufficient basis to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(2). We therefore vacate the administrative law judge's findings pursuant to Sections 718.202(a)(2) and (a)(4) and remand this case to the administrative law judge to specifically discuss the relevant medical evidence at the appropriate subsection. *Dixon*, 8 BLR at 1-345. If the administrative law judge finds that either the biopsy evidence or the medical opinions establish the existence of pneumoconiosis, then she must determine whether the remaining elements of entitlement are established. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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 decision.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

JUDITH S. BOGGS
Administrative Appeals Judge