

BRB No. 96-0883 BLA

VIRGIL MCCOY)
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 Claimant-Respondent)
)
 v.) DATE ISSUED:
)
 WOLF CREEK COLLIERIES)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-0462) of Administrative Law Judge Frederick D. Neusner 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). The administrative law judge credited the miner with eighteen years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(b), (c). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in failing to consider this claim under the provisions of 20 C.F.R. §725.309(d), erred in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), erred in finding the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and erred in failing to consider a medical report

and x-ray readings submitted post-hearing by employer. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Employer has also filed a reply brief.

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 the 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer initially contends that the administrative law judge erred in failing to consider this claim under the provisions of Section 735.309(d). The administrative law judge noted that claimant filed his first application for black lung benefits on May 27, 1988, and that the claim was initially denied by the district director and later withdrawn by claimant on August 23, 1988. 20 C.F.R. §725.306; Decision and Order at 1; Director's Exhibits 15, 19, 21. As claimant withdrew his first claim for benefits, the instant claim was properly treated as if the prior claim had not been filed and the provisions of Section 725.309 are inapplicable herein. 20 C.F.R. §725.306(3)(b).

Employer next contends that the administrative law judge erred in failing to consider x-ray readings and Dr. Dahhan's medical report which were submitted to the Office of Administrative Law Judges post-hearing. By letter dated July 10, 1995, employer's counsel forwarded a copy of Dr. Dahhan's June 5, 1995, medical report and interpretations of an April 28, 1994, x-ray by Drs. Lapp, Morgan and Renn. The letter requests that the reports be made a part of the record in this claim, but the administrative law judge does not mention them in his Decision and Order. Although the administrative law judge has broad discretion in procedural matters, he has provided no specific basis for excluding the reports, if that is the case. 20 C.F.R. §725.456; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). In any event, we agree with employer's request that the case should be remanded to the administrative law judge for clarification of the contents of the official record with respect to these reports and, if necessary, to address the merits in light of this evidence. Consequently, we vacate the administrative law judge's finding of the existence of pneumoconiosis, total disability due to pneumoconiosis and the award of benefits and remand the case for additional findings with regard to the evidence of record. In addition, employer correctly asserts that the administrative law judge, in crediting board-certified internists because of their understanding of the connection between x-rays and disease, used an improper rationale in resolving the conflicts in the x-ray evidence. Decision and Order at 3. On remand, the administrative law judge is instructed to consider only the radiological qualifications of the readers. 20 C.F.R. §718.202(a)(1)(ii)(c)-(f); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-

31 (1991) (en banc). Furthermore, the United States Court of Appeals for the Sixth Circuit held that evidence that pneumoconiosis has played only an infinitesimal or *de minimus* part in a miner's totally disabling respiratory impairment is insufficient to establish disability causation under *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), and that a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). On remand, the administrative law judge is instructed to make specific findings on this issue, if necessary.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge