BRB No. 08-0150 BLA

R.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 10/30/2008
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the September 17, 2007 Decision and Order Denying Benefits (2007-BLA-05215) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge), on claimant's request for modification of a claim[1] filed

[1] Claimant filed his claim for benefits on October 21, 2002. Director's Exhibit 2. Benefits were denied for failure to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and failure to establish total respiratory disability at 20 C.F.R. §718.204(b)(2). Director's Exhibit 48. The Board affirmed the denial of benefits in [*R.R.*] *v. Director, OWCP*, BRB No. 04-0862 (July 26, 2005)(unpub.); Director's Exhibit 53. Claimant filed the instant request for modification on June 22, 2006. Director's Exhibit 54.

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 accepted the parties' stipulation that claimant engaged in qualifying coal mine employment for twenty-four years, and found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310, as the evidence submitted in support of modification was insufficient to establish either the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(a), or total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2)(i)-(iv), (c). As the administrative law judge found no mistake in a prior determination of fact, she concluded that modification was not appropriate, and denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the x-ray evidence and medical opinion evidence on the issue of the existence of pneumoconiosis at Section 718.202(a)(1), (4), a well as her weighing of the pulmonary function study evidence and medical opinion evidence on the issue of total respiratory disability at Section 718.204(b)(2)(i), (iv). The Director, Office of Workers' Compensation Programs (the Director), responds in support of claimant's contentions.[2]

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.[3] 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).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element that defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative

[2] The administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), and total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii), (iii), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Third Circuit is applicable, because the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1-10.

law judge has the authority to consider all of the evidence for any mistake of fact, including the ultimate fact of entitlement. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Initially, claimant and the Director contend that the administrative law judge's analysis and weighing of the newly submitted x-ray evidence at Section 718.202(a)(1) is flawed and inconsistent. We agree. In assessing the x-ray evidence, the administrative law judge stated that she was giving more weight to the interpretations of dually qualified Board-certified radiologists and B readers, and found that the February 1, 2007 x-ray "produced some evidence of pneumoconiosis," as it was interpreted as negative by Dr. Barrett, whose qualifications were unknown,[4] and as positive by Dr. Miller, a dually qualified reader, as well as by Dr. Rashid, a physician with no special radiological qualifications.[5] Decision and Order at 6. In contrast, the administrative law judge found that the interpretations of the February 20, 2007 x-ray were in equipoise, as this film was interpreted as negative by Dr. Navani, a dually qualified reader, and as positive by Dr. Smith, a dually qualified reader, as well as by Dr. Kraynak, whose radiological qualifications are not contained in the record. As the administrative law judge summarily concluded that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, without explaining why the numerical preponderance of positive interpretations by dually qualified physicians did not satisfy claimant's burden, her findings do not comply with the requirements of the Administrative Procedure Act (APA). *See* 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), 30 U.S.C. §932(a). Consequently, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(1), and remand this case for the

[4] The administrative law judge explained that "[t]here are obliterations on the X-ray interpretation form concerning radiological credentials; therefore, Dr. Barrett's qualifications are unclear." Decision and Order at 5 n.10. The Director submits that "[w]hile the form may be somewhat difficult to read, it is clear on the copy of the form in the Solicitor's file that Dr. Barrett checked the boxes indicating that he is a B-reader and board-certified radiologist." Director's Brief at 2 n.3. Our review of the record, however, reveals that the administrative law judge's findings and inferences were proper, as the form's radiological qualifications boxes appear to have been taped over. Director's Exhibit 65.

[5] Although Dr. Rashid observed opacities that he classified as 1/0p in the mid and lower zones of both lungs, he indicated that there were no parenchymal or pleural abnormalities consistent with pneumoconiosis. Director's Exhibit 65. As discussed *infra*, the administrative law judge must reconcile, on remand, Dr. Rashid's x-ray findings with his narrative medical report findings.

administrative law judge to reassess the x-ray evidence and provide a rationale that comports with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Next, claimant and the Director challenge the administrative law judge's weighing of the newly submitted medical opinions of Drs. Rashid and Kraynak at Section 718.202(a)(4), arguing that the administrative law judge failed to address the inconsistency between Dr. Rashid's x-ray findings and his narrative report. Claimant also asserts that Dr. Rashid's Board-certification in internal medicine was not a proper basis for according determinative weight to his opinion, and that the administrative law judge failed to accord appropriate weight to Dr. Kraynak's opinion, based on his status as claimant's treating physician. Some of these arguments have merit. The administrative law judge accurately summarized the opinion of Dr. Rashid, that claimant had no cardiopulmonary diagnosis and no impairment due to coal dust exposure, but failed to reconcile the physician's narrative findings, including a notation of minimal fibrosis on x-ray, with Dr. Rashid's classification of the February 1, 2007 x-ray as 1/0p, which the administrative law judge determined was positive for pneumoconiosis, despite the physician's finding of no parenchymal or pleural abnormalities consistent with pneumoconiosis. Decision and Order at 6, 8-9; Director's Exhibits 64, 65. Additionally, while the administrative law judge permissibly found that the multiple one-page statements Dr. Kraynak submitted relating to claimant's treatment did not provide sufficient evidence of a treating relationship because they were repetitive, conclusory and not well reasoned, *see* Decision and Order at 9, it is not clear whether the administrative law judge adequately considered Dr. Kraynak's deposition testimony detailing his conclusions and monthly treatment of claimant.[6] *See* Claimant's Exhibit 6. Consequently, we vacate the administrative law judge's findings at Section 718.202(a)(4), and instruct the administrative law judge on remand to reassess the medical opinions thereunder, resolve the conflict in Dr. Rashid's opinion, and assign appropriate weight to the opinions in light of the factors set forth at 20 C.F.R. §718.104(d), the respective qualifications of the physicians, the quality and persuasiveness of their reasoning, and the bases for their conclusions. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 590-91 (3d Cir. 1997). If, on remand, the administrative law judge finds the existence of pneumoconiosis established under an individual subsection of Section 718.202(a), she must weigh all relevant evidence together pursuant to Section 718.202(a)(1)-(4), consistent with the Third Circuit's instruction in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Next, claimant and the Director contend that the administrative law judge erred in failing to resolve the factual disputes presented by the newly submitted pulmonary

[6] Dr. Kraynak stated that claimant has been under his care since June 29, 2000. *See* Director's Exhibit 33.

function study evidence on the issue of total disability at Section 718.204(b)(2)(i). We agree. The administrative law judge accurately determined that the January 31, 2007 test conducted by Dr. Kraynak produced qualifying values, and that the February 1, 2007 test conducted by Dr. Rashid produced non-qualifying values.[7] Decision and Order at 10-11; Claimant's Exhibit 1; Director's Exhibit 66. Further, the administrative law judge noted that the validity of both tests was in dispute, and summarized Dr. Spagnolo's invalidation of the January test and Dr. Kraynak's response, Decision and Order at 10, n. 20; Director's Exhibit 70; Claimant's Exhibit 11, as well as Dr. Simelaro's invalidation of the February study and Dr. Rashid's response. Decision and Order at 11, n. 21; Claimant's Exhibit 9; Director's Exhibit 73. The administrative law judge then concluded that the pulmonary function study evidence failed to establish total disability, stating that "[w]ithout performing a detailed analysis of the compliance with the regulations, it is permissible to assess non-compliant pulmonary function tests and give them appropriate weight....[a]fter reviewing these test results, I find that they are so strikingly different that I give neither great weight." Decision and Order at 11. However, it is the administrative law judge's function, as trier-of-fact, to resolve the conflicts in the evidence, and her failure to do so does not comport with the requirements of the APA. Moreover, as the validity of the test results relied upon affects the weight to be accorded to the medical opinions, *see* 20 C.F.R. §718.104(a)(6); *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990), we vacate the administrative law judge's findings at Section 718.204(b)(2)(i), (iv), and remand the case for a reassessment of both categories of evidence.

Additionally, claimant contends that the administrative law judge mischaracterized Dr. Kraynak's opinion at Section 718.204(b)(2)(iv). We agree. The administrative law judge stated that "Dr. Kraynak's opinion [of total respiratory disability] appears to be based in part on the fact that the arterial blood gas study performed by Dr. Rashid did not include an exercise study, and that if such a test were performed, the results may have produced lower values….[h]owever, there is no basis to indicate that the Claimant had a respiratory impairment that manifested only upon exercise." Decision and Order at 14. The administrative law judge concluded that Dr. Rashid's opinion, that claimant's pulmonary function tests showed normal functioning, "reflects the results yielded from the objective tests of record." *Id.* Contrary to the administrative law judge's findings, however, Dr. Rashid obtained blood gas study results after exercise, *see* Director's Exhibit 67. Further, a review of Dr. Kraynak's letter dated March 13, 2007 reveals that after Dr. Kraynak invalidated Dr. Rashid's pulmonary function study of February 1, 2007, he found that Dr. Rashid's exercise stress test performed on February 7, 2007

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

showed a "markedly decreased exercise capacity" after minimal exercise of three and one-half minutes.[8] Claimant's Exhibit 8. Dr. Kraynak also testified at deposition that the non-qualifying pulmonary function studies that he reviewed showed a moderate impairment that would prevent claimant from performing the heavy manual labor required by his usual coal mine employment. Claimant's Exhibit 6 at 11-13. As the administrative law judge selectively analyzed the medical opinions at Section 718.204(b)(2)(iv), *see Wright v. Director, OWCP*, 7 BLR 1-475 (1984), she must reassess them on remand after determining the validity of the pulmonary function studies of record. If, on remand, the administrative law judge finds that the weight of the evidence, like and unlike, is sufficient to establish total respiratory disability at Section 718.204(b)(2), *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), she must determine whether disability causation is established at Section 718.204(c), and whether modification is appropriate pursuant to Section 725.310. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

[8] Dr. Rashid reported blood gas values obtained at rest and after his Bruce protocol exercising of claimant on February 7, 2007. Director's Exhibit 67.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge