

BRB No. 92-1156 BLA

HARRIS WALLACE)
)
 Claimant-Respondent)
)
 v.)
)
 THE PITTSBURG & MIDWAY COAL)
 MINING COMPANY)
) DATE ISSUED:
 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 Thomas Schneider, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Cooper, Mitch, Crawford, Kuykendall & Whatley), Birmingham, Alabama, for claimant.

Orion G. Callison, III (Burr & Forman), Birmingham, Alabama, for employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (91-BLA-2011) of Administrative Law Judge Thomas Schneider, 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). Based on the date of filing, April 20, 1990, the administrative law judge considered the claim pursuant to

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

20 C.F.R. Part 718. After crediting claimant with fourteen and one-half years of coal mine employment, the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c)(4). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204(b) and (c)(4) are not supported by substantial evidence. Claimant responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has chosen not to respond in this case.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

Upon considering the evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the x-ray evidence of record which consists of three interpretations of one x-ray. The first interpretation was negative for pneumoconiosis, the second was read as 0/1, and the third was read as 1/0. See Director's Exhibits 14, 15, 25. The administrative law judge permissibly found the x-ray evidence equally probative and accorded the benefit of the doubt to the interpretation most favorable to claimant. See Decision and Order at 2; Conley v. Roberts and Schaefer Co., 7 BLR 1-309 (1984). As a result, the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed as it is supported by substantial evidence.¹

¹The administrative law judge's finding that employer failed to rebut the Section 718.203 presumption that claimant's pneumoconiosis arose from his coal mine employment is affirmed as supported by substantial evidence. 20 C.F.R. §718.203(b). See generally McClendon v. Drummond Coal Co., 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988).

Pursuant to 20 C.F.R. §718.204(b) and (c)(4), the administrative law judge considered the two medical opinions of record. Neither the opinion of Dr. Bush nor Dr. Goldstein stated that claimant was totally disabled due to pneumoconiosis. See Director's Exhibits 10, 12. The administrative law judge, however, considered these two opinions along with a summary of a medical report by Dr. Snow, which is contained in a Social Security Administration Decision and Order, and determined that claimant is totally disabled due to pneumoconiosis. See Decision and Order at 4; Director's Exhibit 11. Dr. Snow's report is not a part of the record in this case, and as such, the administrative law judge improperly relied upon it in making his determination. See generally Onderko v. Director, OWCP, 14 BLR 1-2 (1989); Snorton v. Zeigler Coal Co., 9 BLR 1-106 (1986). As a result, the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b) and (c)(4) are vacated and the case is remanded for further consideration pursuant to 20 C.F.R. §718.204(b) and (c)(4).²

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge

²The decision as to whether to reopen the record on remand is within the province of the administrative law judge. See 20 C.F.R. §725.456(e); Lynn v. Island Creek Coal Co., 12 BLR 1-146 (1989).