

BRB No. 00-0784 BLA

ROBERT C. CATON)
)
 Claimant-Petitioner)
)
 v.)
)
 BLASCHAK COAL COMPANY)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order--Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Christopher L. Wildfire (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order--Denying Benefits (1999-BLA-0944) of Administrative Law Judge Ralph A. Romano rendered 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).¹ Claimant filed his application for benefits

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

on July 22, 1998. Director's Exhibit 1. The District Director of the Office of Workers' Compensation Programs denied benefits and claimant requested a hearing, which was held on November 2, 1999. Director's Exhibits 16, 28.

At the hearing, claimant's counsel requested the opportunity to submit an October 18, 1999 medical report by Dr. Simelaro in response to Dr. Renn's October 10, 1999 report submitted by employer just prior to the twenty-day deadline before the hearing. Hearing Transcript (Tr.) at 11; *see* 20 C.F.R. §725.456(b)(1), (2). The administrative law judge denied claimant's request and excluded Dr. Simelaro's report. Tr. at 11. Claimant additionally requested the opportunity to respond to the July 7, 1999 chest x-ray reading and pulmonary function study obtained during Dr. Galgon's examination of claimant, because employer did not send the chest x-ray film or pulmonary function study tracings to claimant for review until on or about the twenty-day deadline. Tr. at 6-7, 14. The administrative law judge denied claimant's request. *Id.*

In the Decision and Order--Denying Benefits, the administrative law judge credited claimant with fifteen years of coal mine employment, and found that the weight of the chest x-ray readings and medical opinions did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4). The administrative law judge further found that although the evidence established that claimant is totally disabled by a respiratory or pulmonary impairment, it did not establish that his total disability is due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by denying him the opportunity to submit evidence in response to evidence filed just prior to the twenty-day deadline. Claimant further asserts that the administrative law judge did not consider all of the x-ray evidence, and erred in his analysis of the medical opinion evidence. Employer responds, urging affirmance of the denial of benefits, and the

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.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 supported by substantial evidence, is rational, and is in accordance with law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge denied him a full and fair hearing by not permitting him to submit evidence in rebuttal of Dr. Renn's report and the July 7, 1999 chest x-ray and pulmonary function study, sent to claimant by employer just prior to the twenty-day deadline for the timely submission of evidence. See 20 C.F.R. §725.456(b)(2). We review the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

A review of the hearing transcript indicates that the sole explanation for the administrative law judge's ruling was, "I don't know how to read the 20-day rule except what it says." Tr. 12. The administrative law judge did not consider that where a party would be denied a reasonable opportunity to present its case fully if precluded from submitting evidence in response to evidence submitted just prior to or upon the twenty-day deadline, the party's due process rights as incorporated into the APA would be violated. See *North American Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(*en banc*). Consequently, we are unable to affirm the administrative law judge's ruling. See *Clark, supra*. Because we must remand this case for the administrative law judge to consider all of the relevant evidence regarding the existence of pneumoconiosis, see discussion, *infra*, on remand the administrative law judge should first reconsider claimant's request to submit evidence in response to Dr.

² We affirm as unchallenged on appeal the administrative law judge's findings of fifteen years of coal mine employment and that claimant is totally disabled by a respiratory or pulmonary impairment. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Renn's report, as well as the July 7, 1999 chest x-ray and pulmonary function study, in accordance with *Miller, supra*, *Owens, supra*, and *Shedlock, supra*.³

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge did not consider a positive reading of the August 12, 1998 chest x-ray when he found that the chest x-ray reports by qualified readers were "evenly balanced" and thus did not support a finding of the existence of pneumoconiosis. Decision and Order at 5. Claimant's contention has merit. Review of the record indicates that Dr. Aycoth's "1/2" x-ray reading was admitted into evidence, Tr. at 9, and that Dr. Aycoth is qualified as a B-reader. Claimant's Exhibit 7. All relevant evidence must be considered, 30 U.S.C. §923(b), and the administrative law judge did not mention Dr. Aycoth's positive x-ray reading. Therefore, we must vacate the administrative law judge's finding and remand this case for him to weigh all of the x-ray evidence and determine whether it supports a finding of the existence of pneumoconiosis.⁴

If the administrative law judge concludes that the x-ray evidence supports a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(1), he must weigh the x-ray and medical opinion evidence together to determine whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Claimant alleges generally that the administrative law judge selectively analyzed and mischaracterized the medical opinions, but claimant does not specify which evidence was allegedly mischaracterized or selectively analyzed. Review of the record and the administrative law judge's Decision and Order indicates that the administrative law judge accurately summarized the medical opinions and testimony of Drs. Galgon, Ahluwalia, Kaplan, Renn, and Kraynak, and discussed their opinions in light of the opinions' underlying documentation and reasoning, and the physicians' credentials. *See Kertesz v.*

³ At the hearing, claimant's counsel limited her request for the opportunity to respond to Dr. Renn's report, the July 7, 1999 x-ray and pulmonary function study, and Dr. Galgon's deposition testimony. Tr. at 6-7, 11, 14. Therefore, we do not address claimant's argument that he should be permitted to submit evidence in response to Dr. Kaplan's report, and the readings of the November 22, 1996 and January 27, 1997 chest x-rays. Additionally, the administrative law judge did not abuse his discretion in declining to allow claimant to submit evidence in response to Dr. Galgon's deposition. *See Clark, supra*. The administrative law judge had already found that good cause existed for holding the deposition within twenty-days of the hearing. Order, Oct. 20 1999; ALJ Exhibit 2. Moreover, claimant participated in the deposition and cross-examined Dr. Galgon. Employer's Exhibit 16 at 17-18, 58-87, 89-91.

⁴ Review of the record indicates that one of the x-ray reports bears a notation relevant to the possible existence of complicated pneumoconiosis. Claimant's Exhibit 4 (Category A large opacity); *see* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a).

Director, OWCP, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989)(*en banc*). Nevertheless, as the administrative law judge weighed the medical opinions previously, based in part on his finding as to the x-ray evidence, Decision and Order at 8-9, nothing precludes the administrative law judge from weighing the medical opinions differently on remand if he concludes that the x-ray evidence supports a finding of the existence of pneumoconiosis, *see Williams, supra*, or if the administrative law judge determines that any rebuttal evidence admitted on remand otherwise changes the relative weight of the medical opinions. *See discussion, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge