BRB No. 13-0192 BLA

MARY BELLE KENNEDA (o/b/o FRANKLIN D.R. CLINE)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK MINING COMPANY	)	DATE ISSUED: 12/17/2013
and	)	
ISLAND CREEK COAL COMPANY	)	
Employer/Carrier- Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denial of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand - Denial of Benefits (2009-BLA-5770) of Administrative Law Judge Thomas M. Burke rendered on a subsequent claim filed on April 26, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] This case is on appeal to the Board for the second time.

When this case was first before the administrative law judge, he credited the miner with seven and one-quarter years of coal mine employment[3] and adjudicated the claim pursuant to 20 C.F.R. Part 718.[4] He found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant did not establish that the miner suffered from pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Accordingly, he denied benefits.

Claimant appealed the denial. The Board affirmed, as unchallenged on appeal, the administrative law judge's determinations that the miner had seven and one-quarter years of coal mine employment, and that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and, thus, established a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). *See Kenneda v. Island Creek Mining Co.*, BRB No. 11-0628 BLA, slip op. at 2 n.5 (May 30, 2012)(unpub.); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). The Board also held that

[1] Claimant is the daughter of the miner, who died on February 28, 2009. She is pursuing the claim on behalf of the miner's estate. H.Tr. at 12-13; Director's Exhibit 77.

[2] The miner's first claim for benefits, filed on February 1, 1980, was denied by the district director on December 18, 1980; although the evidence established the existence of pneumoconiosis, arising out of coal mine employment, it did not establish the existence of a totally disabling pulmonary or respiratory impairment. The miner took no further action until he filed the current subsequent claim. Director's Exhibits 1, 3.

[3] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[4] Because the miner was credited with less than fifteen years of qualifying coal mine employment, a recent amendment to the Act does not affect this case. *See* 30 U.S.C §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

"the administrative law judge specifically considered that pneumoconiosis can be progressive, but permissibly concluded that the more recent medical evidence, as a whole, which includes both positive and negative x-ray readings [of a July 12, 2006 x-ray, and a March 14, 2007 x-ray] is of greater probative value than the x-ray reading [of the July 14, 1980 x-ray,] submitted with the prior claim "more than twenty-five years earlier."[5] *Kenneda*, BRB No. 11-0628 BLA, slip. op. at 4. The Board, therefore, rejected claimant's assertion that the administrative law judge erred in discounting the positive reading of the 1980 x-ray. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004)(en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc).

However, the Board held that, in weighing the readings of the 2006 and 2007 x-rays, the administrative law judge erred "in failing to weigh the conflicting interpretations of each individual x-ray …, in order to determine whether the x-ray was positive or negative for pneumoconiosis, before weighing the x-ray evidence as a whole." *Kenneda*, BRB No. 11-0628 BLA, slip op. at 4. Further, the Board noted that, "the administrative law judge focused exclusively on the number of qualified readers who read the x-rays as positive or negative for [pneumoconiosis][,] rather than focusing "on the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading," *Kenneda*, BRB No. 11-0628 BLA slip op. at 5; *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). Additionally, the Board held that the administrative law judge erred in failing to discuss the positive reading of an October 24, 2000 x-ray by Dr. Subramaniam, which was included in the miner's treatment records. The Board noted that the fact that an x-ray reading is contained in a treatment record does not obviate the need to weigh it with the other x-rays. *See* 20 C.F.R. §§725.414(a)(4), 718.102(b). Consequently, the Board vacated the administrative law judge's finding that the x-ray evidence failed to establish the existence

[5] The record consists of eight interpretations of three x-rays. Dr. Gale, a Board-certified radiologist and B reader, interpreted a July 14, 1980 x-ray as positive for pneumoconiosis. Director's Exhibit 1. Dr. Alexander, a Board-certified radiologist and B reader, and Dr. Ranavaya, a B reader, interpreted a July 12, 2006 x-ray as positive for pneumoconiosis. Director's Exhibits 13, 16. Dr. Wiot, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 33. Dr. Miller, a Board-certified radiologist and B reader, and Dr. Alexander, interpreted a March 14, 2007 x-ray as positive for pneumoconiosis, while Dr. Meyer, a Board-certified radiologist and B reader, and Dr. Zaldivar, a B reader, interpreted the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Director's Exhibits 1, 25, 26, 29. In addition, the miner's treatment record includes the positive reading of an October 24, 2000 x-ray by Dr. Subramaniam, a Board-certified radiologist. Director's Exhibit 43.

of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, the administrative law judge's denial of benefits, and remanded the case for further consideration.

Specifically, the Board directed the administrative law judge to determine, on remand, whether each x-ray film is positive, negative, or inconclusive for pneumoconiosis, before determining whether the totality of the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The Board also vacated the administrative law judge's finding that medical opinion evidence did not establish pneumoconiosis pursuant to Section 718.204(a)(4), as the administrative law judge's consideration of the medical opinion evidence was based on his x-ray findings. *Kenneda*, BRB No. 11-0628 BLA, slip op. at 5-6; *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148-149, 11 BLR 2-1, 2-8 (1987); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61-62 (4th Cir. 1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Additionally, the Board instructed the administrative law judge to determine whether all of the relevant evidence, when weighed together, establishes the existence of pneumoconiosis pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000). Finally, the Board directed the administrative law judge to consider whether the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c), and whether the miner's total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), if the existence of pneumoconiosis was established pursuant to Section 718.202(a).

On remand, the administrative law judge found that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). He also found that the medical opinion evidence failed to establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4). Further, weighing all the relevant evidence together, the administrative law judge found that it failed to establish pneumoconiosis pursuant to Section 718.202(a) overall. Consequently, the administrative law judge denied benefits.

On appeal, claimant again asserts that the administrative law judge erred in evaluating the x-ray evidence and, consequently, the medical opinion evidence on the issue of pneumoconiosis, and therefore, erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a response brief.

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). 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a 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).

In considering the readings of the July 12, 2006 x-ray and the March 14, 2007 x-ray, the administrative law judge stated that "due to their temporal proximity," he would "weigh the 2006-2007 x-rays as one." Decision and Order on Remand at 3. The administrative law judge then found that this x-ray evidence failed to establish pneumoconiosis, as two dually-qualified readers[6] and one B reader read the x-rays as positive, while two dually-qualified readers and one B reader read the x-rays as negative for pneumoconiosis. Further, the administrative law judge, in according greater weight to the negative readings, considered the additional radiological experience of the readers, as the physicians who read the x-rays as negative for pneumoconiosis had "greater practical experience, consultative positions and editorships, and professional leadership positions," than the physicians who read them as positive. Decision and Order on Remand at 5. Consequently, the administrative law judge found the 2006 and 2007 x-ray evidence, when considered as "one," was negative for pneumoconiosis. Decision and Order on Remand at 5.

Claimant contends, however, that the administrative law judge erred in considering the July 12, 2006 and March 14, 2007 x-ray readings "collectively, rather than first analyzing the chest x-ray evidence on a chest x-ray by chest x-ray basis, as ordered by this Board." Claimant's Brief at 12. We agree. As the Board previously

[6] A dually-qualified physician is a physician who is both a Board-certified radiologist and a B reader. A "Board-certified radiologist" is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology. A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

noted, the x-rays must be considered individually. *Kenneda*, BRB No. 11-0682 BLA, slip. op. at 4.

Further, the administrative law judge should have considered the credibility of the readings of the March 14, 2007 x-ray in light of the fact that pneumoconiosis is a progressive and irreversible disease. 20 C.F.R. §718.201(c); *Adkins*, 958 F.2d at 52, 16 BLR at 2-62. Moreover, the administrative law judge should have considered, pursuant to *Adkins*, the credibility of the negative readings of both the July 12, 2006 x-ray and the March 14, 2007 x-ray, in light of Dr. Subramaniam's positive reading of the October 24, 2000 x-ray.[7] Accordingly, we vacate the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1), and his consequent denial of benefits, and remand the case for further consideration of the x-ray evidence.[8]

Additionally, we note that the administrative law judge mischaracterized the 2006 and 2007 x-ray evidence when he found that, as a whole, there were positive readings by one B reader and two dually-qualified readers and negative readings by one B reader and two dually-qualified readers. In fact, the July 12, 2006 x-ray was read as positive by one B reader and two dually-qualified readers, while the March 14, 2007 x-ray was read as negative by one B reader and one dually-qualified reader, but as positive by two dually-qualified readers. On remand, the administrative law judge must correct this mischaracterization of the x-ray evidence before determining whether it establishes the existence of pneumoconiosis.[9] *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

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[7] The administrative law judge accorded less weight to Dr. Subramaniam's positive reading of the miner's October 24, 2000 x-ray because he found that Dr. Subramaniam's qualifications were unknown. As claimant contends, however, the record reflects that Dr. Subramaniam is a Board-certified radiologist. Director's Exhibit 43. The administrative law judge erred, therefore, in according less weight to Dr. Subramaniam's reading for the reason given. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[8] Claimant contends that the administrative law judge erred in according less weight to Dr. Gale's positive reading of the July 14, 1980 x-ray because the administrative law judge mistakenly stated that Dr. Gale's qualifications were not in the record. The Board, however, previously affirmed the administrative law judge's accordance of less weight to Dr. Gale's positive reading of a 1980 x-ray as it was "more than twenty-five years earlier" than the 2006 and 2007 x-rays." *Kenneda*, BRB No. 11-0628 BLA, slip. op. at 4. Thus, claimant's contention is moot.

[9] Moreover, the administrative law judge may again consider any additional *radiological* expertise the x-ray readers possess in weighing the credibility of their

We also vacate the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as it was based, in part, on his faulty evaluation of the x-ray evidence. Finally, if reached, the administrative law judge must weigh together the x-ray and medical opinion evidence to determine whether pneumoconiosis is established pursuant to Section 718.202(a) overall. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174. Likewise, if reached, the administrative law judge must determine whether the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b) and whether the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c). *See Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is vacated, and the case is remanded 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

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readings. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(en banc).