BRB No. 03-0320 BLA

JAMES W. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTH STAR CONTRACTORS, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 02/12/2004
	)	
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-Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James W. Ratliff, Paintsville, Kentucky, *pro se*.

Jennifer U. Toth (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order-Denying Benefits (2002-BLA-0221) of Administrative Law Judge Thomas F. Phalen, Jr., 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).[2] Claimant filed his application for benefits on November 2, 1998, which was denied by the district director on February 22, 1999. Director's Exhibits 1, 19. Claimant filed a timely request for modification pursuant to 20 C.F.R. §725.310, which the district director denied on May 26, 2000. Director's Exhibits 22, 29. On May 2, 2001, claimant submitted additional medical evidence. Director's Exhibit 31. The district director treated claimant's submission as a second request for modification, which the district director denied on October 19, 2001. Director's Exhibits 31, 41. Claimant requested a hearing, Director's Exhibit 42, which was held before the administrative law judge on October 9, 2002.

In the Decision and Order-Denying Benefits, the administrative law judge considered the claim *de novo*, credited claimant with "at least 15 years" of coal mine employment pursuant to the parties' stipulation, Decision and Order-Denying Benefits at 3, and found that employer is the responsible operator. The administrative law judge found that a preponderance of the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4) because the record contained no reasoned medical opinion diagnosing pneumoconiosis as defined in 20 C.F.R. §718.201. The administrative law judge found that claimant's pneumoconiosis established by x-ray arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and determined that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge concluded, however, that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), because the record contained no medical opinion addressing the cause of claimant's totally disabling respiratory impairment. Accordingly, the administrative law judge denied benefits.

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[1] Susie Davis, president of the Kentucky Black Lung Association, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, claimant generally challenges the denial of benefits. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand this case to the administrative law judge for him to reconsider whether claimant has established that he is totally disabled due to pneumoconiosis.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). 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).

We affirm as unchallenged on appeal the administrative law judge's findings that claimant had at least fifteen years of coal mine employment, that employer is the responsible operator, that the existence of pneumoconiosis arising out of coal mine employment was established by chest x-ray evidence pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *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). Ordinarily, affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established by the chest x-rays at Section 718.202(a)(1) would obviate the need to review his finding that the medical opinions did not establish the existence of pneumoconiosis at Section 718.202(a)(4). *Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985). However, in this case errors made by the administrative law judge in analyzing the medical opinions at Section 718.202(a)(4) for the existence of pneumoconiosis affected his consideration of the disability causation issue pursuant to Section 718.204(c).

After finding the existence of pneumoconiosis established by the x-ray evidence, the administrative law judge found that under Section 718.202(a)(4), the existence of pneumoconiosis as defined in Section 718.201 was not established by the medical opinions because "[t]he record does not contain a reasoned medical judgment that

claimant suffers from pneumoconiosis." Decision and Order-Denying Benefits at 11. However, the record reflects that the administrative law judge misapplied *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) to discredit medical opinions, mischaracterized a medical opinion, and overlooked part of another opinion in making this finding.

Citing *Cornett*, the administrative law judge found that the opinions of Drs. Wright, Younes, Sundaram, and Jarboe were not reasoned medical judgments under Section 718.202(a)(4) because their opinions were mere restatements of either a positive or negative x-ray. Decision and Order-Denying Benefits at 10-11. While a mere restatement of an x-ray does not constitute a reasoned medical judgment, *Cornett*, 277 F.3d at 575, 22 BLR at 2-120, in this case substantial evidence does not support the administrative law judge's description of the doctors' reports. The record indicates that Drs. Wright, Younes, Sundaram, and Jarboe based their opinions on physical examinations, pulmonary function and blood gas tests, x-rays, and smoking and employment histories. Director's Exhibits 7-9, 20, 38, 45. Consequently, their opinions may not be discredited as mere restatements of an x-ray. *Cornett*, 277 F.3d at 575-76, 22 BLR at 2-120.

Additionally, the administrative law judge mischaracterized Dr. Younes's opinion and overlooked part of Dr. Sundaram's opinion. Dr. Younes diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease (COPD) due primarily to smoking and secondarily to dust exposure, and chronic bronchitis of uncertain etiology. Director's Exhibits 7, 20. Initially, the administrative law judge recognized that Dr. Younes diagnosed COPD due to both smoking and coal dust exposure. Decision and Order-Denying Benefits at 6, *see* 20 C.F.R. §718.201(a)(2)(defining "legal" pneumoconiosis). Later, however, when weighing Dr. Younes's opinion, the administrative law judge specifically found that Dr. Younes attributed the COPD to smoking. Decision and Order-Denying Benefits at 11. The administrative law judge's inconsistent analysis mischaracterizes Dr. Younes's opinion and therefore is not affirmable.[3] Moreover, Dr. Sundaram diagnosed coal workers' pneumoconiosis and a ventilatory impairment due to coal dust exposure. Director's Exhibits 38, 45. The administrative law judge did not discuss Dr. Sundaram's diagnosis of an impairment due to coal dust exposure, and thus did not consider all relevant evidence as to the existence

[3] The administrative law judge also discounted Dr. Younes's opinion because Dr. Younes expressed conflicting views as to whether claimant is totally disabled. While an administrative law judge has the discretion to accord less weight to an inconsistent opinion, *see Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-212 (*en banc*), here the administrative law judge mischaracterized Dr. Younes's opinion as to the existence of pneumoconiosis and thus must reconsider the opinion.

of pneumoconiosis as defined at Section 718.201. Decision and Order-Denying Benefits at 11; 30 U.S.C. §923(b); 20 C.F.R. §718.201(a)(2).

Thus, substantial evidence does not support the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4). Since the administrative law judge's errors in weighing the medical opinion evidence at Section 718.202(a)(4) affected his consideration of the disability causation issue, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and instruct him to reweigh the medical opinions on remand and determine whether claimant has established the existence of pneumoconiosis.

In considering whether pneumoconiosis is "a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment," 20 C.F.R. §§718.204(c)(1), the administrative law judge found that "[t]he record does not contain medical opinions regarding the etiology of Claimant [sic] total disability." Decision and Order-Denying Benefits at 15. As the Director points out in his Motion to Remand, the administrative law judge made this finding without discussing Dr. Sundaram's opinion that claimant has a totally disabling respiratory impairment due to coal dust exposure,[4] Director's Exhibits 38, 45, or Dr. Younes's opinion that claimant has COPD due partly to dust exposure, which contributes to his respiratory impairment. Director's Exhibit 7 at 4. Review of Dr. Younes's opinion further reflects that he also attributed claimant's impairment to coal workers' pneumoconiosis diagnosed by chest x-ray. *Id*. Because the administrative law judge did not properly consider these opinions, we must vacate his finding and remand this case for him to reweigh the medical opinions and determine whether claimant has established that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c)(1).

Finally, the Director requests that we instruct the administrative law judge to make findings regarding the basis, if any, for modifying the district director's decision denying benefits. Director's Brief at 4 n.2. Where, as here, the administrative law judge considers a request for modification of a district director's denial of benefits, the administrative law judge necessarily renders a *de novo* decision on the claim and thus need not make findings as to the basis for modifying the district director's decision. *Motichak v. BethEnergy Mines, Inc*., 17 BLR 1-14, 1-17-19 (1992). Therefore, we deny the Director's request.

[4] Review of the administrative law judge's decision reflects that he credited Dr. Sundaram's opinion that claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order-Denying Benefits at 14-15.

Accordingly, the Director's Motion to Remand is granted, 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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge