BRB No. 10-0619 BLA

JAMES F. NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STRAIGHT CREEK MINING COMPANY	)	DATE ISSUED: 06/16/2011
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Subsequent Claim Denying Benefits of Administrative Law Judge Robert B. Rae, United States Department of Labor.

James F. Napier, Bledsoe, Kentucky, *pro se*.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Subsequent Claim Denying Benefits (08-BLA-05991) of Administrative Law Judge Robert B. Rae filed on November 7, 2007,[2] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act). The administrative law judge found that claimant established nine years of coal mine employment, but found that the newly submitted evidence was insufficient to establish any element of entitlement under 20 C.F.R. Part 718, and was, therefore, insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Benefits were, accordingly, denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge's denial of benefits must be vacated and the case remanded for reconsideration because the administrative law judge erred in weighing the new x-ray evidence at 20 C.F.R. §718.202(a)(1) and his error affected his weighing of the credibility of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4) and 718.204(b). The Director further contends that if the Board does not affirm the administrative law judge's finding that claimant had nine years of coal mine employment, the case must be remanded for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4),[3] since claimant alleged "about" or "at least" fourteen years of coal mine

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed his first claim for benefits in November of 1988. The claim was denied on June 2, 1989, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant filed his second claim for benefits on November 28, 1994. It was denied on April 17, 1997, for the same reason. Director's Exhibit 2 at 2. On April 28, 1998, claimant filed his third claim for benefits. That claim was also denied for failure to establish any element of entitlement. Director's Exhibit 3 at 2.

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

employment at the hearing and alleged forty years of coal mine employment on his application for benefits.

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.[4] 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 living miner's claim, a claimant must establish 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing at least one of the elements of entitlement previously adjudicated against him. 20 C.F.R. §725.309(d)(2), (3).

Pneumoconiosis

In finding that the new evidence did not establish the existence of pneumoconiosis, the administrative law judge found that the x-ray evidence was in equipoise and, therefore, "split evenly for the presence or absence of pneumoconiosis." Decision and Order at 17. Specifically, considering the two readings of the May 23, 2007 x-ray, the administrative law judge found that they were "at best in equipoise" because Dr. Spitz, a dually-qualified reader, found the x-ray to be negative for pneumoconiosis, while Dr. Alexander, a dually-qualified reader, found it to be positive. The administrative law judge, however, deemed the x-ray to be negative because he determined that Dr. Alexander's reading was "more equivocal[,]" as it was based on a "compromised film quality of 2." Decision and Order at 16.

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Regarding the readings of the January 10, 2008 x-ray, the administrative law judge found them to be in equipoise, as Drs. Wiot and Spitz, dually-qualified readers, read the film as completely negative, while Drs. Alexander and Ahmed, dually-qualified readers, read it as positive. Although the administrative law judge noted that Dr. Forehand, a B-reader, read the film as positive, he stated that he accorded greater weight to the readings of the dually-qualified physicians. Additionally, the administrative law judge found "Dr. Alexander's [positive] interpretation…entitled to a bit less weight because he acknowledged that his ability to read the film was somewhat compromised[,]" based on a film quality of 2. Decision and Order at 16.

Turning to the March 6, 2008 x-ray, the administrative law judge noted that the film was read as negative by Dr. Broudy, a B reader, and as positive by Dr. Ahmed. He stated that he would normally accord Dr. Ahmed's positive reading greater weight, based on his superior credentials as a dually-qualified reader, but he found the readings to be in equipoise since Dr. Ahmed "marked the film quality as compromised at 2[,]" and also read the film as showing "emphysema" and "atherosclerotic aorta." Decision and Order at 17. The administrative law judge determined, therefore, that "Dr. Ahmed's reading was somewhat equivocal[.]" Decision and Order at 17.

Finally, regarding the readings of the September 9, 2009 x-ray, the administrative law judge found them to be in equipoise, as Drs. Alexander and Wiot, equally credentialed readers, read the film as positive on the one hand, and negative on the other.

The Director contends that the administrative law judge erred in concluding "that a radiologist's notation that a chest x-ray film is of Quality 2 indicates that his ability to interpret the x-ray was compromised or that his x-ray interpretation is equivocal." Director's Brief at 3. The Director contends that "[t]he regulations require only that an x-ray be of suitable quality, not optimal quality, for interpretation in order to constitute evidence of the presence or absence of pneumoconiosis[,]" citing 20 C.F.R. §718.102(a). Director's Brief at 3. Thus, the Director contends that "the [administrative law judge] should not have discounted the x-ray interpretations that were classified as Quality 2, but should have accepted the readings as evidence for the fact for which they were proffered." Director's Brief at 3. We agree.

While the administrative law judge may find contrary x-ray readings to be in equipoise when they are read by equally credentialed readers, he may not accord a reading, properly classified for the presence or absence of pneumoconiosis, less weight because he finds it compromised based on its quality reading. *See* 20 C.F.R. §718.102(a); *Auxier v. Director, OWCP*, 8 BLR 1-109 (1985); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *Preston v. Director, OWCP*, 6 BLR 1-229 (1984). We, therefore, vacate the administrative law judge's finding that the new x-ray evidence failed

to establish pneumoconiosis at Section 718.202(a)(1), and remand the case to the administrative law judge to reconsider the new x-ray evidence.

Further, we agree with the Director that the administrative law judge's error in considering the x-ray evidence affected his evaluation of the credibility of the medical opinion evidence at 20 C.F.R. §718.202(a)(4), especially the opinion of Dr. Forehand. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Director's Brief at 3; Decision and Order at 17. The administrative law judge's finding that pneumoconiosis was not established at Section 718.202(a)(4) is, therefore, vacated and the case is remanded for reconsideration thereunder, if reached.[5]

Total Disability

In finding that total disability was not established by the new evidence at Section 718.204(b), the administrative law judge properly concluded that the new pulmonary function studies, accounting for claimant's age, did not establish total disability and that the new blood gas studies were not qualifying. Decision and Order at 19; 20 C.F.R. §718.204(b)(2)(i), (ii). Turning to the medical opinions of Drs. Forehand, Westerfield, Broudy and Dahhan at Section 718.204(b), the administrative law judge rejected the opinion of Dr. Forehand because "Dr. Forehand [was] the only doctor who attribute[d] [c]laimant's disability to pneumoconiosis[,]" and his assumption of pneumoconiosis was contrary to the weight of the x-ray evidence. Decision and Order at 19. The administrative law judge rejected the opinion of Dr. Westerfield, because it attributed claimant's disability, in part, to asthma of the "general population." Decision and Order at 19. As Drs. Broudy and Dahhan opined that claimant was not disabled, the administrative law judge concluded that the medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv).

The administrative law judge did not properly evaluate the medical opinion evidence. The administrative law judge erred in rejecting the opinion of Dr. Forehand on the issue of total disability because it was contrary to the weight of the x-ray evidence. *See Koppenhaver v. Director, OWCP*, 864 F.2d 287, 288 (3d Cir. 1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n.4 (1987). Moreover, we cannot affirm the administrative law judge's evaluation of Dr. Forehand's opinion, because we do not affirm the administrative law judge's finding that the x-ray evidence did not establish pneumoconiosis. *See Trumbo*, 17 BLR at 1-88. The administrative law judge also erred in conflating the evidence relevant to total disability at Section 718.204(b)(2) with that

[5] The administrative law judge noted that only new x-ray and medical opinion evidence had been submitted on the issue of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); Decision and Order at 16.

relevant to disability causation at Section 718.204(c), in considering the opinions of Drs. Forehand and Westerfield. *See Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Accordingly, the administrative law judge's finding that the new medical opinion evidence failed to establish total disability at Section 718.204(b)(2)(iv) is vacated, and the case is remanded for the administrative law judge to reconsider the new medical opinion evidence and to then weigh all of the new evidence together at Section 718.204(b).

If the administrative law judge finds that the new evidence establishes either pneumoconiosis at Section 718.202(a) or total disability at Section 718.204(b), then a change in an applicable condition of entitlement would be established at Section 725.309(d). The administrative law judge must then consider all of the evidence of record on the merits. 20 C.F.R. §725.309(d). *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987).

Section 411(c)(4)

We instruct the administrative law judge on remand, to first consider whether claimant is entitled to the rebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). In order to invoke the Section 411(c)(4) presumption, in addition to establishing a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), at least fifteen years of qualifying coal mine employment must be established. 30 U.S.C. §921(c)(4). The administrative law judge found that only nine years of coal mine employment were established, based on the district director's finding and claimant's Social Security record. However, since the record contains allegations of coal mine employment of forty, over fifteen, and at least fourteen years, on remand the administrative law judge should determine whether claimant has established fifteen years of qualifying years of coal mine employment pursuant to Section 411(c)(4). In so doing, in particular, the administrative law judge must determine whether any, or all, of claimant's time in the construction of highways for Bizzak Construction Company, where he stated that he "removed four coal seams[,]" constituted qualifying coal mine employment. *See Schegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41 (1994). Additionally, the administrative law judge must consider whether employment for Hosco Mining, which is reflected in the record, but not addressed by the administrative law judge, constitutes qualifying coal mine employment. Accordingly, we vacate the administrative law judge's finding of nine years of coal mine employment and remand the case for the administrative law judge to reconsider all of the evidence on the issue.[6]

[6] If reached, the administrative law judge must also consider whether the ten years of coal mine employment necessary to invoke the presumption, that pneumoconiosis arose out of coal mine employment, has been established pursuant to 20 C.F.R.

If the Section 411(c)(4) presumption is invoked, the burden is on employer to rebut the presumption. 30 U.S.C. §921(c)(4). On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). The submission of any additional evidence must be in compliance with the evidentiary limits set forth in 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order on Subsequent Claim Denying Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings 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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BETTY JEAN HALL
Administrative Appeals Judge

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§718.203(b). Further, the administrative law judge must consider the effect claimant's years of coal mine employment has on the credibility of the medical opinion evidence. *See* 20 C.F.R. §§718.203(b); 718.204(c).