BRB No. 06-0776 BLA

GUY T. SADARO (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/11/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

I. John Rossi, West Des Moines, Iowa, for claimant.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-0063) of Administrative Law Judge Thomas M. Burke 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] In a Decision and Order dated September 22, 2006, the

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

administrative law judge credited claimant with five to seven years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found that the medical evidence submitted since the prior denial of benefits established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 4. Consequently, the administrative law judge determined that claimant met his burden to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *See Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); Decision and Order at 4. Considering the merits of the claim, however, the administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his length of coal mine employment determination, and in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's findings at 20 C.F.R. §718.202(a)(1), but requesting that the denial of benefits be vacated and the case remanded to the administrative law judge for further consideration of the medical opinion evidence at 20 C.F.R. §718.202(a)(4).[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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

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[2] Claimant's prior application for benefits, filed on February 16, 1990, was finally denied on June 8, 1990, because claimant failed to establish any element of entitlement. 20 C.F.R. §§718.202(a), 718.204(c) (2000); Director's Exhibit 1. On January 10, 2000, claimant filed his current application for benefits, which is considered a duplicate claim because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d) (2000); Director's Exhibit 2.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3). *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).

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 a finding of 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 initially challenges the administrative law judge's finding that claimant established five to seven years of covered coal mine employment. Claimant's Brief at 4, 11. Claimant asserts that he informed the Director that he received coal, not cash wages, in consideration for his coal mine work, and that, therefore, closer examination of the record would support a longer period of covered employment.[4] Claimant's Brief at 4, 11. We disagree.

Relying on the documentary evidence,[5] the administrative law judge initially found that, while claimant's Social Security Administration earnings records did not show any employment by a coal mine operator, on claimant's CM-911a employment history forms, completed in conjunction with claimant's 1990 and 2000 claims, claimant listed employment at New Block Coal Company from 1935 to 1944, and from 1933 to 1945, respectively.[6] Decision and Order at 2-3; Director's Exhibits 1, 3, 4. The administrative law judge found that claimant's CM-911a employment forms were supported by witness statements from three co-workers who attested to claimant's employment at New Block Coal Company, primarily loading coal, from 1933 to 1940. Decision and Order at 3; Director's Exhibit 1. Noting that claimant would have been ten years old in 1934, when he started to work as a coal miner, and noting further that claimant stated on his benefits application that he attended school through the twelfth grade, the administrative law judge reasoned that any coal mine employment between 1934 and 1940 would have been part time, at least during the school year. Thus, the

[4] On his 2000 application for benefits, claimant indicated that he received coal, not cash, in exchange for his labor at New Block Coal Company. Director's Exhibit 2.

[5] The administrative law judge noted that no testimony was taken at the hearing, because claimant had passed away and claimant's widow was unable to testify. Decision and Order at 1.

[6] Claimant indicated that following his coal mine employment, between approximately 1944 and 1979, he was employed in foundries, where he worked with coal-fired ovens, and was exposed to dust, gases, and fumes. Decision and Order at 3; Director's Exhibits 1, 3.

administrative law judge credited claimant with five to seven years of coal mine employment.[7] Decision and Order at 3.

The Board has held that in determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation, provided he considers "all relevant evidence and the facts and circumstances of each case." *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988)(*en banc*). As the administrative law judge fully considered all of the evidence of record relevant to claimant's coal mine employment, including claimant's conflicting statements and the statements of his co-workers, and explained how he resolved the inconsistencies in the evidence to determine that claimant had five to seven years of qualifying coal mine employment, we affirm the administrative law judge's finding, as reasonable and within his discretion. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *Henderson v. Director, OWCP*, 7 BLR 1-866 (1985); *Vanover v. Director, OWCP*, 6 BLR 1-920 (1984). In addition, as the administrative law judge fully credited claimant with the time for his employment with New Block Coal Company, for which claimant alleged he received coal, not cash, in exchange for his labor, there is no merit to claimant's contention that the administrative law judge failed to consider this employment.

Claimant next challenges the administrative law judge's evaluation of the x-ray evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), specifically asserting that the administrative law judge erred in failing to consider the February 9, 2000 x-ray reading of Dr. Preger. Claimant's Brief at 7; Director's Exhibit 10. Claimant's contention lacks merit.

In evaluating the x-ray evidence of record pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly found that the record contains readings of two x-rays. Decision and Order at 5-6. A March 16, 1990 x-ray, submitted with claimant's initial claim, was read as negative by both Dr. Christensen, a Board-certified radiologist, and Dr. Sargent, a B reader and Board-certified radiologist. Director's Exhibit 1;

[7] Noting that claimant had alleged twenty-two and forty-three years of coal mine employment on his applications for benefits, and had further stated that he was exposed to coal dust, gas, and fumes during his foundry work between 1945 and 1979, the administrative law judge reasonably determined that claimant's remaining alleged coal mine work must have been the years he worked in the foundry, not as a coal miner. *See* 30 U.S.C. §902(d); 20 C.F.R. §725.101(a)(26); *Fox v. Director*, OWCP, 880 F.2d 1037, 13 BLR 2-156 (11th Cir. 1989); *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990)(*en banc*); *Swinney v. Director, OWCP*, 7 BLR 1-524 (1984); Decision and Order at 3.

Decision and Order at 6. The sole recent x-ray, dated February 1, 2000, was read once by Dr. Christensen, a Board-certified radiologist, as showing no active disease, and once by Dr. Preger, who is a B reader and Board-certified radiologist, as showing some pleural abnormalities suggestive of pneumoconiosis. Director's Exhibits 9, 10. Contrary to claimant's arguments, the administrative law judge properly found that Dr. Preger's notation, that the February 1, 2000 x-ray revealed some pleural abnormalities, is not a positive classification for pneumoconiosis. 20 C.F.R. §718.102(b) (2000); *Risher v. Director, OWCP*, 940 F.2d 327, 330, 15 BLR 2-186, 2-191 (8th Cir. 1991); Decision and Order at 5-6; Director's Exhibit 10. Therefore, as the administrative law judge properly concluded that the record contains no positive x-ray readings, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant further contends that the administrative law judge erred in his evaluation of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Specifically, claimant asserts that the administrative law judge erred in failing to credit the opinion of Dr. Jewett. Claimant's Brief at 7; Director's Exhibit 10. The Director responds that claimant's "contention has some merit." Director's Brief at 4.

In evaluating the medical opinion evidence as to the existence of pneumoconiosis, the administrative law judge found that the record contains two medical opinions. In a report dated March 16, 1990, Dr. Jewett diagnosed chronic bronchitis and stated that claimant's foundry work of eight years' duration, and coal dust exposure of nine years' duration, were significant causative factors. Decision and Order at 6-7; Director's Exhibit 1. In a report dated February 1, 2000, Dr. Jewett again diagnosed chronic bronchitis, but this time stated that the chronic bronchitis was due to recurring infections. Director's Exhibit 5.

The administrative law judge initially concluded, correctly, that neither medical opinion supported a finding of clinical coal workers' pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1). The administrative law judge further found that there was "no evidence that the Claimant's chronic bronchitis arose from his exposure to coal dust while working in coal mines during the years 1934 to 1940 or to his later and more extensive exposure to coal dust during his employment at foundries or, as Dr. Jewett's most recent reports states, to recurrent infections." Decision and Order at 7. Therefore, the administrative law judge concluded that the evidence also did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §§718.201(a)(2); Decision and Order at 7.

The Director contends that it is "unclear from the [administrative law judge's] decision why he found the medical opinion evidence failed to establish the existence of pneumoconiosis," in light of the administrative law judge's acknowledgement that "Dr. Jewett's 1990 report explicitly states that claimant's disease arose both from foundry and

coal mine dust exposure." Director's Brief at 4-5. Therefore, the Director requests that the denial of benefits be vacated and the case be remanded to the administrative law judge for clarification of his rationale for finding the medical opinion evidence insufficient to establish the existence of legal pneumoconiosis. Director's Brief at 4-5.

Upon review of the administrative law judge's decision, we agree with the Director that the administrative law judge did not adequately explain his finding. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for further consideration.

The Director further states that, if the administrative law judge finds the opinion of Dr. Jewett to be "wholly incredible," then the Director concedes that he has failed to fulfill his statutory duty to provide claimant with a complete pulmonary evaluation.[8] Director's Brief at 5. The Director indicates that if, on remand, the administrative law judge determines that Dr. Jewett did not provide a credible opinion, the administrative law judge should remand the case to the district director "to obtain a supplemental medical opinion from Dr. Jewett addressing the cause of claimant's chronic bronchitis . . . ." Director's Brief at 5.

In light of the Director's concession that Dr. Jewett's medical opinion may be insufficient to fulfill the Director's statutory obligation, we instruct the administrative law judge that if, on remand, he determines that Dr. Jewett's opinion is not credible, he should consider the Director's request to remand this case to the district director for further medical development. *See Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

[8] The Department of Labor has a statutory duty to provide a miner with a complete pulmonary examination sufficient to constitute an opportunity to substantiate the claim. 30 U.S.C. §923(b); *see* 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge 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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BETTY JEAN HALL
Administrative Appeals Judge