BRB No. 02-0304BLA

DONALD R. MAHON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Alice T.K. Corba (Kepner, Kepner & Corba, P.C.), Berwick, Pennsylvania, for claimant.

Helen H. Cox (Eugene Scalia, Acting 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 appeals the Decision and Order (01-BLA-0079) of Administrative Law Judge Robert D. Kaplan denying benefits 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] The instant case involves a duplicate claim filed on October 28, 1999.[2]

[1]The Department of Labor has amended the regulations implementing the Federal

The administrative law judge noted that the parties stipulated that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was, therefore, sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] The administrative law judge, therefore, considered claimant's 1999 claim on the merits. After crediting claimant with eight years of coal mine employment, the administrative law judge found that the evidence was insufficient to

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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.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on February 16, 1982. Director's Exhibit 12. In a Decision and Order dated May 29, 1985, Administrative Law Judge Gerald M. Tierney found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, Judge Tierney denied benefits. *Id.* By Decision and Order dated August 28, 1987, the Board affirmed Judge Tierney's finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Mahon v. Director, OWCP*, BRB No. 85-1782 BLA (Aug. 28, 1987) (unpublished). The Board, therefore, affirmed Judge Tierney's denial of benefits. *Id.* Claimant subsequently filed a request for modification on February 8, 1988. *Id.* The district director denied claimant's motion for modification on July 18, 1988. *Id.* There is no indication that claimant took any further action in regard to his 1982 claim.

Claimant filed a second claim on July 7, 1992. Director's Exhibit 12. The district director denied the claim on October 16, 1992. *Id.* There is no indication that claimant took any further action in regard to his 1992 claim.

Claimant filed a third claim on December 6, 1993. Director's Exhibit 12. In a Decision and Order dated June 20, 1995, Administrative Law Judge Ralph A. Romano found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Judge Romano, however, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Accordingly, Judge Romano denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1993 claim.

Claimant filed a fourth claim on October 28, 1999. Director's Exhibit 1.

[3]Although Section 725.309 has been revised, these revisions apply only to claims filed after January 19, 2001.

establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's length of coal mine employment finding. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, requesting that the Board vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge for further consideration.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Given Dr. Talati's January 14, 2001 report wherein he opines that claimant suffers from pneumoconiosis, Dr. Gaia's positive x-ray interpretation, claimant's eight year history of coal mine employment and the lack of any other industrial exposure, the Director currently concedes that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. Director's Motion to Remand at 3. We accept the Director's concession. Consequently, we remand the case to the administrative law judge for his consideration of whether claimant has established all of the other necessary elements of entitlement.[5]

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[4]Inasmuch as no party challenges the administrative law judge's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]In order to establish entitlement to benefits under Part 718 in a living 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

We finally address claimant's contention that the administrative law judge erred in crediting him with only eight years of coal mine employment.[6] The administrative law judge noted that claimant's Social Security Administration earnings statement showed periodic coal mine employment from the second quarter of 1949 through the second quarter of 1958. Decision and Order at 3. The administrative law judge concluded that:

> The Social Security earnings record shows [c]laimant had quarterly earnings from coal mine employment exceeding $50 in 31 quarters or 7¾ years. Based on my review of the entire evidentiary record (including statements of [c]laimant's co-workers), and taking into consideration [the] Director's concession of 8 years, I find that [c]laimant has established a coal mine employment of 8 years.

Decision and Order at 3.

[6]The Director, Office of Workers' Compensation Programs (the Director), contends that because he has conceded the existence of coal workers' pneumoconiosis, the ten year presumption of causation of pneumoconiosis found at 20 C.F.R. §718.203(b) is no longer relevant. Director's Motion to Remand at 3 n.1. The Director, therefore, argues that it is unnecessary for the Board to address claimant's contentions of error in regard to the administrative law judge's finding of only eight years of coal mine employment. While we agree with the Director that the length of claimant's coal mine employment is no longer relevant in regard to the issue of whether claimant's pneumoconiosis arose out of his coal mine employment, we find it necessary to address claimant's contentions since the length of claimant's coal mine employment could become significant in the administrative law judge's evaluation of whether the evidence is sufficient to establish that claimant's total disability (if established on remand) is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant contends that the administrative law judge erred in not crediting him with any coal mine employment prior to 1949. At the hearing, claimant testified that he began his coal mine employment with Glen Alden Coal Company in 1947 when he was fifteen years of age. Transcript at 23-28. The administrative law judge acknowledged that he stated at the hearing that claimant "appeared to be testifying credibly that his coal mine employment began in 1947 with Glen Alden Coal Company rather than 1949....." Decision and Order at 3. The administrative law judge, however, noted that claimant failed to provide any explanation for why his Social Security Administration earnings record showed earnings at Glen Alden Coal Company in 1949, but not any prior earnings. *Id.* The administrative law judge further noted that Glen Alden Coal Company submitted an April 28, 1971 letter indicating that claimant commenced coal mine employment on May 3, 1949. *Id*; Director's Exhibit 11. The administrative law judge, therefore, discredited claimant's testimony that he began working in coal mine employment in 1947. Decision and Order at 3.

We agree with claimant that the administrative law judge erred in stating that claimant failed to provide any explanation for why his Social Security Administration earnings record did not document his coal mine employment prior to 1949. Claimant testified that when he first began working for Glen Alden Coal Company, he was paid in cash rather than check, *see* Transcript at 24-27, thereby providing a plausible explanation for why his coal mine employment prior to 1949 was not evidenced by his Social Security Administration earnings record. The administrative law judge also failed to address other evidence supporting claimant's assertion that he began working in coal mine employment in 1947. The administrative law judge did not specifically address the testimony of Leonard Mahon, claimant's father. Leonard Mahon testified that when he became unable to work due to ulcers in 1947, claimant commenced coal mine employment in order to support the family. Transcript at 14-21. The administrative law judge, also failed to specifically address the significance of an affidavit from Merlin Nallo, stating that claimant commenced coal mine employment in 1947 at the site where he worked. Claimant's Exhibit 10.

Claimant also argues that the administrative law judge erred in not crediting him with any coal mine employment after the second quarter of 1958. Although claimant testified that he left coal mine employment in 1958 after suffering a serious injury, he further testified that he subsequently returned to coal mine employment at the end of 1958. Transcript at 32-34, 40. Claimant testified that when he returned to work after his injury, he worked two jobs, construction and coal mining. *Id.* at 34-38. Claimant indicated that he ceased his coal mine employment in 1963. *Id.* at 42. In regard to claimant's post-1958 coal mine employment, the administrative law judge stated that:

> I also discredit Claimant's testimony that he worked in [the coal mine] industry beyond the second quarter of 1958, the last period of his employment in the industry revealed by his Social Security earnings record.

Decision and Order at 3. The administrative law judge's consideration of claimant's testimony regarding his post-1958 coal mine employment does not comply with the requirements of the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On remand, the administrative law judge must provide a basis for crediting or discrediting claimant's testimony regarding his post-1958 coal mine employment.

In light of the above referenced errors, we vacate the administrative law judge's length of coal mine employment finding. Consequently, the alj, on remand, in addition to considering whether claimant has established all necessary elements of entitlement, must also reconsider whether claimant is entitled to credit for additional coal mine employment prior to 1949 and after 1958.

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge