BRB No. 96-0864 BLA

JOHN S. BAINBRIDGE	)	
	)	
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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Gary K. Stearman (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (95-BLA-1608) of Administrative Law Judge Ainsworth H. Brown 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

[1] Claimant is John S. Bainbridge, the miner, whose initial application for benefits filed on February 11, 1980 was finally denied on April 3, 1981. Director's Exhibit 61. Claimant filed the present claim on November 24, 1993. Director's Exhibit 1.

amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge accepted the parties' stipulation to 14.61 years of coal mine employment, but found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge

failed to determine whether the evidence submitted with the present claim established a material change in conditions pursuant to 20 C.F.R. §725.309(d). Claimant further asserts that the administrative law judge erred in his weighing of the x-rays and the medical opinions. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.[2]

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).

Claimant first contends, and the Director agrees, that the administrative law judge failed to analyze this duplicate claim in accordance with controlling case law. Claimant's Brief at 3; Director's Brief at 4 n.2. The United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Swarrow*, 72 F.3d at 318, 20 BLR at 2-96.

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Here, instead of determining whether the new evidence established a material change in conditions under *Swarrow*, the administrative law judge considered the old and new evidence relevant to the existence of pneumoconiosis and denied benefits on the grounds that pneumoconiosis was not established. Had the administrative law judge rendered an affirmable decision denying benefits on the merits, any error in failing to first perform a material change in conditions analysis would have been harmless because the existence of pneumoconiosis is a necessary element of entitlement under Part 718. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc). However, because the administrative law judge erred in his weighing of the medical opinions pursuant to Section 718.202(a)(4), *see* discussion, *infra*, we must remand this case for further proceedings[3] and therefore we instruct the administrative law judge on remand to determine whether the newly-submitted evidence establishes a material change in conditions pursuant to Section 725.309(d) under *Swarrow*.

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge erred by according greater weight to Dr. Barrett's negative reading of the June 24, 1993 x-ray based on the physician's teaching credentials. Claimant's Brief at 4. The Board has held that where an administrative law judge first considers the board-certification and B-reader status of the physicians reading the x-rays, the administrative law judge may also consider a physician's professorship in radiology as a factor relevant to his or her radiological competence. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Dr. Barrett's *curriculum vitae* indicates that he is a board-certified radiologist and B-reader who has taught radiology at the Boston V.A. Hospital and at Tufts Medical School since the early 1970's. Director's Exhibit 63.

In weighing the June 24, 1993 x-ray, the administrative law judge first discussed the board-certification and B-reader qualifications of all readers. Decision and Order at 3. Focusing on the four interpretations by B-readers,[4] the administrative law judge permissibly found that:

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[3] We disagree with the Director's view that the administrative law judge provided valid reasons for his weighing of the medical opinions. Director's Brief at 4-5.

[4] Drs. Pruitt and Bassali, board-certified radiologists and B-readers, read the x-ray as 1/1. Director's Exhibits 26, 28. Drs. Greene and Barrett, also board-certified B-readers, interpreted the x-ray as negative. Director's Exhibits 30, 31. Dr. Imperiale, a board-certified radiologist not qualified as a B-reader, read the x-ray as "2 p." Director's Exhibit 34.

> Dr. Barrett's credentials reflect the fact that he possesses extensive teaching experience (DX 63). Thus, although there is equipoise between the B-reader interpretations, there is a modest professional edge favoring a finding that the June 1993 film is negative.

Decision and Order at 3; *see Worhach*, *supra*. Because the administrative law judge permissibly weighed the June 24, 1993 x-ray interpretations in light of the readers' radiological qualifications, we reject claimant's contention.

Claimant further contends that the administrative law judge should have found the December 3, 1993 and April 14, 1994 x-rays to be positive, asserting that the 0/1 readings rendered by two physicians constitute "some evidence of the presence of pneumoconiosis." Claimant's Brief at 5-7. A chest x-ray classified as 0/1 does not constitute evidence of pneumoconiosis. 20 C.F.R. §718.102(b). Therefore, the administrative law judge properly considered the 0/1 readings to be negative for pneumoconiosis.

Although the parties raise no further issues at Section 718.202(a)(1), in light of our disposition of this case we note the administrative law judge's failure to consider Dr. Gaia's positive reading of the December 3, 1993 x-ray. Director's Exhibit 33; Decision and Order at 3. This x-ray reading was admitted to the record and is relevant to whether claimant has established a material change in conditions. Hearing Transcript at 5; *see Swarrow*, *supra*. Thus, the administrative law judge's analysis pursuant to Section 718.202(a)(1) does not meet the *Swarrow* material change in conditions standard. Inasmuch as we are remanding this case, *see* discussion, *infra*, and the administrative law judge must apply *Swarrow* on remand, we also vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and instruct him to consider whether all of the newly-submitted x-ray evidence establishes a material change in conditions pursuant to Section 725.309(d) under *Swarrow*.

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred by discrediting Dr. Aquilina's opinion based on the physician's reliance on a positive x-ray when the administrative law judge found the x-ray evidence to be negative for pneumoconiosis.[5] Claimant's Brief at 10. Claimant's

[5] Five physicians examined claimant and rendered opinions. Drs. Weiss, Fasciana, and Aquilina diagnosed pneumoconiosis. Director's Exhibits 17, 19, 21; Claimant's Exhibit 2. Dr. Talati detected no pneumoconiosis and diagnosed "likely bronchial asthma." Director's Exhibit 71. Dr. Lehman, who examined claimant in

contention has merit.

In February of 1994, Dr. Aquilina examined and administered pulmonary tests to claimant, diagnosing chronic obstructive pulmonary disease and emphysema due to the "natural aging process." Director's Exhibit 21. Two years later Dr. Aquilina was deposed, by which time he had reviewed the reports and objective study results obtained by Drs. Weiss, Fasciana, and Talati, as well as a summary of the x-ray evidence in claimant's file. Claimant's Exhibit 2 at 8-12. At that time, Dr. Aquilina amended his opinion, stating that the subsequent examination results and x-rays reviewed convinced him that claimant has pneumoconiosis in addition to his other respiratory disorders. Claimant's Exhibit 2 at 14-15. In support of his diagnosis, Dr. Aquilina cited claimant's symptoms, lack of heart disease, negative smoking history, and fifteen years of coal dust exposure. Claimant's Exhibit 2 at 7. In addition, Dr. Aquilina highlighted the x-rays, stating that "based now on the x-ray evidence made available to me," he believed claimant suffers from pneumoconiosis and emphysema. Claimant's Exhibit 2 at 14-15.

1981 in connection with his initial application for benefits, diagnosed "chronic asthma by history," unrelated to coal dust exposure. Director's Exhibit 61.

The administrative law judge found that "what changed [Dr. Aquilina's] diagnosis was positive x-ray evidence," and accorded diminished weight to his opinion, finding that "[s]ince the radiologic diagnosis has been brought into question, Dr. Aquilina's diagnosis is suspect as well." Decision and Order at 5. The administrative law judge did not explain what he meant by the phrase "brought into question." An administrative law judge may not discredit a medical opinion merely because it relies on a positive x-ray interpretation that conflicts with the weight of the x-ray evidence. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *see also Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Here, the administrative law judge apparently discredited Dr. Aquilina's opinion based on his finding that the x-ray evidence was negative.[6] Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4).

Claimant also contends that the administrative law judge erred by discrediting the opinions of Drs. Fasciana and Weiss for failing to address the issue of whether claimant has asthma. Claimant's Brief at 11. The administrative law judge assigned diminished weight to the physicians' opinions because he found that "they do not address the question of bronchial asthma . . . ." Decision and Order at 6. The administrative law judge was apparently referring to the opinions of Drs. Lehman and Talati, who diagnosed bronchial asthma. Director's Exhibits 61, 71. Although an administrative law judge may assign less weight to the opinion of a physician who has an incomplete picture of the miner's health, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the administrative law judge in this case has not provided a rationale for crediting the opinions of the two physicians who diagnosed asthma. The administrative law

[6] The administrative law judge also discredited the opinions of Drs. Weiss and Fasciana in part because they "rel[ied] on positive chest x-ray evidence . . . ." Decision and Order at 6. In addition, the administrative law judge charged Dr. Aquilina with "selective reliance on certain x-ray interpretations." Decision and Order at 6. The specifics of this charge are unexplained. Dr. Aquilina testified that he considered a summary of the x-rays in the file which included negative readings. Claimant's Exhibit 2 at 8-10.

judge made no finding that claimant in fact suffers from asthma.[7] In the absence of such a foundation, the administrative law judge's weighing of the opinions of Drs. Fasciana and Weiss based on whether they addressed the possible existence of asthma is not supported by substantial evidence.[8] Therefore, we must remand this case for further proceedings.

On remand, before proceeding to the merits of entitlement the administrative law judge must determine whether the newly-submitted evidence establishes a material change in conditions pursuant to Section 725.309(d). *See Swarrow*, *supra*. If so, the administrative law judge must then determine whether all of the medical evidence supports a finding of entitlement. We instruct the administrative law judge to explain fully his weighing of the medical evidence.

[7] The medical evidence conflicts regarding claimant's family and individual medical history of asthma. Director's Exhibits 17, 19, 21, 61, 71.

[8] The administrative law judge committed the same error with respect to Dr. Aquilina's opinion. Decision and Order at 5-6.

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.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge