BRB No. 96-1169 BLA

DELPHIA MURPHY )
(Widow of JAMES MURPHY) )
)
Claimant-Petitioner )
)
v. )
)
JUSTICE and MURPHY COAL )
COMPANY )
)
and )
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
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 on Remand of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Benjamin C. Hall, Pikeville, Kentucky, for claimant.
Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, DOLDER and McGranery, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (81-BLA-6262) of

Administrative Law Judge Daniel J. Roketenetz 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). This case is before the Board for the fourth time. In its most recent Decision and Order, the Board held that the administrative law judge's previous finding that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) was the law of the case and that it precluded a finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(4). The Board then affirmed the administrative law judge's award of benefits. *Murphy v. Justice & Murphy Coal Co.*, BRB No. 92-0372 BLA (May 13, 1994)(unpub.). On reconsideration, the Board vacated the administrative law judge's finding of invocation pursuant to Section 727.203(a)(1) in light of the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) and remanded the case for further consideration pursuant to subsection (a)(1). *Murphy v. Justice & Murphy Coal Co.*, BRB No. 92-0372 BLA (Oct. 27, 1995)(unpub.).

On remand, the administrative law judge found that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in weighing the x-ray evidence pursuant to subsection (a)(1). Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.

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).

On appeal, claimant contends that the administrative law judge erred in weighing the x-ray evidence of record pursuant to Section 727.203(a)(1) by following the "long-standing unofficial head count approach to evaluate evidence." Claimant's Brief at 3. Claimant further contends that:

> The preponderance of the evidence does not mean solely counting the heads of B-Readers and Board Certified Radiologists. Consideration should also be given to the inequity of resources of a miner to those of the coal company and its insurance carriers. Credibility of a physician not only turns on his qualifications but the volume of his utilization by a particular class.

Claimant's Brief at 3.

In evaluating the evidence of record, the administrative law judge need not accept the opinion of any physician but must weigh all the evidence and draw his own conclusions and inferences. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Further, the administrative law judge must not rely solely on the quantity of x-ray readings on one side or the other, without reference to a difference in the qualifications of the experts. *See Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

In this case, the record contains fourteen interpretations of three x-rays. Director's Exhibits 11, 12, 17; Employer's Exhibits 1-5, 9. Dr. Brandon, a B-reader and board-certified radiologist, read a film dated January 13, 1978 as positive for pneumoconiosis, and Dr. Cole, also a B-reader and board-certified radiologist, read a film dated February 15, 1979, as positive for pneumoconiosis. Director's Exhibits 12, 17. The January 13, 1978 film was read as negative by Drs. Felson, Spitz, and Quillin, all B-readers and board-certified radiologists and the February 15, 1979 film was read as negative by Drs. Quillin and Spitz. Employer's Exhibits 1-5. Drs. Quillin, Felson, and Spitz also read a film dated July 5, 1979 as negative for pneumoconiosis. Dr. Kim, a board-certified radiologist, read the February 15, 1979 film as normal and Dr. O'Neill, a pulmonary specialist, read all three films as negative. Director's Exhibit 11; Employer's Exhibit 9.

The administrative law judge considered the positive and negative interpretations of the B-readers and board-certified radiologists, as well as the other interpretations of record, and permissibly found that the preponderance of the x-ray evidence is negative for the existence of pneumoconiosis. Decision and Order at 4; *Staton, supra; Lafferty, supra.* Because the administrative law judge considered the quantity of the of the evidence in light of the qualifications of the readers, we affirm his finding that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). Decision and Order at 4; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Staton, supra; Lafferty, supra*.

However, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises has held that where entitlement to benefits is not established under 20 C.F.R. Part 727, and the claim was filed before March 31, 1980 and adjudicated after that date, entitlement must be considered pursuant to 20 C.F.R. Part 718. *See Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). Thus, because the Board is not empowered to engage in a *de novo* review of the facts in this case, we vacate the denial of benefits and remand the

case for consideration of entitlement pursuant to 20 C.F.R. Part 718. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order on Remand 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.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge