BRB No. 04-0126 BLA

WILLIAM WESLEY SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARTIN COUNTY COAL CORPORATION	)	DATE ISSUED: 10/27/2004
	)	
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Stumbo, Moak & Nunnery, PSC), Prestonsburg, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2003-BLA-5085) of Administrative Law Judge Robert L. Hillyard 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). The administrative law judge found that this case involves the filing of a subsequent claim on May 9, 2001, pursuant to 20 C.F.R. §725.309.[1] Decision and Order at 2, 12-14. The administrative law judge then credited claimant with thirty years of coal mine employment and adjudicated the claim under 20 C.F.R. Part 718, based on claimant's May 9, 2001 filing date. Decision and Order at 4, 12. Addressing the merits of entitlement, the administrative law judge accepted employer's concession of the existence of pneumoconiosis and a totally disabling pulmonary impairment. Decision and Order at 4-5, 14. The administrative law judge then noted that the prior claim was denied because claimant failed to establish that he was totally disabled due to pneumoconiosis. Decision and Order at 13-14. Therefore, the administrative law judge found that in order to proceed to a *de novo* review of the entire medical record, claimant must establish that pneumoconiosis was a substantially contributing cause of claimant's total respiratory disability. Decision and Order at 14. However, the administrative law judge found the newly submitted medical opinion evidence insufficient to establish that pneumoconiosis was a substantially contributing factor to claimant's total disability. Decision and Order at 21. Consequently, he found that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). Accordingly, benefits were denied.

[1] The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

In this case, claimant's initial application for benefits was filed with the Social Security Administration (SSA) on May 16, 1973 and denied by SSA on April 10, 1979. Director's Exhibit 1. Claimant filed his first application for benefits with the Department of Labor (DOL) on July 29, 1977, and was awarded benefits in 1980. However, employer appealed the award and the claim was ultimately denied by the district director on March 2, 1985 because claimant failed to establish a total respiratory disability due to pneumoconiosis. *Id*.

Claimant filed a second claim with DOL on April 1, 1996, which was denied by the district director on August 27, 1996. *Id*. The claim was then transferred to the Office of Administrative Law Judges. Following a formal hearing, Administrative Law Judge Donald W. Mosser denied benefits in a Decision and Order issued April 20, 1998, finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment and, therefore, that the disability causation element was moot. *Id*. The Board affirmed Judge Mosser's denial of benefits. *Smith v. Martin County Coal Corp.*, BRB No. 98-1138 BLA (May 20, 1999)(unpub.); *Id*. Claimant filed his third and current claim on May 9, 2001. Director's Exhibit 3.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish that claimant's total respiratory disability was due to pneumoconiosis. Specifically, claimant contends that the administrative law judge erred in not crediting the medical opinions of Drs. Baker, Feinberg and Klein, which support a finding that total disability is due, at least in part, to pneumoconiosis. Claimant also contends that the administrative law judge erred in crediting the opinion of Dr. Zaldivar, arguing that the physician's opinion regarding the existence of pneumoconiosis is contrary to the administrative law judge's finding and, therefore, this is not a credible opinion. In response, employer urges affirmance of the administrative law judge's denial of benefits.

The Director, Office of Workers' Compensation Programs (the Director), has submitted a Motion to Remand requesting that the Board remand this case to the administrative law judge because he did not properly consider the medical evidence of record and he did not conduct the hearing in accordance with the regulations. Initially, the Director agrees with claimant that the administrative law judge erred in his consideration of the medical opinions of Drs. Baker and Zaldivar and, therefore, requests that the case be remanded for the administrative law judge to reassess these opinions. In addition, the Director contends that the case must be remanded for the administrative law judge to render a specific finding regarding the admission of medical evidence in excess of the regulatory limitations set forth at 20 C.F.R. §725.414, arguing that the parties are not empowered to waive these limitations by agreement. In response to the Director's Motion to Remand, employer requests that the motion be stricken as untimely filed with the Board.[2] In the alternative, employer submits a reply brief addressing the arguments raised in the Director's Motion to Remand.

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. 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).

The Director contends that the administrative law judge erred in failing to render a specific finding regarding the evidentiary limitations pursuant to 20 C.F.R. §§725.414 and 725.456(b)(1). The Director argues there is no provision in the regulations which would allow the parties to waive the evidentiary limitations set forth at Section 725.414;

[2] By Order dated March 30, 2004, the Board denied employer's Motion to Strike and accepted the Director's Motion to Remand as its response brief. In addition, the Board accepted employer's additional submission as its Reply brief. *Smith v. Martin County Coal Corp.*, BRB No. 04-0126 BLA (Mar. 30, 2004)(Order)(unpub.).

rather, the administrative law judge must find that "good cause" exists for the admission of any medical evidence exceeding the regulatory limitations. This contention has merit.

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. The regulations further provide that "notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

At the formal hearing in this case, claimant and employer agreed to waive the regulatory limitations on the submission of medical evidence, stating that each waived any limits which were exceeded by the other party, provided that the other party likewise waived the restrictions of the evidentiary limitations. Hearing Transcript at 8-9. The administrative law judge accepted into the record all proffered evidence with no further discussion. Hearing Transcript at 9.

However, unlike Section 725.456(b)(3) which allows the parties to waive the 20-day requirement, Section 725.456(b)(1) does not provide for parties to waive the regulatory limitations on medical evidence submitted in fulfillment of Section 725.414. *Compare* 20 C.F.R. §725.456(b)(1) with 20 C.F.R. §725.456(b)(3). Thus, while Section 725.456(b)(3) allows the parties to waive the requirement that documentary evidence must be submitted to all other parties at least 20 days prior to the formal hearing, Section 725.456(b)(1) does not provide a comparable waiver provision for evidence submitted under Section 725.414. Rather, Section 725.456(b)(1) specifically states that medical evidence submitted in excess of the Section 725.414 limitations "shall not be admitted

into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Herein, claimant and employer agreed to waive the regulatory limitations, and the administrative law judge accepted their waiver without rendering the requisite finding of whether there was good cause for admitting the medical evidence in excess of the Section 725.414 limitations. Consequently, the administrative law judge's Decision and Order is vacated and the case is remanded to the administrative law judge for further proceedings pursuant to Sections 725.414 and 725.456(b)(1); *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

On remand, the parties must present their evidence as delineated in Section 725.414, setting forth the evidence submitted as their case-in-chief , 20 C.F.R. §725.414 (a)(2)(i), (a)(3)(i), (a)(3)(iii), as well as the medical evidence submitted as rebuttal and rehabilitative evidence, 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(2), (a)(3). The administrative law judge may then, within his discretion, admit any medical evidence submitted in excess of these limitations, pursuant to a finding that the party submitting the evidence has established "good cause" for the submission of the additional evidence. 20 C.F.R. §725.456(b)(1); *Dempsey*, 23 BLR at 1-61-62.

Although this case must be remanded for the administrative law judge to render a specific "good cause" determination pursuant to Section 725.456(b)(1), in the interest of judicial economy, we will address certain of the errors committed by the administrative law judge in his consideration of the "newly submitted" medical opinion evidence pursuant to Section 718.204(c). The administrative law judge stated that Dr. Baker's professional credentials were not listed as part of the record. Decision and Order at 16. However, the professional qualifications of Dr. Baker are set forth in the letterhead associated with the submissions accompanying his July 21, 2001 medical report. *See* Director's Exhibit 11.

The administrative law judge also stated that there was no credible evidence linking claimant's total respiratory disability and his coal workers' pneumoconiosis, specifically noting that Dr. Baker's opinion is "silent as to causation." Decision and Order at 20-21. The administrative law judge based this determination on his conclusion that because Dr. Baker did not diagnose total respiratory disability, his opinion could not establish the cause of claimant's total disability. Decision and Order at 17. However, Dr. Baker did diagnose a mild impairment due to claimant's coal dust exposure and coal workers' pneumoconiosis, 2/1. Director's Exhibit 11. Inasmuch as the administrative law judge has accepted employer's concession of a totally disabling respiratory impairment, Decision and Order at 4, 14, the issue is no longer the extent of the disability but rather the cause of claimant's total respiratory disability. *See* 20 C.F.R. §718.204(c); *see generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988). Thus, the administrative law judge erred in stating that there was no evidence in the

record sufficient to establish the link between claimant's total respiratory disability and his pneumoconiosis. On remand, the administrative law judge must take Dr. Baker's assessment into account in his weighing of the relevant evidence under Section 718.204(c).

As the Director contends, the administrative law judge has not adequately considered the entirety of Dr. Zaldivar's medical opinion. Specifically, Dr. Zaldivar opined that claimant's total respiratory disability was strictly restrictive in nature and, therefore, could not be due to coal workers' pneumoconiosis. Decision and Order at 16; Director's Exhibit 13; Employer's Exhibit 16. However, the regulations recognize that pneumoconiosis can cause either a restrictive or an obstructive impairment and, therefore, the administrative law judge must take this conflict with Dr. Zaldivar's opinion into consideration in his weighing of the relevant medical evidence at Section 718.204(c) and specifically discuss whether it affects the credibility of the physician's opinion. 20 C.F.R. §§718.201(a)(2), 718.204(c)(1). Consequently, on remand, the administrative law judge must more fully discuss the relevant medical evidence of record in determining whether claimant has established that pneumoconiosis is a substantially contributing cause of claimant's total respiratory disability. 20 C.F.R. §718.204(c); *see Cornett*, 227 F.3d 569, 22 BLR 2-107; *see also Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge