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BRB No. 05-0570 BLA

RONNIE BRASHER	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
PLEASANT VIEW MINING COMPANY, INCORPORATED	)	DATE ISSUED: 04/28/2006
	)	
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 and Decision and Order on Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Thomas M. Rhoads (Rhoads & Rhoads, P.S.C.), Madisonville, Kentucky, for claimant.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Employer appeals the Decision and Order (03-BLA-5520) and Decision and Order on Reconsideration (03-BLA-5520) of Administrative Law Judge Thomas F. Phalen, Jr. awarding 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 involves a claim filed on February 7, 2001. After crediting claimant with thirty years of coal mine employment, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer subsequently filed a motion for reconsideration, contending that the administrative law judge erred in excluding certain evidence from the record. In a Decision and Order on Reconsideration dated March 15, 2005, the administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in excluding all of its evidence in certain categories based upon the fact that it submitted evidence that exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer argues that it should have been afforded an opportunity to establish "good cause" for submitting evidence in excess of the evidentiary limitations. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, contending that where a party submits excess evidence and fails to argue that "good cause" exists for its submission, an administrative law judge may properly find that the "good cause" issue has been waived. However, under the facts of this case, the Director contends that the administrative law judge's wholesale exclusion of evidence was too severe a penalty for employer's failure to identify which evidence it intended to submit in support of its affirmative case, and in rebuttal of the evidence submitted by claimant. Consequently, the Director requests that the Board vacate the administrative law judge's award of benefits and remand the case for further consideration.

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).

Employer argues that the administrative law judge erred in excluding all of its evidence in certain categories, based upon the fact that it submitted evidence that

exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414.[1] At the hearing, the administrative law judge admitted all of the evidence submitted by the parties without addressing whether the evidence was in compliance with the evidentiary limitations set forth at 20 C.F.R. §725.414.[2] However, in his 2004 Decision and Order, the administrative law judge excluded certain evidence because it exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. *See* Decision and Order at 5-6.

Employer subsequently filed a motion for reconsideration. Citing *Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004), employer argued that an administrative law judge, at a formal hearing, is required to provide the parties an opportunity to present their evidence and to identify their affirmative, rebuttal and rehabilitative evidence. Employer further argued that an administrative law judge is required to permit the parties an opportunity to present argument and rationale as to why "good cause" exists for the admission of evidence in excess of the evidentiary restrictions. Employer argued that the administrative law judge, in his decision, excluded some of its evidence as exceeding the evidentiary limitations set forth at Section 725.414 without affording it an opportunity to

[1]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), (a)(3)(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.* "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).

[2]The administrative law judge admitted into evidence Director's Exhibits 1-40, Claimant's Exhibits 1-2 and Employer's Exhibits 1-6. Transcript at 6-9.

present argument regarding whether "good cause" existed for the submission of the evidence. Employer, therefore, argued that the administrative law judge effectively deprived it of its due process rights.

In a Decision and Order on Reconsideration dated March 15, 2005, the administrative law judge agreed with employer that the parties must be provided an opportunity to show "good cause" for the admission of evidence that exceeds the limitations set forth at Section 725.414. However, in this case, the administrative law judge found that the parties had been provided with multiple opportunities to present their rationale for why "good cause" existed for the admission of medical evidence that exceeded the limitations of Section 725.414, but had failed to do so. The administrative law judge noted that claimant and employer each submitted Black Lung Benefits Act Evidence Summary Forms. The administrative law judge noted that both of the submissions included evidence that exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. The administrative law judge stated that:

> It is not the undersigned's responsibility to point out every opportunity where a party should argue its rights. In this claim, the Employer chose to exceed the limitations and made no attempt to justify its actions until it was too late. Therefore, I find that the Employer has not been deprived of due process, but instead chose not to assert its right to argue for the inclusion of more evidence than was allowed, thus, waiving its ability to later contest the exclusions by the undersigned.

Decision and Order on Reconsideration at 2. The administrative law judge, therefore, denied employer's motion for reconsideration.

On appeal, employer initially argues that the administrative law judge should have provided it with an opportunity to demonstrate "good cause" for its submission of evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director disagrees, arguing that "if a party submits excess evidence and fails to argue good cause for its submission, [an administrative law judge] may properly consider the good cause issue waived." Director's Brief at 4.

The comments to the regulations provide that:

> A showing of "good cause" is necessary only in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony.

65 Fed. Reg. 80000 (Dec. 20, 2000). Thus, if employer wanted to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it was required to make a showing of "good cause" for its submission. In this case, employer did not attempt to make such a showing. Consequently, we affirm the administrative law judge's determination that the "good cause" issue was waived.[3]

Employer next argues that the administrative law judge erred in excluding all of its evidence in certain categories merely because employer submitted evidence in excess of that permitted by the regulations. We agree. Although Section 725.456(b)(1) provides that medical evidence in excess of the limitations contained in Section 725.414 shall not be admitted into the hearing record in the absence of good cause, the regulations do not authorize an administrative law judge to exclude properly submitted evidence based upon

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[3]The administrative law judge properly found that employer's reliance upon *Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004) is misplaced. In *Smith*, the administrative law judge permitted the parties to waive the evidentiary limitations set forth at 20 C.F.R. §725.414. However, in reviewing the case, the Board held that Section 725.456(b)(1) does not provide for the parties to waive the evidentiary limitations imposed by Section 725.414. In remanding the case, the Board instructed the administrative law judge to allow the parties to present their evidence as delineated in Section 725.414, setting forth the evidence submitted as their case-in-chief, as well as the medical evidence submitted as rebuttal and rehabilitative evidence. The Board further noted that:

> 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.

Smith, 23 BLR at 1-74-75 (emphasis added).

Notably, the Board did not hold that the administrative law judge was obligated *sua sponte* to conduct an independent assessment as to whether or not "good cause" justified the admission of evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414.

the fact that a party has submitted excessive evidence. Consequently, an administrative law judge should not exclude all of a party's submitted evidence merely because that party submits evidence that exceeds the limitations set forth at 20 C.F.R. §725.414.

In this case, the administrative law judge excluded all of the arterial blood gas studies submitted by claimant and employer because each of these parties submitted three arterial blood gas studies in support of their affirmative cases, instead of the two studies permitted under 20 C.F.R. §725.414.[4] Decision and Order at 5-6; *see* Claimant's Exhibit 2; Employer's Exhibit 6. The administrative law judge erred in not allowing claimant and employer to submit two arterial blood gas studies in support of their respective affirmative cases.

The administrative law judge also excluded all of employer's medical opinion evidence because he found that employer submitted more than the two medical opinions permitted under Section 725.414. Decision and Order at 5. Employer submitted, as its affirmative evidence, Dr. Malampalli's August 23, 2000 report, Dr. Broudy's July 2, 2001 report, Dr. Broudy's January 7, 2002 report and Dr. Broudy's January 11, 2002 supplemental report. *See* Employer's Exhibit 6. Employer also submitted Dr. Broudy's October 9, 2001 deposition testimony and Dr. Broudy's February 25, 2003 deposition testimony. *Id.*

Under the facts of this case, the administrative law judge permissibly found that Dr. Broudy's 2001 and 2002 physical examination reports constitute two separate medical reports for purposes of employer's affirmative case evidentiary limitations.[5] Where a physician's reports constitute two separate written assessments of the claimant's pulmonary condition at two different times, an administrative law judge may properly decline to construe them as a single medical report under the evidentiary limitations. Consequently, the administrative law judge properly found that employer, by submitting Dr. Malampalli's report and two reports from Dr. Broudy, exceeded the evidentiary

[4]Claimant and employer each submitted, as affirmative evidence, the results of claimant's arterial blood gas studies conducted on August 23, 2000, July 2, 2001 and January 7, 2002. Director's Exhibits 18, 23; Employer's Exhibit 4.

[5]Employer also submitted, as part of its affirmative evidence, Dr. Broudy's January 11, 2002 supplemental report. On remand, the administrative law judge is instructed to address the admissibility of Dr. Broudy's supplemental report and the weight to be given to it.

limitations set forth at Section 725.414.[6] However, the administrative law judge erred in not allowing employer to submit two medical reports in support of its affirmative case.

Employer submitted two x-ray interpretations in rebuttal of Dr. Majmudar's positive interpretation of claimant's April 4, 2001 x-ray (submitted as part of the Department of Labor-sponsored pulmonary evaluation). Employer submitted negative interpretations of this x-ray rendered by Drs. Broudy and Wiot. *See* Director's Exhibit 11A; Employer's Exhibit 2. The administrative law judge correctly noted that employer was entitled to submit only one x-ray interpretation in rebuttal to Dr. Majmudar's x-ray interpretation. Thus, the administrative law judge correctly found that employer submitted an excessive number of x-ray interpretations as its rebuttal evidence. *See* Decision and Order at 6. However, the administrative law judge erred in not allowing employer to submit one of its x-ray interpretations in rebuttal to Dr. Majmudar's positive interpretation of claimant's April 4, 2001 x-ray.[7]

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[6]The administrative law judge also erred in excluding Dr. Broudy's deposition testimony. Section 725.414(c) provides, in relevant part, that:

> A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this subsection. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of §725.456 of this part.

20 C.F.R. §725.414(c).

[7]Employer contends that it submitted only one x-ray interpretation in rebuttal of Dr. Majmudar's positive interpretation of claimant's April 4, 2001 x-ray, namely, Dr. Wiot's negative interpretation of this film. Employer's Brief at 16. The Director contends that employer is mistaken since it also submitted Dr. Broudy's negative interpretation of this x-ray. Director's Brief at 5; *see* Director's Exhibit 11A. The Director, Office of Workers' Compensation Programs (the Director), construes employer's statement to mean that it now relies solely upon Dr. Wiot's x-ray interpretation as its rebuttal evidence. Director's Brief at 5. The Director also contends that "[b]ecause the [administrative law judge] found the chest x-ray evidence to be negative, on balance, any error in this regard appears harmless." *Id.* However, because

On remand, the administrative law judge must allow for the consideration of evidence that complies with the evidentiary limitations set forth at 20 C.F.R. §725.414.

Employer also contends that the administrative law judge erred in admitting Dr. Chavda's deposition testimony in light of the doctor's reliance upon the results of objective studies that were not admitted into the record. The regulations do not specify what is to be done with a medical report that references inadmissible evidence. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). However, in a recent case, the Board considered the treatment that an administrative law judge should afford admissible evidence which contains references to evidence that has been excluded as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414. *See Harris v. Old Ben Coal Co.*, BLR , BRB No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). Because the regulations do not contain a provision regarding the appropriate treatment of such evidence, the Board held that the weight to be accorded such evidence is committed to an administrative law judge's discretion. *Harris*, slip op. at 6. Consequently, the administrative law judge, on remand, is instructed to address whether Dr. Chavda relied upon inadmissible evidence and, if so, the weight that should be accorded his opinion.[8]

Employer also argues that the administrative law judge erred in admitting the x-ray interpretations rendered by Drs. Lane and Goldwin because the original x-ray films had not been submitted to the district director as required by 20 C.F.R. §718.102(d).[9]

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the case must be remanded to the administrative law judge for his reconsideration of which evidence is admissible, it is not clear whether the administrative law judge's error is harmless. Moreover, if a physician has relied upon inadmissible x-ray evidence in rendering his opinion, it could affect the weight that the administrative law judge accords to the opinion. *See Harris v. Old Ben Coal Co.*, BLR , BRB No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting).

[8]If the administrative law judge, on remand, determines that Dr. Chavda relied upon inadmissible evidence, he has several available options for addressing his opinion, including excluding his report, redacting the objectionable content, asking the physician to submit a new report, or factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *See Harris, supra*. We note, however, that exclusion is not a favored option, because it results in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

[9]Section 718.102(d) provides, in relevant part, that:

> The original film on which the X-ray report is based shall be supplied to the Office, unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties.

Claimant submitted Dr. Lane's positive interpretation of an April 15, 1996 x-ray and Dr. Goldwin's positive interpretation of an August 23, 2000 x-ray. Director's Exhibit 23. In a Proposed Decision and Order dated September 14, 2002, the district director noted that these x-ray interpretations had been excluded from consideration pursuant to 20 C.F.R. §718.102(d) because the original x-ray film had not been submitted. Director's Exhibit 34. At the hearing, the administrative law judge admitted the x-ray interpretations rendered by Drs. Lane and Goldwin into the record without objection. In its post-hearing brief, employer noted that the x-ray films interpreted by Drs. Lane and Goldwin had not been made available for re-reading and cross-examination.

In his Decision and Order, the administrative law judge admitted these two x-ray interpretations as claimant's affirmative x-ray evidence without addressing employer's post-hearing argument. On remand, the administrative law judge is instructed to address whether Dr. Lane's positive interpretation of an April 15, 1996 x-ray and Dr. Goldwin's positive interpretation of an August 23, 2000 x-ray should be excluded pursuant to 20 C.F.R. §718.102(d) on the basis that claimant did not make the original films of these x-rays available for review.[10]

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20 C.F.R. §718.102(d).

[10]The Director argues that the administrative law judge's error in considering this x-ray evidence is harmless since he found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis. Director's Brief at 6. However, if this evidence is not part of the record, the administrative law judge could accord less weight to the opinions of those physicians who relied upon it.

Finally, we note that the administrative law judge properly admitted the results of claimant's April 4, 2001 pulmonary function study as part of the Department of Labor sponsored complete pulmonary evaluation. 20 C.F.R. §725.406; Decision and Order at 5; Director's Exhibit 7. However, the administrative law judge also admitted, on behalf of the Director, a second pulmonary function study conducted on May 16, 2001. *See* Decision and Order at 5; Director's Exhibit 9. The administrative law judge did not provide a basis for its admissibility.[11] Consequently, we instruct the administrative law judge, on remand, to reconsider the admissibility of this evidence.

In light of the foregoing, we vacate all of the administrative law judge's findings on the merits and remand the case to the administrative law judge for reconsideration of which evidence is properly admissible in light of the evidentiary limitations set forth at 20 C.F.R. §725.414. After rendering findings as to which evidence is properly admitted, the administrative law judge is instructed to reconsider claimant's entitlement to benefits.

[11]In cases in which the district director has not identified any potentially responsible operators, or has dismissed all potentially responsible operators, the district director is entitled to exercise the rights of a responsible operator under Section 725.414. *See* 20 C.F.R. §725.414(a)(3)(iii). However, in this case, a responsible operator has been designated. Consequently, the district director is not entitled to exercise the rights of a responsible operator, *i.e.*, the right to submit two pulmonary function studies as affirmative evidence.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration awarding benefits are vacated and the case is remanded 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