BRB No. 05-0705 BLA

WARREN WAYNE WELLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY, INCORPORATED	)	
	)	
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 04/27/2006
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (03-BLA-6184) of Administrative Law Judge Thomas F. Phalen, Jr. on a miner's subsequent 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). Initially, the administrative law judge credited claimant[1] with thirty-two years of coal mine employment based on the parties' stipulation, Hearing Transcript 9-10. Decision and Order at 3. The administrative law judge excluded from his consideration Dr. Jarboe's November 25, 2003 report submitted by employer. *Id.* at 5. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found, based on the newly submitted evidence, that claimant established the existence of pneumoconiosis and, thus, a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §§725.309, 718.202(a)(4). *Id.* at 13. Considering all of the medical evidence of record, the administrative law judge found that claimant established that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) and that his total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *Id.* at 14-19. Accordingly, the administrative law judge awarded benefits, commencing July 2001. *Id.* at 19.

On appeal, employer asserts that the administrative law judge erred in excluding Dr. Jarboe's November 25, 2003 report from his consideration. Employer's Brief at 10-13. Employer also contends that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to Sections 718.202(a) and 718.204(c). *Id.* at 13-25. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief in which he addresses the administrative law judge's exclusion of Dr. Jarboe's 2003 report from the record.[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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

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[1]Claimant is Warren Wayne Wells, the miner, who filed his present claim for benefits on July 16, 2001. Director's Exhibit 3. Claimant's first claim, filed on May 27, 1998, was finally denied by a Department of Labor claims examiner on September 25, 1998 for failure to show the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 1.

[2]We affirm the administrative law judge's finding of thirty-two years of coal mine employment and his finding that the new evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3) as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We additionally affirm, as unchallenged, the administrative law judge's finding that all of the evidence of record establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.*

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially asserts that the administrative law judge erred in excluding Dr. Jarboe's November 25, 2003 report from the record. Dr. Jarboe's November 2003 report was attached, as "Exhibit 1," to this physician's May 15, 2004 deposition. *See* Employer's Exhibit 1. The administrative law judge stated that at the hearing employer identified Dr. Jarboe's 2004 deposition as Employer's Exhibit 1. Decision and Order at 5. The administrative law judge noted that Dr. Jarboe's 2003 report was included as part of the record because it was attached, as Exhibit 1, to this physician's deposition. However, the administrative law judge further noted that although employer summarized Dr. Jarboe's 2004 deposition as initial evidence on its summary form, it did not also "mention" the attached 2003 report. *Id.* Thus, the administrative law judge stated that he would not consider Dr. Jarboe's 2003 report because he found that employer intended only to include Dr. Jarboe's deposition as evidence, since employer did not "mention" Dr. Jarboe's 2003 report on its evidence summary form, or at the hearing. *Id.*

Employer's contention regarding the administrative law judge's exclusion of Dr. Jarboe's 2003 report has merit. Although an administrative law judge is given broad discretion to handle procedural matters, on the facts of this case, the administrative law judge's determination that it is "apparent that Employer intended to include only Dr. Jarboe's deposition as evidence to be considered in this claim" is irrational. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). First, as employer notes in its brief, the fact that employer did not specifically identify Dr. Jarboe's 2003 written report when describing Employer's Exhibit 1 at the hearing is inconsequential, since Dr. Jarboe's written report was attached to the transcript as a deposition exhibit. Second, contrary to the administrative law judge's statement, employer *did* mention Dr. Jarboe's 2003 report in its evidence summary form. Specifically, on page five of employer's evidence summary form, Dr. Jarboe's deposition is listed as one of the two medical reports submitted as employer's initial evidence, pursuant to 20 C.F.R. §725.414(a)(3)(i). Employer's Exhibit 4. In the comments section in the listing for Dr. Jarboe's deposition, employer noted "On 5-14-04, Dr. Jarboe, gave testimony to clarify his report dated 11-25-03 regarding review of claimant's medical records." *Id.* Based on the foregoing, it is apparent that employer intended to submit into the record Dr. Jarboe's November 25, 2003 report. Thus, the administrative law judge erred in finding that employer intended only to include this physician's deposition as evidence.

Moreover, the regulations do not require that a physician's report be contained in a single document. Section 725.414(a)(1) states that "a medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed

the available admissible evidence." In accordance with Section 725.414(c), "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing. . .or by deposition." A physician who has not prepared an admissible report may also testify pursuant to 20 C.F.R. §725.457(c)(2), provided that "the party offering the physician's testimony has submitted fewer medical reports than permitted by §725.414." In such a case, the "physician's opinion shall then be considered a medical report subject to the limitations of §725.414." 20 C.F.R. §725.457(c)(2). Therefore, in the instant case, consistent with the regulations, it was not reasonable for the administrative law judge to have assumed that employer intended only to submit Dr. Jarboe's deposition and not to also submit Dr. Jarboe's 2003 report, which was attached to the transcript as a deposition exhibit.

The administrative law judge gave two additional grounds for excluding Dr. Jarboe's 2003 opinion from the record later in his decision, stating that, even if employer had designated Dr. Jarboe's 2003 opinion as evidence, he still would be "unable to consider it for purposes of determining pneumoconiosis under subsection (a)(4)" because "Dr. Jarboe based his conclusions concerning pneumoconiosis on several reports that have not been admitted into evidence in this claim, and would exceed the limitations…[and that Dr. Jarboe] further relies on a number of reports that proceeded [sic] the instant claim." *Id.* at 13 n.8. As employer and the Director assert, the administrative law judge's determination not to consider Dr. Jarboe's 2003 report because it was based on evidence that preceded the instant claim is contrary to the revised regulations. While Dr. Jarboe *did* rely on evidence from claimant's previous claim in rendering an opinion in his 2003 report, such reliance is proper pursuant to Section 725.309(d)(1), which provides that evidence admitted in prior federal claims is part of the record in subsequent claims. As the Director states:

> "[w]hile the ALJ attempted to distinguish between the admissibility of prior-claim evidence for purposes of determining the merits of a subsequent claim (admissible according to the ALJ) and the admissibility of such evidence for determining whether there has been [a change in one of the applicable conditions of entitlement] (inadmissible according to the ALJ), the regulation makes no such distinction."

Director's Brief at 2. Therefore, the administrative law judge could not properly reject Dr. Jarboe's 2003 report based on his review of, and reliance on, the evidence contained in claimant's prior claim.

The administrative law judge provided a second basis for not considering Dr. Jarboe's conclusions regarding the existence of pneumoconiosis, expressed in his 2003 report. Specifically, the administrative law judge determined that Dr. Jarboe's opinion

could not be considered because his conclusions were based on evidence that was not admitted into the record in claimant's present claim.[3] The administrative law judge did not specify the inadmissible evidence upon which Dr. Jarboe relied. However, by comparing the evidence from Dr. Jarboe's 2003 report and the excluded evidence listed in the administrative law judge's Decision and Order, it appears likely that this evidence is Dr. Wiot's negative reading of the February 21, 2002 x-ray and Dr. Hudson's deposition transcript. The administrative law judge excluded Dr. Wiot's negative x-ray reading and Dr. Hudson's deposition transcript because employer did not move to admit this evidence into the record at the hearing. *Id.* at 5. On appeal, employer does not challenge the administrative law judge's exclusion of Dr. Wiot's negative reading of the February 21, 2002 x-ray and Dr. Hudson's deposition transcript.

The regulation at Section 725.414(a)(3)(i) states that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physician's opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." Section 725.414(a)(3)(i) does not require that a medical report that contains inadmissible evidence also be deemed inadmissible, but insures that parties cannot exceed the limitations by submitting excess test results as part of a physician's report. In appropriate circumstances, an administrative law judge may admit a report containing inadmissible evidence, but must determine whether the physician's consideration of the inadmissible evidence affects the weight to be given to that report. *See Harris v. Old Ben Coal Co.*, BLR , BRB No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). In the present case, the administrative law judge did not explain his reasoning for not considering Dr. Jarboe's conclusions regarding the existence of pneumoconiosis contained in his 2003 report. The administrative law judge simply determined that Dr. Jarboe's 2003 conclusions regarding the existence of pneumoconiosis cannot be considered because they are based on evidence that was not admitted into the record. Because it is unclear, without further elaboration, whether the administrative law judge properly did not consider Dr. Jarboe's November 25, 2003 findings regarding pneumoconiosis, we vacate the administrative law judge's determination not to consider this physician's report pursuant to Section 718.202(a)(4) and instruct the administrative

[3]In considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that he had previously *excluded* Dr. Jarboe's 2003 report because employer had not designated it as evidence. The administrative law judge further noted that he *would not be able to consider* Dr. Jarboe's 2003 report regarding the existence of pneumoconiosis because Dr. Jarboe's "conclusions concerning pneumoconiosis [are based on] several reports that have not been admitted into evidence, and would exceed the limitations. . . . Also, Dr. Jarboe further relies on a number of reports that proceeded [sic] the instant claim." Decision and Order at 13 n.8.

law judge, on remand, to clarify his rationale regarding this determination. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Specifically, we instruct the administrative law judge to identify, on remand, which inadmissible evidence, if any, Dr. Jarboe relied upon in formulating his conclusions regarding the existence of pneumoconiosis, prior to determining whether to consider Dr. Jarboe's 2003 report pursuant to Section 718.202(a)(4).

Regarding the existence of pneumoconiosis, employer asserts that the administrative law judge improperly weighed the medical opinion evidence pursuant to Section 718.202(a)(4). At Section 718.202(a)(4), the administrative law judge reviewed the newly submitted opinions of Dr. Rasmussen, who found the existence of pneumoconiosis, and Drs. Hudson and Jarboe, who did not find the existence of pneumoconiosis. Decision and Order at 12-13. In considering Dr. Jarboe's opinion, the administrative law judge noted that this physician's opinion is limited to his deposition because employer did not designate Dr. Jarboe's November 25, 2003 report as part of its evidence to be considered. *Id.* at 13. The administrative law judge placed "no weight" on Dr. Jarboe's opinion because he found that "Dr. Jarboe's deposition testimony was limited to discussing how he was able to rule out pneumoconiosis as a cause of [claimant's] disability. . .and did not directly address why he believed [claimant] does not suffer from pneumoconiosis." *Id.* The administrative law judge noted that Dr. Jarboe explained, in his 2003 report, his reasoning as to why claimant did not suffer from pneumoconiosis, but the administrative law judge further noted that because he had excluded it from the record, the 2003 report could not be considered at Section 718.202(a)(4). *Id.* at 13 n.8. The administrative law judge found the remaining opinions of Drs. Hudson and Rasmussen to be well documented and reasoned. However, the administrative law judge concluded that Dr. Rasmussen's opinion was "more probative" than Dr. Hudson's opinion because Dr. Rasmussen's "finding is supported by the readings of a dually certified radiologist/B-reader." *Id.* Therefore, the administrative law judge found that claimant established the existence of pneumoconiosis and a change in one of the applicable conditions of entitlement pursuant to Sections 725.309 and 718.202(a)(4). *Id.*

We have previously instructed the administrative law judge, on remand, to reconsider his exclusion of Dr. Jarboe's 2003 report. Because the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4) was affected by his exclusion of Dr. Jarboe's 2003 report, we vacate the administrative law judge's findings that claimant established the existence of pneumoconiosis and a change in one of the applicable conditions of entitlement pursuant to Sections 725.309 and 718.202(a)(4), and remand this case for him to reconsider these issues.

Regarding Section 718.202(a)(4), employer asserts that the administrative law judge failed to explain how Dr. Rasmussen's diagnosis of pneumoconiosis can be considered to be supported by the x-ray readings of Dr. Patel, who is a dually-qualified reader. In considering the newly submitted x-ray evidence regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge considered Dr. Patel's positive reading of the February 21, 2002 x-ray, associated with Dr. Rasmussen's first examination. Decision and Order at 11. The administrative law judge noted that Dr. Patel had indicated on the 2002 x-ray that it was a "quality 3." *Id.* The administrative law judge noted "[i]f a physician marks an x-ray as quality 3, the x-ray study may be accorded little or no probative value as it is of very poor quality," and, therefore, accorded less weight to Dr. Patel's reading of the 2002 x-ray. *Id.* The administrative law judge also considered Dr. Patel's positive reading of the February 20, 2003 x-ray, associated with Dr. Rasmussen's second examination, in conjunction with Dr. Wiot's negative reading of this same x-ray. The administrative law judge found the 2003 x-ray to be negative because claimant did not establish the existence of pneumoconiosis based on that x-ray by a preponderance of the evidence. *Id.* In considering the conflicting opinions of Drs. Rasmussen and Hudson pursuant to Section 718.202(a)(4), the administrative law judge concluded that Dr. Rasmussen's opinion of pneumoconiosis was "more probative" than Dr. Hudson's negative opinion because Dr. Rasmussen's finding "is supported by the readings of a dually certified radiologist/B-reader," Dr. Patel. *Id.* at 13.

As employer contends, it is unclear, without further elaboration, why the administrative law judge accorded more probative weight to Dr. Rasmussen's opinion of pneumoconiosis over Dr. Hudson's negative opinion, based on Dr. Patel's readings of the 2002 and 2003 x-rays, given the administrative law judge's previous findings at Section 718.202(a)(1) regarding Dr. Patel's positive readings: Namely, the administrative law judge gave less weight to Dr. Patel's 2002 x-ray reading because it was of poor quality and found that the 2003 x-ray is negative, in spite of Dr. Patel's positive reading, because claimant failed to establish the existence of pneumoconiosis based on that x-ray by a preponderance of the evidence. *See generally Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (a factfinder is required to examine the validity of the reasoning of a medical opinion in light of the studies upon which the opinion is based); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984) (evidence which calls into question the reliability of the tests upon which a physician's opinion is based is relevant to determining whether a report is documented and reasoned). Accordingly, we instruct the administrative law judge, on remand, to reconsider the conflicting opinions of Drs. Rasmussen and Hudson and provide a more detailed analysis in weighing these physicians' opinions. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

In considering the evidence at Section 718.203(b), the administrative law judge found that claimant is entitled to the rebuttable presumption set forth at this section

because he has established over ten years of coal mine employment. Decision and Order at 14. The administrative law judge found that claimant's pneumoconiosis arose out of his coal mine employment because employer failed to sufficiently rebut the presumption at Section 718.203(b). *Id.* In light of our instructions to the administrative law judge that he reconsider his exclusion of Dr. Jarboe's 2003 opinion and reevaluate his weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), we also instruct the administrative law judge to reconsider all the relevant evidence regarding whether claimant's pneumoconiosis arose out of his coal mine employment, if the issue is again reached on remand. 20 C.F.R. §718.203(b).

Pursuant to Section 718.204(c), the administrative law judge considered all of the evidence of record and found that claimant established total disability due to pneumoconiosis. Decision and Order at 18-19. In doing so, the administrative law judge discounted the theories of Drs. Hudson and Jarboe on disability causation because neither physician diagnosed pneumoconiosis. *Id.* at 18. Because we instruct the administrative law judge, on remand, to reevaluate his exclusion of Dr. Jarboe's 2003 opinion[4] and his weighing of the medical opinion evidence regarding the existence of pneumoconiosis, and because these determinations affected his weighing of the evidence on the issue of disability causation, we vacate the administrative law judge's 20 C.F.R. §718.204(c) finding. If the issue of disability causation is again reached on remand, we instruct the administrative law judge to consider all the relevant evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis, 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), and to explain the rationale for his conclusions, *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Finally, because we vacate the administrative law judge's weighing of the evidence at Sections 718.202(a), 718.203(b), and 718.204(c), we also vacate the administrative law judge's finding regarding the date of entitlement and instruct the administrative law judge to reconsider this issue, if reached, on remand.

[4]As employer points out in its brief, Dr. Jarboe further explained his rationale for attributing claimant's disability to his asthma and cigarette smoking in his 2003 opinion.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge