BRB No. 07-0623 BLA

B.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/30/2008
	)	
TOPPER COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, P.S.C., Pikeville, Kentucky, for claimant.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (04-BLA-6482) of Administrative Law Judge Larry S. Merck rendered 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). Claimant filed this claim on October 28,

2002. Director's Exhibit 2. The administrative law judge initially found that the claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge admitted Dr. Baker's reports dated March 13 and August 1, 2006 as Claimant's Exhibits 4 and 7, respectively, pursuant to 20 C.F.R. §725.414. The administrative law judge credited claimant with at least eighteen years of coal mine employment, as stipulated by the parties.[1] Decision and Order at 3, 5; Hearing Transcript (Tr.) at 11, 24. The administrative law judge found that although the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the medical opinion evidence established that claimant's chronic lung disease is due in part to coal mine dust exposure and thus constitutes legal pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(4); 718.201. The administrative law judge further found that claimant established that he is totally disabled due to pneumoconiosis 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the claim was timely filed. Employer further asserts that the administrative law judge admitted Dr. Baker's two reports in violation of the evidentiary limitations at 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant established the existence of legal pneumoconiosis and that he is totally disabled due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.[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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer first challenges the administrative law judge's finding that claimant's claim was timely filed pursuant to 20 C.F.R. §725.308.[3] Employer contends that the administrative law judge erred in finding that claimant did not receive the 1993 reports of Drs. Anderson and Baker,[4] which employer asserts were medical determinations of total disability due to pneumoconiosis, because the administrative law judge did not consider claimant's testimony that he had these reports in his possession as part of his state workers' compensation claim documents, and had personally filed them with the district director.[5] Employer's contention has merit.

Pursuant to 20 C.F.R. §725.308, the administrative law judge found that there had been no communication to claimant of a medical determination of total disability due to pneumoconiosis, because there was no evidence that he had actually received the 1993 reports of Drs. Anderson and Baker. *See Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-43 (1993). In so finding, the administrative law judge stated that claimant testified only

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[3] Section 725.308 provides in relevant part that:

> (a) A claim for benefits . . . shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner . . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

[4] In his report dated August 14, 1993, Dr. Anderson diagnosed category 2/2 pneumoconiosis by x-ray and stated that this diagnosis "carries an irrebuttable presumption of disability." Director's Exhibit 6 (Dr. Anderson's report at 2). In his report dated September 24, 1993, Dr. Baker diagnosed claimant with both clinical and legal pneumoconiosis, and stated that claimant was not physically able, from a pulmonary standpoint, to perform his usual coal mine employment, and would have difficulty doing sustained manual labor on an eight-hour basis, due to those conditions. *Id.* (Dr. Baker's 1993 report at 4).

[5] The record reflects that claimant was awarded benefits pursuant to a settlement of his Kentucky claim for occupational disease on June 16, 1994. Director's Exhibit 6. The 1993 reports of Drs. Baker and Anderson are associated with the state claim documents. *Id.*

that Dr. Anderson told him to leave coal mine employment because of his lungs, and that Dr. Baker stated in his report that claimant should leave the mines, but never told him so personally. Tr. at 17.

As employer argues, the administrative law judge did not consider claimant's testimony that these medical reports were among "the papers I had when I got my state black lung," and that he "sent in" all of the papers from his Kentucky workers' compensation claim to the district director. Tr. at 17-18. The record suggests that claimant was not represented by counsel at the time he filed these documents.[6] We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.308, and remand this case to the administrative law judge for him to consider this aspect of claimant's testimony, and to reconsider whether a medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years before he filed this claim. If the administrative law judge determines that claimant received the 1993 reports of Drs. Anderson and Baker, he must determine if they constitute the reasoned opinion of a medical professional diagnosing claimant as totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §725.308. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-298 (6th Cir. 2001); *Sturgill v. Bell County Coal Corp.*, 23 BLR 1-159, 1-166 (2006)(*en banc).*

Employer next challenges the administrative law judge's admission of Dr. Baker's March 13 and August 1, 2006 reports pursuant to 20 C.F.R. §725.414. The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Employer contends that Dr. Baker's March 13, 2006 report[7] "was inadmissible" under 20 C.F.R. §725.414 because Dr. Baker considered an inadmissible x-ray reading by Dr. Anderson.[8] Employer's Brief at 17. Contrary to employer's contention, an

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[6] The record indicates that claimant's state workers' compensation documents were stamped as received by the district director on April 2, 2003, Director's Exhibit 6, and that claimant first obtained legal representation in August 2005. Administrative Law Judge's Exhibit 2.

[7] The applicable provision of 20 C.F.R. §725.414 allowed claimant to submit, in support of his affirmative case, no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i). Claimant designated Dr. Baker's March 13, 2006 report as his first affirmative medical report, and Dr. Hussain's March 8, 2006 report as his second affirmative medical report. Claimant's Exhibit 6.

[8] Employer notes that Dr. Anderson's 1993 report containing his x-ray reading was submitted on the timeliness issue but was not designated as affirmative evidence on

administrative law judge need not exclude a medical report that refers to inadmissible evidence. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2006)(*en banc*). If an administrative law judge determines that a physician's medical report relied upon inadmissible evidence, the administrative law judge has several available options, including factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled.[9] *Keener*, 23 BLR at 1-242 n.15. We therefore reject employer's contention that the administrative law judge erred in admitting Dr. Baker's March 13, 2006 report into evidence.

Employer next contends that the administrative law judge erred in admitting Dr. Baker's August 1, 2006 report, in which Dr. Baker reviewed Dr. Fino's report submitted by employer, and commented on Dr. Fino's analysis of Dr. Hussain's medical treatment records. In employer's view, because Dr. Baker addressed Dr. Fino's discussion of Dr. Hussain's records, Dr. Baker's report constituted improper rehabilitation of Dr. Hussain's report.[10] We disagree. Claimant designated Dr. Baker's August 1, 2006 report as part of a single, affirmative medical report from Dr. Baker. Claimant's Response to Motion to Strike at 2. The administrative law judge admitted Dr. Baker's August 1, 2006 report as a supplement to his March 13, 2006, affirmative medical report. Decision and Order at 4, n.4; Claimant's Exhibit 7. This was consistent with the regulation providing that "[a]

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the medical issues by either employer or claimant. Claimant's Exhibit 6; Employer's Exhibit 8; Tr. at 7; Employer's Brief at 17. Relevant to Dr. Baker's consideration of Dr. Anderson's x-ray reading, the regulation provides that "[a]ny chest X-ray interpretations . . . that appear in a medical report must each be admissible . . . ." 20 C.F.R. §725.414(a)(2)(i).

[9] Consistent with this principle, when weighing the evidence, the administrative law judge considered that "Dr. Baker's reliance, if any, on Dr. Anderson's x-ray was limited to his clinical pneumoconiosis determination, and [it] played no part" in his diagnosis of legal pneumoconiosis. Decision and Order at 15 n.9. The administrative law judge therefore determined to consider Dr. Baker's report on the issue of legal pneumoconiosis. *Id*.

[10] In support of its argument, employer relies on the provision that, where the responsible operator has submitted rebuttal interpretations of specific objective tests submitted by claimant, such as x-rays, pulmonary function studies, and blood gas studies, and those rebuttal interpretations "tend[] to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement *from the physician who prepared the medical report* explaining his conclusion in light of the rebuttal evidence." 20 C.F.R. §725.414(a)(2)(ii)(emphasis added).

medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence . . . ." 20 C.F.R. §725.414(a)(1); *see generally Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-147 (2006); *C.L.H. v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007)(unpub.)(noting the Director's position that supplemental reports based on review of admissible evidence do not exceed the two-report limitation because there is no requirement that a doctor's medical report be contained within one document). Detecting no abuse of discretion by the administrative law judge in admitting Dr. Baker's August 1, 2006 report, we reject employer's argument. *See Clark*, 12 BLR at 1-153.

We now turn to employer's arguments on the merits of entitlement. To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge erred in applying the presumption of 20 C.F.R. §718.203(b) to credit medical opinions that claimant has legal pneumoconiosis.[11] We agree. The administrative law judge found that the opinions of Drs. Baker and Hussain diagnosing chronic obstructive pulmonary disease (COPD) related to coal dust exposure were "consistent with" and "supported by" the "presumption that pneumoconiosis in a coal miner who worked ten years or more in the mines is presumed to have arisen out of his or her coal mine employment. §718.203(b)." Decision and Order at 16-17. Contrary to the administrative law judge's finding, the burden is on claimant to establish by a preponderance of the evidence that he has pneumoconiosis. 20 C.F.R. §§718.3, 718.202(a)(4). The presumption that claimant's pneumoconiosis arose out of coal mine employment is invoked only after claimant establishes the existence of pneumoconiosis. 20 C.F.R. §718.203(b); *see Adams v. Director, OWCP*, 886 F.2d 818, 823 n.4, 13 BLR 2-52, 2-59 n.4 (6th Cir. 1989); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990).

Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for him to reconsider the medical opinion evidence without reference to the Section 718.203(b) presumption, maintaining the

[11] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

burden of proof on claimant to establish the existence of legal pneumoconiosis.[12] *See* 20 C.F.R. §718.201(a)(2); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986).

Further, we agree with employer that, on remand, the administrative law judge should adequately explain his finding that Dr. Hussain's opinion was well-reasoned even though Dr. Hussain made no mention of claimant's smoking history.[13] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n. 6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993). Additionally, employer contends that Dr. Baker's opinion attributing claimant's COPD in part to coal mine dust exposure was too "uncertain" to constitute a reasoned medical opinion. Employer's Brief at 17. While a physician's use of cautious language is not necessarily equivocation, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), we instruct the administrative law judge on remand to take into account Dr. Baker's statements that claimant's smoking and coal dust exposure were "probably" synergistic, and that claimant's smoking could, by itself, have caused claimant's COPD and chronic bronchitis, when the administrative law judge assesses the persuasiveness of Dr. Baker's opinion as a whole. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-484 (6th Cir. 2007); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Claimant's Exhibit 4 at 2; Claimant's Exhibit 5 at 16,17.

Pursuant to 20 C.F.R. §718.204(c), employer contends that the administrative law judge erred in according little weight to the opinions of Drs. Dahhan and Fino, that claimant's total disability is unrelated to pneumoconiosis, because these doctors did not diagnose pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). On remand,

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[12] If the administrative law judge properly finds the existence of legal pneumoconiosis established pursuant to 20 C.F.R. §§718.201, 718.202(a)(4), he will necessarily have determined the etiology of the pneumoconiosis, obviating the need for a separate inquiry into that issue under 20 C.F.R. §718.203(b). *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

[13] Although the administrative law judge stated that he could not arrive at an exact smoking history based on the "inconsistent and somewhat contradictory" accounts in the record, he characterized claimant's smoking history, which extended over a period of approximately forty-six years, as "significant." Decision and Order at 5, 17.

the administrative law judge must reconsider disability causation under 20 C.F.R. §718.204(c), if reached, in accordance with the proper legal standard in the Sixth Circuit. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 1-185-186 (6th Cir. 1997); *Adams*, 886 F.2d at 825, 13 BLR at 2-63. If, on remand, the administrative law judge again finds that pneumoconiosis is established, he has the discretion to accord less weight to disability causation opinions of physicians who do not diagnose pneumoconiosis. *See Adams*, 886 F.2d at 826, 13 BLR at 2-63-64.

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 to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge