BRB No. 13-0397 BLA

CLARK WAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELEN MINING COMPANY and VALLEY CAMP COAL COMPANY	)	
	)	
and	)	
	)	
WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 04/18/2014
	)	
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 Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer/carrier.

Dominique V. Sinesi (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-06159) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed his claim for benefits on September 14, 2010. Director's Exhibit 2.

The administrative law judge credited claimant with 8.82 years of coal mine employment,[1] as stipulated by the parties, and found that claimant is a lifelong non-smoker. The administrative law judge further determined that the evidence established the existence of clinical pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a)(1), and legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine employment, pursuant to 20 C.F.R. §718.202(a)(4). Finally, the administrative law judge found that the evidence established that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in excluding Dr. Schaaf's medical report, submitted by employer, as in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer further asserts that the

[1] Because claimant established fewer than fifteen years of coal mine employment, a recent amendment to the Act, that became effective on March 23, 2010, does not apply to this case. 30 U.S.C. §921(c)(4) (2012). Unless otherwise indicated, the relevant version of all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[2] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[3] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

administrative law judge abused his discretion in admitting, over employer's objection, Dr. Cohen's medical report, which was not timely exchanged with employer. Employer also asserts that the administrative law judge erred in finding that claimant established the existence of clinical and legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's allegations of error regarding the exclusion of Dr. Schaaf's report.[4]

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.[5] 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 Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

To establish entitlement 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).

Exclusion of Dr. Schaaf's Report

Employer contends that the administrative law judge erred in excluding Dr. Schaaf's medical report as in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(3). Employer's Brief at 4-7. Employer further argues that the administrative law judge erred in rendering his evidentiary ruling in the Decision and Order, thus depriving employer of the opportunity to establish good cause for the submission of the report, pursuant to 20 C.F.R. §725.456. *Id.*

The regulations governing the development of evidence provide that each party may submit, in support of its affirmative case, two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two

[4] Employer does not challenge the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Notwithstanding the limitations" of 20 C.F.R. §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 20 C.F.R. §725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Claimant was examined by Dr. Schaaf on April 14, 2011, at the request of claimant's counsel. However, claimant chose not to submit Dr. Schaaf's report into evidence. At the hearing, employer submitted the medical reports of Drs. Kaplan and Fino, as its two affirmative-case medical reports, and also submitted the report from Dr. Schaaf, which employer described as a treatment record. Hearing Tr. at 38, 39, 41. Claimant objected to the admission of Dr. Schaaf's report, noting that employer had already submitted its two allowable medical reports, and argued that Dr. Schaaf's report was not a treatment record. Hearing Tr. at 43. The administrative law judge agreed that Dr. Schaaf's report did not appear to be a treatment record, but provisionally admitted the document, subject to further review. Hearing Tr. at 43-44. The administrative law judge explained that if, after reviewing the document post-hearing, he determined that it was a medical report, rather than a treatment record, Dr. Schaaf's opinion would be excluded from the record. Hearing Tr. at 44. In his Decision and Order, the administrative law judge found that Dr. Schaaf's report constituted a medical report pursuant to 20 C.F.R. §725.414(a)(3), and not a treatment record pursuant to 20 C.F.R. §725.414(a)(4), and excluded it from evidence, as in excess of the allowable number of medical reports.

Employer initially argues that the limitations of evidence at 20 C.F.R. §725.414 do not apply to Dr. Schaaf's report, because the report was developed by claimant, not employer. Employer asserts that the purpose of the evidentiary limitations is to mitigate the effects of employers' superior ability to pay for the development of medical evidence by retaining numerous physicians to evaluate the claimant and interpret the evidence. Employer's Brief at 6. Employer contends that because claimant sought, and paid for, the opinion of Dr. Schaaf, the administrative law judge should have admitted his report, notwithstanding the evidentiary limitations. Employer's Brief at 5-6. Contrary to employer's argument, the Board has held that the limitations on evidence are mandatory. *See Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-73-34 (2004). Moreover, as the Director asserts, there is no exception for evidence originally developed by another party. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 296, 23 BLR 2-430, 2-459 (4th Cir. 2007); Director's Brief at 1.

Alternatively, employer asserts that the administrative law judge erred in failing to admit Dr. Schaaf's report as a treatment record, pursuant to 20 C.F.R. §725.414(a)(4), because claimant did not see Dr. Schaaf at employer's request. We disagree.

Reviewing Dr. Schaaf's opinion in light of the parties' arguments, the administrative law judge accurately noted that Dr. Schaaf's written opinion begins by stating that "[claimant] is a 62-year-old man I am seeing at the request of Attorney Bilonick for evaluation of possible black lung disease." Decision and Order at 3; Employer's Exhibit 8 [excluded]. The administrative law judge further considered claimant's testimony that only his family physician, Dr. McKendry, has treated him for his breathing condition. Decision and Order at 4; Hearing Tr. at 29-30. Therefore, the administrative law judge found that Dr. Schaaf's opinion constituted a medical report prepared for litigation, subject to the limitations at 20 C.F.R. §725.414(a)(3), and was not admissible as a record of treatment, pursuant to 20 C.F.R. §725.414(a)(4). As substantial evidence supports the administrative law judge's conclusion that Dr. Schaaf was not treating claimant at the time he wrote his report, we affirm the administrative law judge's finding that Dr. Schaaf's report is a medical report, subject the limitations set forth at 20 C.F.R. §725.414(a)(3).

In addition, we hold that there is no merit in employer's assertion that it was prejudiced by the fact that the administrative law judge rendered his ruling concerning the admissibility of Dr. Schaaf's report in his Decision and Order. Employer's Brief at 7, *citing L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008) (en banc). In *Preston*, the Board held that:

> Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations . . . if the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

Preston, 24 BLR at 1-63. Although the administrative law judge waited until he issued his Decision and Order to notify the parties that Dr. Schaaf's report had been excluded, we decline to remand this case, as requested by employer, because the facts of this case satisfy the standard for fairness and administrative efficiency outlined in *Preston*. *See Preston*, 24 BLR at 1-55. Specifically, employer received notice at the hearing that claimant challenged the admissibility of Dr. Schaaf's report, and was advised by the administrative law judge that Dr. Schaaf's report "does look like . . . a [medical] report rather than treatment records." Hearing Tr. at 43. The administrative law judge further advised employer that if, after post-hearing review, Dr. Schaaf's opinion was found to be a medical report, it would be excluded from evidence. Employer was also given the

opportunity, both at the hearing and in its post-hearing brief, to argue that good cause existed for the admission of Dr. Schaaf's report, notwithstanding the limitations, pursuant to 20 C.F.R. §725.465, or to redesignate its evidence. Therefore, we reject employer's assertion that it was denied a full and fair opportunity to present a defense in this case. Thus, we reject employer's assertion of prejudicial error and affirm the administrative law judge's decision to exclude Dr. Schaaf's report from the record, as a medical report in excess of the evidentiary limitations at 20 C.F.R. §725.414(a)(3). *See Smith*, 23 BLR at 1-74.

Admission of Dr. Cohen's Report

We next address employer's contention that the administrative law judge erred in admitting Dr. Cohen's medical report into the record. Employer contends that claimant failed to establish good cause for failing to exchange Dr. Cohen's report with employer at least twenty days prior to the hearing, in accordance with 20 C.F.R. §725.456(b)(3).

Pursuant to 20 C.F.R. §725.456(b)(2), documentary evidence that was not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). Evidence not exchanged within the twenty-day timeframe may still be admitted at the hearing with the written consent of the parties, or on the record at the hearing, or upon a showing of good cause. 20 C.F.R. §725.456(b)(3). If the parties do not waive the requirement, or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3). Further, Section 725.456(b)(4) provides that "a medical report which is not made available to the parties in accordance with paragraph (b)(2) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least [thirty] days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence." 20 C.F.R. §725.456(b)(4). An administrative law judge's finding on the issue of "good cause" is reviewed for an abuse of the broad discretion granted to him in resolving procedural issues. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

The administrative law judge did not abuse his discretion in admitting claimant's evidence into the record. At the hearing, held on June 14, 2012, employer objected to the admission of Dr. Cohen's report, noting that it was submitted roughly eighteen days prior to the hearing. Hearing Tr. at 8. Claimant's counsel explained that, due to Dr. Cohen's busy schedule, claimant was not able to see Dr. Cohen until April 17, 2012, and, despite repeated phone calls, did not receive his report until the last day of May. Hearing Tr. at 8-9. Claimant further asserted that employer would not be prejudiced by the late

admission of Dr. Cohen's report, because employer had a post-hearing deposition scheduled with Dr. Fino, who could respond to Dr. Cohen's opinion. Hearing Tr. at 9. After considering the parties' arguments, the administrative law judge found that claimant had established good cause for the tardy submission of Dr. Cohen's report, and held the record open until September 1, 2012 for post-hearing evidentiary development. Hearing Tr. at 9, 43.

Based upon these facts, we decline to disturb the administrative law judge's resolution of this issue. The administrative law judge provided both parties the opportunity to explain their positions, and credited claimant's counsel's statements regarding the difficulties he had experienced in both seeing Dr. Cohen, and in obtaining his report; the administrative law judge acted within his discretion in finding that claimant's counsel had demonstrated good cause for submitting of Dr. Cohen's medical report two days late. Hearing Tr. at 8-9. Further, the administrative law judge properly allowed employer additional time to submit responsive evidence. 20 C.F.R. §725.456(b)(4); *see North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); Hearing Tr. at 43. It is noteworthy that neither at the hearing nor on appeal has employer argued it was prejudiced by the late submission. We affirm the administrative law judge's determination to admit Dr. Cohen's report, as it does not constitute an abuse of discretion. *Keener*, 23 BLR at 1-236; *Morgan*, 8 BLR at 1-493.

Merits of Entitlement

We first address employer's challenge to the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, "in the form of pulmonary disability caused by his coal dust exposure," pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 19; Employer's Brief at 10.

Relevant to the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Zlupko, Begley, Cohen, Fino, and Kaplan. Drs. Zlupko, Begley, and Cohen diagnosed legal pneumoconiosis, opining that claimant, a lifetime non-smoker, suffered from COPD due to coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Decision and Order at 17-18; Director's Exhibits 9, 17; Claimant's Exhibits 2, 4. Drs. Fino and Kaplan opined that claimant's COPD is not due to coal mine dust exposure, but may be related to hereditary factors. Decision and Order at 18-19; Employer's Exhibits 1, 3.

The administrative law judge accorded determinative weight to the opinion of Dr. Cohen, that coal mine dust exposure is a significant contributing factor to claimant's disabling COPD, finding that Dr. Cohen is the most highly qualified physician of record, and that he persuasively explained his conclusions in light of the pattern of claimant's pulmonary impairment, claimant's significantly dusty job duties, and claimant's lack of

other exposures that could cause the pattern of impairment claimant exhibited. Decision and Order at 18-19; Claimant's Exhibit 4. Moreover, the administrative law judge found that Dr. Cohen's opinion was not inconsistent with the opinions of Drs. Kaplan and Fino, as Dr. Cohen explained that, even assuming a genetic predisposition, claimant would not have developed COPD absent exposure to a triggering mechanism. Decision and Order at 19; Claimant's Exhibit 4. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer's sole challenge to the administrative law judge's finding of legal pneumoconiosis is that the administrative law judge "erroneously admitted the opinions of Dr. Cohen" and "erred in not considering the opinions of Dr. Schaaf." Employer's Brief at 10. Because we have affirmed the administrative law judge's admission of Dr. Cohen's report and his exclusion of Dr. Schaaf's report, we reject employer's allegations of error. As employer raises no further arguments pertaining to the administrative law judge's finding of legal pneumoconiosis, and since the Board must limit its review to contentions of error that are specifically raised by the parties, *see* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis.

Finally, as the administrative law judge rationally credited the opinion of Dr. Cohen to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Cohen's opinion, that claimant's disabling impairment is due to coal mine dust exposure, supported a finding that claimant is totally disabled due to legal pneumoconiosis. Decision and Order at 19. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* We, therefore, affirm the administrative law judge's award of benefits.[6]

[6] In view of our affirmance of the administrative law judge's finding that claimant is totally disabled due to legal pneumoconiosis, and as no physician of record has attributed claimant's disabling impairment to clinical pneumoconiosis, we need not address employer's challenges to the administrative law judge's finding of clinical pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997)*; Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); 20 C.F.R. §718.202(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge