BRB No. 03-0738 BLA

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| TOMMY HOWELL, JR. | ) | |
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| Claimant-Petitioner | ) | DATE ISSUED: 08/03/2004 |
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| v. | ) | |
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| EASTERN COAL CORPORATION | ) | |
| | ) | |
| 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 – Denying Benefits of Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Rita Roppolo (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (02-BLA-5139) of Administrative Law Judge Rudolph L. Jansen on a subsequent claim for benefits[1] 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).[2] The administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a), and was thereby insufficient to demonstrate at 20 C.F.R. §725.309(d) that the applicable condition of entitlement had changed since the denial of the prior claim. Accordingly, the administrative law judge denied the claim.

On appeal, claimant asserts that it was error for the administrative law judge to allow employer to submit four x-ray interpretations and four medical reports, since the applicable regulation, set forth at 20 C.F.R. §725.414 (a)(3)(i), authorizes the designated responsible operator to submit no more than two each. In addition, claimant generally challenges the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis. Claimant asserts that there is medical evidence in the record which, if credited, would support a finding of the existence of pneumoconiosis at Section 718.202(a), and would, therefore, demonstrate pursuant to Section 725.309(d) that the applicable condition of entitlement has changed since the denial of the prior claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds only to the arguments raised by claimant concerning the evidentiary limitations contained in Section 725.414. The

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[1] Claimant filed his first claim on September 13, 1988. Director's Exhibit 1. Following a hearing, Administrative Law Judge Ainsworth H. Brown issued a Decision and Order dated July 23, 1993, wherein he denied benefits on the basis that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). *Id.* Claimant appealed, and the Board affirmed Judge Brown's decision. *Howell v. Eastern Coal Corp.*, BRB No. 93-2137 BLA (August 15, 1994)(unpub.). *Id.* Claimant filed the instant claim on January 26, 2001. Director's Exhibit 3. Following a hearing, Administrative Law Judge Rudolf L. Jansen denied this subsequent claim by Decision and Order dated July 25, 2003. Claimant filed the instant appeal with the Board.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726. (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Director argues that the administrative law judge did not violate the provisions of Section 725.414 because Section 725.414(a)(3)(ii) allows employer to file a limited amount of rebuttal evidence. The Director asserts that the amount of newly submitted rebuttal evidence submitted by employer did not exceed the parameters allowed by the regulations. The Director does not address the administrative law judge's findings on the merits of the claim.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially challenges the administrative law judge's decision to admit into the record and to consider four newly submitted x-ray interpretations submitted by employer. Claimant asserts that the administrative law judge's decision violates the provisions of the new regulations, referring to Section 725.414, wherein evidentiary limitations are set forth. Claimant asserts that Section 725.414 only permits employer to submit a maximum of two x-ray interpretations into the record.

We reject claimant's argument. The record reflects that claimant submitted two x-ray interpretations, Dr. Hussain's reading dated February 4, 2001, Director's Exhibit 19, and Dr. Halbert's reading dated August 1, 2001, Director's Exhibit 21. Employer also submitted two x-ray interpretations, one by Dr. Wiot dated December 10, 2001, Director's Exhibit 23, and one by Dr. Halbert dated January 16, 2003, Employer's Exhibit 3. Employer then submitted two rebuttal x-ray interpretations, both by Dr. Wiot. The first was Dr. Wiot's interpretation dated January 9, 2002, re-reading Dr. Halbert's x-ray. Director's Exhibit 24. The second by Dr. Wiot, also dated January 9, 2002, was a re-reading of Dr. Hussain's x-ray.[4] *Id.* Although the regulation at Section 725.414(a)(3)(i) permits the

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[3] No party challenges the administrative law judge's findings that claimant established twenty-seven and one-quarter years of qualifying coal mine employment, that the subsequent claim was timely filed, or that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). We thus affirm these findings. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] We note that the record also contains a "reading" by Dr. Sargent dated

responsible operator to submit no more than two x-ray interpretations in its affirmative case, in Section 725.414(a)(3)(ii), the regulation permits the responsible operator to submit additional interpretations in rebuttal. It provides in relevant part:

> The responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray, pulmonary function study, arterial blood gas study, autopsy or biopsy submitted by the claimant under paragraph (a)(2)(i) of this section…

20 C.F.R. §725.414(a)(3)(ii). Employer submitted two of its own x-ray interpretations into the record in this subsequent claim, and then submitted two interpretations in rebuttal of the two submitted by claimant in accordance with Section 725.414(a)(3)(ii). We hold, therefore, that administrative law judge did not err in his decision to admit into the record and to consider four newly submitted x-ray interpretations from employer. 20 C.F.R. §725.414(a)(3)(ii); *Dempsey v. Sewell Coal Co.*, BLR , BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004)(*en banc*).

Claimant next contends that the administrative law judge violated the evidentiary limitations set forth in Section 725.414 when he permitted employer to submit three narrative medical reports. The three newly submitted medical reports were rendered by Drs. Rosenberg, Broudy, and Vuskovich. Director's Exhibit 22; Employer's Exhibits 1, 3. Claimant contends that the regulations permit employer to submit only two narrative medical reports, and that the administrative law judge erred by allowing employer to submit a third report.

We reject claimant's argument. The administrative law judge restricted employer to two narrative medical reports, the reports rendered by Drs. Rosenberg and Broudy. Director's Exhibit 22; Employer's Exhibit 3. The administrative law judge found that employer designated Dr. Vuskovich's report as rebuttal evidence of the pulmonary function study performed by Dr. King and the pulmonary function study and blood gas study performed by Dr. Hussain. Employer's Exhibit

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March 15, 2001, reviewing Dr. Wiot's x-ray dated February 7, 2001. Director's Exhibit 20. Therein, Dr. Sargent expressed no opinion as to whether the film was positive or negative for the presence of pneumoconiosis, but rather, stated only that the film was of sufficient quality to allow an accurate reading. *Id.* The administrative law judge correctly did not consider this as an x-ray interpretation, as he stated that "[t]he evidence of record contains six interpretations of four chest x-rays." Decision and Order at 14.

1; Decision and Order at 5-6. Citing Section 725.414(a)(3)(ii), the administrative law judge rejected employer's attempt to submit Dr. Vuskovich's report for the purpose of rebutting the narrative portions of the reports of Drs. King and Hussain, as Section 725.414 does not permit the rebuttal of narrative medical evidence. Decision and Order at 6. The administrative law judge considered only portions of Dr. Vuskovich's opinion for the limited purpose of rebutting the objective tests of Drs. King and Hussain. The administrative law judge stated that he would consider "only the portion of Dr. Vuskovich's report which addresses the August 1, 2001 and March 20, 2001 pulmonary function studies and the February 7, 2001 arterial blood gas study." Decision and Order at 6. Section 725.414(a)(3)(ii) permits employer to submit rebuttal evidence for each pulmonary function study or arterial blood gas study which claimant submits for the purpose of establishing entitlement. 20 C.F.R. §725.414(a)(3)(ii). We affirm, therefore, the administrative law judge's decision to admit to the record and to consider only those portions of Dr. Vuskovich's report that attempt to rebut the objective tests administered by Drs. King and Hussain. 20 C.F.R. §725.414(a)(3)(ii); *Dempsey*, slip op. at 5-8.

In the remainder of claimant's brief, claimant lists newly submitted evidence supportive of either a finding of the existence of pneumoconiosis or entitlement in general. *See* Claimant's Brief at 2-7. The only discernible argument on the merits of the claim is claimant's assertion that the administrative law judge erred by failing to give determinative weight to the opinion of Dr. King, as the administrative law judge found that Dr. King was claimant's treating physician. *See* Decision and Order at 9, 15. The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims, but rather, "the opinions of treating physician's get the deference they deserve based upon their power to persuade." *Eastover Mining Co. v. Williams*, 338 F. 3d 501, 513; 22 BLR 2-625, 2-647 (6th Cir. 2003). Further, the administrative law judge found that Dr. King's opinion was not well-reasoned and not well-documented, as it was based only upon claimant's history of coal dust exposure, his symptoms, and the results of Dr. King's x-ray and pulmonary function study, both of which Dr. King found to be normal. The administrative law judge properly found that Dr. King did not explain the basis for his diagnosis in light of the normal test results. Decision and Order at 15. We affirm, therefore, the administrative law judge's decision to discount Dr. King's opinion on the basis that it was not well reasoned and not well documented, despite his status as claimant's treating physician. *Peabody Coal Co. v. Odon*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

Claimant makes no other assertion of error with respect to the administrative law judge's finding that the newly submitted evidence failed to

establish the existence of pneumoconiosis at Section 718.202(a). Claimant's recitation of evidence supportive of a finding of pneumoconiosis does not meet the requirement that he specify error on the part of the administrative law judge. *See 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); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Moreover, the Board is not empowered to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at Sections 718.202(a)(1) and (a)(4). Moreover, we affirm the administrative law judge's finding that the newly submitted evidence fails to demonstrate pursuant to Section 725.309(d) that the applicable condition of entitlement has changed since the denial of the prior claim. 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). We thus affirm the administrative law judge's denial of benefits in this subsequent claim.

Accordingly, we affirm the administrative law judge's Decision and Order - Denying Benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge