BRB No. 03-0839 BLA

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| ADAM FRANKLIN HEVENER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| ELM GROVE COAL COMPANY/ VALLEY CAMP COAL COMPANY | ) | DATE ISSUED: 08/11/2004 |
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| and | ) | |
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| ACORDIA EMPLOYERS SERVICES CORPORATION | ) | |
| | ) | |
| Employer/Carrier-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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Adam Franklin Hevener, Wheeling, West Virginia, *pro se*.

Kathy L. Snyder and Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (02-BLA-5073) of Administrative Law Judge Gerald M. Tierney (the

administrative law judge) on a claim[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 credited claimant with at least nineteen years of coal mine employment. On the merits of the claim, the administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Specifically, the administrative law judge determined that x-ray and medical opinion evidence were the means by which claimant could establish the existence of pneumoconiosis in this case. The administrative law judge found that the x-ray and medical opinion evidence of record were insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), respectively, and made no findings at 20 C.F.R. §718.202(a)(2) or (a)(3). Citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis by either means available to him. Accordingly, benefits were denied. Employer responds to claimant's appeal, and urges the Board to affirm the decision below as it is supported by substantial evidence and in accordance with law. Alternatively, in the event that the Board does not affirm the decision below, employer maintains that the administrative law judge erred in limiting the evidence under 20 C.F.R. §725.414(a)(3)(i) and (ii). Employer argues that all of employer's evidence that the administrative law judge excluded, including x-ray and medical opinion evidence, is relevant to the issues in the case *sub judice* and should have been considered. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and

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[1]Claimant filed the instant application for benefits on May 30, 2001. Director's Exhibit 1. By proposed Decision and Order dated March 1, 2002, the district director awarded benefits based on a finding of complicated pneumoconiosis. Employer controverted the district director's decision and requested a hearing. A hearing was held before the administrative law judge, Gerald M. Tierney, on November 5, 2002. Subsequent to the administrative law judge's August 27, 2003 Decision and Order denying benefits, claimant filed the instant appeal.

[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.

conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

The administrative law judge found that the x-ray evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record contains a total of five interpretations of three x-rays. With regard to the x-ray dated July 24, 2001, Dr. Noble, a Board-certified B reader, read the x-ray as 1/0 st, Category B and indicated that the x-ray showed nodules "with the appearance favoring that of metastatic disease and not from pneumoconiosis. There are no pleural abnormalities."[3] Director's Exhibits 11, 12. After comparing the July 24, 2001 x-ray with claimant's January 28, 2000 x-ray, Dr. Noble stated, in his August 21, 2001 Addendum:

> The nodules have shown no significant change since that time indicating they are less likely to be metastatic disease. There was a lateral film with that study and there is suggestion these may be somewhat pleural based in origin. There are others that appear to be parenchymal as well. There may be a degree of calcification. CAT scan of the chest is suggested to confirm their true location and to confirm the calcification.

Director's Exhibit 11. Dr. Wheeler, also a Board-certified B reader, read the July 24, 2001 x-ray as negative for pneumoconiosis and noted cancer, tuberculosis, and nodules measuring one to two centimeters in diameter. Director's Exhibit 24. Dr. Gaziano, a B reader, reviewed the July 24, 2001 x-ray for quality only and found quality one. Director's Exhibit 13. With regard to the September 24, 2001 x-ray, Dr. Altmeyer, a B reader, interpreted the September 24, 2001 x-ray as 1/1 tt positive for pneumoconiosis and noted "masses of 2 to 3 cm in diameter." Director's Exhibit 22. Dr. Altmeyer opined that this x-ray was not consistent

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[3]Dr. Noble read the July 24, 2001 x-ray on July 31, 2001 for Dr. Reddy. Director's Exhibit 11; *see* Decision and Order at 3. Dr. Reddy, in his August 14, 2001 report, identifies the July 24, 2001 x-ray as underlying his opinion but did not refer to Dr. Noble's reading of 1/0 st Category B when he diagnosed "coal workers' pneumoconiosis by chest x-ray and history." Director's Exhibit 9.

with coal workers' pneumoconiosis or silicosis and indicated that the radiographic pattern is consistent with metastatic disease to the lung, nodular sarcoidosis or any of a number of other abnormalities." *Id.* With regard to the June 6, 2002 x-ray, Dr. Fino, a B reader, interpreted the x-ray as 0/0 negative for pneumoconiosis. Employer's Exhibit 11. Considering these interpretations of the three x-rays of record, the administrative law judge stated:

> The equally-qualified readers disagree as to the existence of pneumoconiosis. Claimant does not meet his burden of proof. Claimant does not prove, by a preponderance of the chest x-ray evidence, the existence of pneumoconiosis at [20 C.F.R.] §718.202(a)(1).

Decision and Order at 3.

Upon review of the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and the x-ray evidence of record, we hold that the administrative law judge's decision cannot be affirmed. As an initial matter, the administrative law judge did not address the Category B opacities found by Dr. Noble on the July 24, 2001 x-ray, Director's Exhibits 11, 12, or the masses/nodules measuring at least one centimeter in diameter found by Dr. Wheeler on the July 24, 2001 x-ray, Director's Exhibit 24, and by Dr. Altmeyer on the September 24, 2001 x-ray, Director's Exhibit 22. This evidence is relevant to whether claimant has established entitlement to the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.304(a). Consequently, the administrative law judge erred by not considering this evidence at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.202(a)(3).

Further, it is not clear from the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) what weight he assigned to the x-ray readings of Drs. Altmeyer and Fino, both B-readers. Dr. Altmeyer interpreted the September 24, 2001 x-ray as 1/1 tt, which is a positive for pneumoconiosis reading,[4] 20 C.F.R. §718.202(a)(1), and Dr. Fino interpreted the

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[4]Dr. Altmeyer interpreted the September 24, 2001 x-ray as 1/1 tt which is a positive for pneumoconiosis reading, see 20 C.F.R. §718.202(a)(1), and noted "masses of 2 to 3 cm in diameter" which finding is relevant to a determination at 20 C.F.R. §718.304 regarding whether claimant has complicated pneumoconiosis. Director's Exhibit 22. Dr. Altmeyer opined, however, that the September 24, 2001 x-ray was not consistent with coal workers' pneumoconiosis or silicosis. Rather, the x-ray was consistent with "metastatic disease to the lung, nodular sarcoidosis or any of a number of other abnormalities." *Id.* The administrative law judge on remand must consider all relevant evidence of record to determine whether the irrebuttable presumption provided at 20 C.F..R. §718.304 is invoked. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship,* 177 F.3d 240, 242-243, 22 BLR 2-554, 2-558-

June 6, 2002 x-ray as 0/0 negative for pneumoconiosis. The administrative law judge stated, "The equally-qualified readers disagree as to the existence of pneumoconiosis." Decision and Order at 3. It is not clear whether the administrative law judge was referring to the interpretations of Drs. Altmeyer and Fino without taking into account the fact that these physicians read different x-rays, or whether he was referring to the overall conflicting nature of the x-ray evidence of record.

Based on the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) and remand the case. On remand, the administrative law judge must redetermine the sufficiency of the evidence to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and consider all relevant evidence at 20 C.F.R. §718.304, rendering complete findings that comport with the requirements of the Administrative Procedure Act (APA.) APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a).

At 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the medical opinions of Drs. Reddy, Altmeyer, and Fino and determined that this evidence failed to establish the existence of pneumoconiosis.[5] The administrative law judge found that "Dr.

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561 (4th Cir. 1999); *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-247 n.5 (2003)(Gabauer, J., concurring); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

[5] Dr. Reddy examined claimant on July 24, 2001 and by report dated August 14, 2001 diagnosed coal workers' pneumoconiosis "by chest x-ray and history" and chronic obstructive pulmonary disease "by spirometry and history." Director's Exhibit 9. Dr. Reddy indicated that claimant's conditions were due to coal dust exposure and cigarette smoke. *Id.* Dr. Reddy also stated, "Based on the above data in my opinion patient has about 5% pulmonary impairment due to occupational pneumoconiosis." *Id.*

Dr. Altmeyer examined claimant on September 24, 2001 and by report dated October 24, 2001 opined that the lung masses seen on x-ray measuring two to three centimeters in diameter were not consistent with coal workers' pneumoconiosis or silicosis. Director's Exhibit 22. Rather, Dr. Altmeyer opined that the "radiographic pattern is consistent with metastatic disease to the lung, nodular sarcoidosis or any of a number of other abnormalities." *Id.* Dr. Altmeyer found that claimant's lung function was normal; that there was no respiratory or pulmonary impairment and claimant was not totally and permanently disabled. *Id.* Dr. Altmeyer indicated that there were no findings to suggest that claimant had an occupationally related lung disease. *Id.*

Dr. Fino examined claimant on June 6, 2002 and reviewed other evidence, including

Reddy stands alone in his diagnosis of pneumoconiosis." Decision and Order at 4. The administrative law judge accorded less weight to Dr. Reddy's opinion because "[t]he preponderance of the chest x-ray evidence does not bear out the diagnosis of pneumoconiosis. Drs. Altmeyer and Fino explained why Claimant's chest x-ray abnormalities are not consistent with pneumoconiosis." *Id.* The administrative law judge further noted that Dr. Reddy's qualifications are not in the record whereas the record establishes that Drs. Altmeyer and Fino are Board-certified pulmonary specialists. *Id.* The administrative law judge also found that Drs. Altmeyer and Fino "explained why other features of Claimant's exam, including the results of his pulmonary function testing, do not support a diagnosis of pneumoconiosis." *Id.* The administrative law judge further stated that Dr. Fino "had the advantage of reviewing the other evidence in the record to render an opinion based on a more complete picture of Claimant's health. I rely on the opinions of Drs. Altmeyer and Fino over the opinion of Dr. Reddy." *Id*

After reviewing the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), we hold that they cannot be affirmed. Specifically, the administrative law judge accorded less weight to Dr. Reddy's opinion because, *inter alia*, "the preponderance of the chest x-ray evidence does not bear out the diagnosis of pneumoconiosis." Decision and Order at 4. Since the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) is vacated, his weighing of Dr. Reddy's medical opinion at 20 C.F.R. §718.202(a)(4) is impacted. We, therefore, vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and further remand the case for reconsideration of all the relevant medical opinion evidence thereunder.

In addition, while the administrative law judge noted that Dr. Reddy based his finding of coal workers' pneumoconiosis on claimant's x-ray and "history," which the administrative law judge interpreted to mean history of exposure to coal mine dust, *see* Decision and Order at 4, Dr. Reddy made physical findings and considered claimant's medical, smoking, and employment histories. Director's Exhibit 9. Moreover, Dr. Reddy also diagnosed chronic obstructive pulmonary disease, which he attributed to claimant's exposure to coal dust and cigarette smoking, based on a "spirometry and history." *Id.* A diagnosis of chronic obstructive pulmonary disease attributable in part to exposure to coal dust, if credited, could support a finding of "legal" pneumoconiosis under the Act. *See* 20 C.F.R. §718.201(a)(2).

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the reports of Drs. Reddy and Altmeyer. Employer's Exhibit 11. By report dated July 11, 2002, Dr. Fino diagnosed multiple pulmonary mass lesions not consistent with coal workers' pneumoconiosis. *Id.* Dr. Fino found no evidence of coal workers' pneumoconiosis and indicated that when claimant "gives a good effort, lung function is normal." *Id.* Dr. Fino found that claimant had no respiratory impairment, but also indicated that claimant had a variable mild obstruction related to cigarette smoking. *Id.* Dr. Fino concluded that claimant was not partially or totally disabled. *Id*.

Given the content of this record, we hold that substantial evidence does not support the administrative law judge's determination at 20 C.F.R. §718.202(a)(4) that Dr. Reddy's opinion lacked explanation. *See* Decision and Order at 4.

If, on remand, the administrative law judge finds the existence of pneumoconiosis at either 20 C.F.R. §718.202(a)(1) or (a)(4), he must determine whether the relevant evidence, when considered together, establishes the existence of pneumoconiosis pursuant to *Compton*. If so, then the administrative law judge must make further findings on the merits of the claim to determine claimant's entitlement to benefits. *See* 20 C.F.R §§718.203, 718.204. Alternatively, should the administrative law judge find that the irrebuttable presumption provided at 20 C.F.R. §718.304 is invoked, claimant would establish entitlement to benefits.

We next addresses employer's contention that the administrative law judge erred in limiting the evidence under 20 C.F.R. §725.414(a)(3)(i) and (ii). Employer's Brief at 2 n.2; *see* Decision and Order at 1 n.1. Employer argues that all of its evidence that the administrative law judge excluded, including x-ray and medical opinion evidence, is relevant to and probative of the issues in the case *sub judice* and should have been considered. Employer cites to, *inter alia*, the Act's provision that all relevant evidence shall be considered, 30 U.S.C. §923(b), and to the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

Employer's contention lacks merit. The Department of Labor relied upon other language in Section 923(b) which incorporates a provision of the Social Security Act authorizing the agency to regulate "the nature and extent of the proofs and evidence...." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a); Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3358 (Jan. 22, 1997). Additionally, the Department of Labor relied upon Section 556(d) of the Administrative Procedure Act, which empowers the agency to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy." 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); 62 Fed. Reg. at 3359. These statutory provisions were cited by the United States Court of Appeals for the District of Columbia Circuit when it upheld 20 C.F.R. §725.414 as a valid regulation. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002).

Further, in *Underwood*, which the Fourth Circuit issued prior to the recent regulatory revisions, the Fourth Circuit set a standard for administrative law judges to apply in exercising their discretion to exclude unduly repetitious evidence under Section 556(d) of the APA, while considering all relevant evidence under Section 923(b) of the Act. The Fourth Circuit held that administrative law judges "must consider all relevant evidence, erring on the side of inclusion, but . . . they should exclude evidence that becomes unduly repetitious in the sense that the evidence provides little or no additional probative value." *Underwood*, 105

F.3d at 951, 21 BLR at 2-32. Because the issue in *Underwood* concerned case-by-case rulings by administrative law judges under Section 556(d) of the APA, the Fourth Circuit did not decide the issue of the Department of Labor's authority to impose limits on the admission of evidence in black lung claims. Subsequent to *Underwood*, the Department of Labor exercised its authority to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence," 5 U.S.C. §556(d), and replaced the *ad hoc* determinations of administrative law judges with a bright-line rule in 20 C.F.R. §725.414, including a "good cause" exception at Section 725.456(b)(1). In *Underwood*, the Fourth Circuit recognized "the discretion reposed in agencies when it comes to deciding whether to permit the introduction of particular evidence at a hearing," so long as the agency "is not arbitrary ...." *Underwood*, 105 F.3d at 950, 21 BLR at 2-30-32 (citations omitted). Based on the foregoing, we reject employer's assertion of error on the administrative law judge's part in excluding certain evidence from the record in the instant case. *See Dempsey v. Sewell Coal Co.*, BLR , BRB Nos. 03-0615 BLA, 03-0615 BLA-A (Jun. 28, 2004)(*en banc*).

Accordingly, we vacate in part the administrative law judge's Decision and Order – Denying Benefits and remand the case to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge