BRB No. 04-0838 BLA

CARLOS COOTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED: 08/12/2005
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-5601) of Administrative Law Judge Joseph E. Kane 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) - (a)(4). Accordingly, benefits were denied.[2] On appeal, claimant alleges error in the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and (a)(4) and asserts that the relevant evidence establishes the existence of pneumoconiosis. Claimant further alleges that the administrative law judge erred by failing to exclude from the record medical reports submitted by employer in excess of the evidentiary limitations provided at 20 C.F.R. §725.414. Claimant requests that the Board reverse the administrative law judge's denial of benefits, or, in the alternative, that the Board vacate the decision below and remand the case for a proper evaluation of the admissible evidence. Employer responds, and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director) responds, and supports claimant's contention that the evidentiary limitations at 20 C.F.R. §725.414(a) were exceeded by the inclusion of Dr. Repsher's report.[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 rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be disturbed. 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).

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[1] Claimant filed this claim for benefits on February 16, 2001. Director's Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on August 15, 2002. Director's Exhibit 31. Pursuant to employer's request for a hearing, the case was transferred to the Office of Administrative Law Judges on March 7, 2003. Director's Exhibits 32, 36. A hearing was held on September 17, 2003.

[2] At the hearing, the parties stipulated to thirty-one years of coal mine employment. Hearing Transcript at 40.

[3] The Director, Office of Workers' Compensation Programs (the Director), notes that arguably any error in admitting Dr. Repsher's report is harmless because the administrative law judge accorded it "lesser weight" and did not rely on it in finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

With regard to the issue of the evidentiary limitations, claimant states:

> Pursuant to [20 C.F.R.] §725.414(a)(3)(i), the responsible operator… shall be entitled to obtain and submit, in support of its affirmative case, no more than two medical reports. In the instant claim the employer has submitted four (4): Dr. Broudy (DX 29), Dr. Rosenberg (EX 5, 9), Dr. Repsher (EX 3, 10), and a second report from Dr. Rosenberg (EX 1). In his Position Statement, the claimant objected "to any evidence submitted by the employer that is in excess of the guidelines set forth in [20 C.F.R.] §725.414" (Position Statement, page 3). As the [administrative law judge] failed to strike two of these reports from the record, the instant claim must be remanded for a proper evaluation of the evidence.

Claimant's Brief at 6-7. Both employer and the Director acknowledge that the administrative law judge did not apply the evidentiary limitations.

Claimant correctly contends that the administrative law judge erred by not applying the evidentiary limitations at 20 C.F.R. §725.414, which issue both claimant and employer raised below.[4] *Smith v. Martin Coal Corp.*, BRB No. 04-0126 BLA (Oct. 27, 2004)(published).

A review of the record reveals that employer submitted the following medical reports: Dr. Rosenberg's April 28, 2003 and July 20, 2003 reports, Employer's Exhibits 1, 5; Dr. Repsher's May 9, 2003 report, Employer's Exhibit 10; and Dr. Broudy's April 26, 2001 report, Director's Exhibit 29. Employer argues that Dr. Repsher's report does not constitute excess medical opinion evidence as it was properly submitted as rebuttal evidence. The Director argues that the administrative

[4]In claimant's Position Statement dated November 5, 2003, which he submitted to the administrative law judge, claimant stated, "Pursuant to 20 C.F.R. §725.414, there are limitations to the amount of evidence that each party can submit. As such, the claimant hereby objects to any evidence submitted by the employer that is in excess of the guidelines set forth in 20 C.F.R. §725.414." Position Statement at 3. In employer's Proposed Evidence Summary Form dated October 20, 2003, which it submitted to the administrative law judge, employer stated, "Further, the Employer does not waive its right to contest the limitation of evidence pursuant to the new regulations in adjudication of this claim." The administrative law judge referred to the evidentiary limitations at the hearing, *see* Hearing Transcript at 13, 15-16, but did not apply them to this case.

law judge erred in admitting Dr. Repsher's report as it constitutes a "medical report" pursuant to 20 C.F.R. §725.414(a)(1) and exceeds the evidentiary limitations.[5]

Employer's contention lacks merit. Contrary to employer's contention, Dr. Repsher's report was not properly submitted as rebuttal evidence. The regulation at 20 C.F.R. §725.414(a)(3)(ii) permits a responsible operator 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 test, arterial blood gas study, autopsy or biopsy submitted by the claimant under 20 C.F.R. §725.414(a)(2)(i) and by the Director pursuant to 20 C.F.R. §725.406. 20 C.F.R. §725.414(a)(3)(ii). Because Dr. Repsher did not interpret any single piece of evidence, but rather based his report and deposition testimony on a review of the evidence of record, *see* Employer's Exhibit 10, Dr. Repsher's report constitutes a "medical report" and does not constitute rebuttal evidence. 20 C.F.R. §725.414(a)(1), (a)(3)(iii).

Based on the foregoing, we vacate the administrative law judge's finding on the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as well as the administrative law judge's denial of benefits.[6] We remand the case for the administrative law judge to weigh the evidence, applying the evidentiary limitations under 20 C.F.R. §725.414(a). *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004). The administrative law judge may, within his discretion, admit medical evidence submitted in excess of the evidentiary limitations, pursuant to a finding that the party submitting the evidence has established "good cause" for the submission of the additional evidence. 20 C.F.R. §725.456(b)(1); *Dempsey*, 23 BLR at 1-61-62.

We next address claimant's challenge to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) on the merits of the claim. Claimant argues that the administrative law judge "placed substantial weight on the numerical superiority" of the negative x-ray readings and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

Claimant's arguments lack merit. The administrative law judge properly considered both the qualitative and quantitative nature of the x-ray evidence, and

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[5] "Medical reports" are defined as: "A physician's written assessment. A medical report may be prepared by the physician who examined the miner and/or reviewed the available admissible evidence. A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section." 20 C.F.R. §725.414(a)(1).

[6] We decline to address the Director's arguments pertaining to the submission of Dr. Rosenberg's reports as they are premature.

permissibly accorded greater weight to the readings rendered by physicians with superior qualifications, namely physicians qualified as either B readers or as B readers and Board-certified radiologists. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Specifically, the administrative law judge correctly noted that of the nine x-ray interpretations of record, only four were positive and of those four positive readings, only two were rendered by a dually qualified physician. *See* Claimant's Exhibit 4. Further, we reject claimant's assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant provides no support for that assertion, and a review of the evidence and the administrative law judge's Decision and Order does not reveal selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1 (2004). We, therefore, affirm the administrative law judge's finding that the preponderance of the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge