BRB No. 05-1020 BLA

RICHARD SPRAGUE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING COMPANY	)	DATE ISSUED: 08/31/2006
	)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Theodore F. Kommers and Christa B. Conlin (Gould & Ratner), Chicago, Illinois, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-5980) of Administrative Law Judge Jeffrey Tureck 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's prior application for benefits, filed on February 9,

1990, was finally denied on May 8, 1990 because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c)(2000). Director's Exhibit 1. On May 6, 2002, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 2. On March 6, 2003, the district director issued a Proposed Decision and Order – Awarding Benefits. Director's Exhibit 28. Employer requested a hearing, which was held on February 16, 2005. At the hearing, pursuant to the rebuttal provisions set forth at 20 C.F.R. §725.414(a)(2)(ii), claimant proffered a positive re-reading by Dr. Ahmed of a June 18, 2002 X-ray, which had originally been read as positive by Dr. Cohen on behalf of the Director, Office of Workers' Compensation Programs (the Director). The administrative law judge excluded this evidence because he found that Dr. Ahmed's positive reading of the June 18, 2002 X-ray did not serve as "rebuttal" to Dr. Cohen's positive reading of the same X-ray, and thus could not be admitted under 20 C.F.R. §725.414(a)(2)(ii).[1] Hearing Transcript at 18. Considering employer's proffered evidence, the administrative law judge admitted two negative re-readings of an April 30, 1999 X-ray, which were proffered in rebuttal to two readings of that same X-ray submitted by claimant as part of his affirmative case. Hearing Transcript at 23-4; Employer's Exhibits 9, 15. The administrative law judge also admitted four negative readings of a July 8, 2003 computerized tomography (CT) scan, proffered by employer pursuant to the provisions set forth at 20 C.F.R. §718.107. Hearing Transcript at 23-24; Employer's Exhibits 1, 5, 12, 14.

In a Decision and Order dated August 30, 2005, the administrative law judge credited claimant with twenty-four years of coal mine employment[2] and found that because employer stated at the hearing that it is no longer contesting the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), claimant had

[1] In excluding Dr. Ahmed's X-ray reading as not constituting rebuttal evidence, the administrative law judge stated, "I think rebuttal means rebuttal. And as it is, you've got to pick the doctor who did the exam. And now you want to rebut his own report that was favorable to you. And I just don't think that's what the regulations contemplate. I think they're talking about rebuttal. That's not rebuttal and you just want to reaffirm what's already been in the record." Hearing Transcript at 18.

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

met his burden to establish a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *see Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991); Decision and Order at 3. Considering the merits of the claim, however, 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)(1)-(4).

In weighing the X-rays pursuant to Section 718.202(a)(1), the administrative law judge found that the probative X-ray evidence of record[4] was equally balanced, in that it included five positive readings of three X-rays by highly qualified readers and five negative readings of the same three X-rays by highly qualified readers. The administrative law judge concluded that because the remaining X-ray readings of record, contained in claimant's medical treatment notes, did not include any positive X-ray readings for pneumoconiosis, claimant failed to establish the existence of pneumoconiosis by X-ray at Section 718.202(a)(1). Decision and Order at 4.

The administrative law judge also found that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 3.

Considering the CT scan evidence of record, submitted pursuant to Section 718.107, the administrative law judge found that Dr. Cohen's positive reading of the July 8, 2003 CT scan was countered by the four negative readings of the same July 8, 2003 CT scan by Drs. Repsher, Becker, Tuteur, and Fishman. The administrative law judge found that while Dr. Cohen possesses outstanding qualifications, his sole positive reading

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[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

[4] The administrative law judge permissibly found that the record also contained a negative reading of the June 18, 2002 X-ray by Dr. Hackett, whose qualifications are unknown, and an ambiguous reading of a July 8, 2003 X-ray by Dr. Becker, but that these readings had less probative value. Decision and Order at 4, n.5.

was not sufficient to outweigh the four negative readings, three of which are by physicians who also have outstanding qualifications.[5] Thus, the administrative law judge concluded that the CT scan evidence failed to establish the existence of pneumoconiosis. Decision and Order at 5.

Turning to the medical opinions, the administrative law judge accorded little probative value to the opinion of Dr. Cohen, the only physician to diagnose pneumoconiosis, in part because Dr. Cohen's diagnosis of clinical pneumoconiosis was based on his own positive X-ray and CT scan interpretations, which the administrative law judge found in conflict with his own conclusions that neither the overall X-ray nor CT evidence supported a diagnosis of pneumoconiosis. Decision and Order at 5. The administrative law judge also accorded little weight to Dr. Cohen's additional diagnosis of legal pneumoconiosis, on the ground that it was unreasoned. Decision and Order at 6-7. Thus, the administrative law judge concluded that the medical evidence of record did not establish the existence of pneumoconiosis at Section 718.202(a)(4). Consequently, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his application of 20 C.F.R. §725.414 to exclude Dr. Ahmed's re-reading of the June 18, 2002 X-ray. Claimant also contends that the administrative law judge erred in admitting the two re-readings of the April 30, 1999 X-ray and all four readings of the July 8, 2003 CT scan submitted by employer. Claimant further asserts that the administrative law judge erred in his analysis of the X-ray, CT scan, and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). Employer responds, urging affirmance of the administrative law judge's evidentiary rulings under Section 725.414 and the denial of benefits. The Director has filed a brief agreeing with claimant that the administrative law judge improperly excluded Dr. Ahmed's re-reading of the June 18, 2002 X-ray. The Director, however, maintains that the administrative law judge acted properly in admitting employer's two re-readings of the April 30, 1999 X-ray.[6]

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[5] The administrative law judge found that Dr. Becker's qualifications are not in the record; Dr. Tuteur is a highly qualified pulmonary specialist and Associate Professor of Medicine at Washington University (St. Louis) Medical School; Dr. Fishman is a Professor of Radiology and Oncology at Johns Hopkins and Director of Diagnostic Imaging and Body CT; and Dr. Cohen is a B reader, runs a black lung clinic, has written several articles regarding coal workers' pneumoconiosis, and is running a long-term study of respiratory disease in coal miners in the Ukraine. Decision and Order at 4.

[6] Claimant does not challenge the administrative law judge's finding of twenty-four years of coal mine employment, or his findings pursuant to 20 C.F.R.

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). 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*).

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).

Initially, we address claimant's contention that the administrative law judge erred in his application of 20 C.F.R. §725.414 to exclude Dr. Ahmed's positive re-reading of the June 18, 2002 X-ray, originally read, also as positive, by Dr. Cohen on behalf of the Director. Claimants are permitted "to submit, in rebuttal of the case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray…submitted by the designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii). Claimant contends that because the regulations provide, without restriction, for the submission of a physician's interpretation of each X-ray submitted by the opposing party, and by the Director, the administrative law judge erred in excluding Dr. Ahmed's re-reading of the Director's June 18, 2002 X-ray, because both Dr. Cohen's reading, for the Director, and Dr. Ahmed's re-reading for claimant, were positive. Claimant's Brief at 4-5. Employer responds, asserting that to admit Dr. Ahmed's positive re-reading of the Director's positive X-ray would be to ignore the plain meaning of the word "rebut," which is to contradict or refute. By definition, employer contends, positive X-ray readings cannot rebut other positive X-ray readings. Employer's Brief at 5. The Director responds, agreeing with claimant that a reasonable interpretation of 20 C.F.R. §725.414(a)(2)(ii) would allow for the submission of Dr. Ahmed's re-reading of the June 18, 2002 X-ray. The Director asserts that the language of the regulation does not limit a party to rebutting a particular item of evidence, rather, it permits a party to respond to a particular item of evidence in order to rebut "*the case presented by the party opposing entitlement*[.]" Director's Brief at 2 [emphasis added]. Thus, the Director concludes, the regulation specifically entitles claimant to have the June

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§718.202(a)(2), (a)(3). We therefore affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

18, 2002 X-ray re-read, because it was developed "by the Director pursuant to §725.406" and because Dr. Ahmed's re-reading of that X-ray was developed and submitted "in rebuttal of the case presented by the party opposing entitlement," *i.e.*, the responsible operator. The Director therefore contends that the administrative law judge erred in excluding Dr. Ahmed's re-reading. Director's Brief at 2.

We are persuaded by the Director's reasonable interpretation of the regulations, which is consistent with the language of the provision. *Freeman United Coal Mining Co. v. Director, OWCP* [*Taskey*], 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 541 n.8, 22 BLR 2-429, 2-445 n.8 (7th Cir. 2002); *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62 (1994)(citing collected cases). Thus, we hold that rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but rather, need only refute "the case" presented by the opposing party. Therefore, under the facts of this case, as Dr. Ahmed's re-reading of the June 18, 2002 X-ray was submitted by claimant in rebuttal of the case presented by employer, we reverse the administrative law judge's ruling as to the admissibility of Dr. Ahmed's re-reading of the June 18, 2002 X-ray. Consequently, we also vacate the administrative law judge's findings regarding the evaluation of the X-ray evidence at Section 718.202(a)(1). On remand, the administrative law judge should admit Dr. Ahmed's re-reading of the June 18, 2002 X-ray and re-weigh the X-ray evidence accordingly.

Claimant next contends that the administrative law judge erred in applying Section 725.414(a) to permit employer to rebut both interpretations of the April 30, 1999 X-ray submitted by claimant, rather than limiting employer to only one rebuttal reading of claimant's April 30, 1999 X-ray. Claimant's Brief at 5. Claimant specifically asserts that, although claimant submitted two interpretations of the April 30, 1999 X-ray as his affirmative case evidence, for purposes of Section 725.414(a)(2)(i), claimant had submitted only one *X-ray* and, therefore, employer should be permitted to submit only one interpretation of that X-ray on rebuttal. Claimant's Brief at 5. We disagree. Subsequent to the issuance of the administrative law judge's decision in this case, the Board held that as 20 C.F.R. §§725.414(a)(2)(i), (a)(3)(i) permits each party to submit "chest X-ray interpretations" in its affirmative case, consequently, "chest X-ray interpretations" are what each party may rebut under 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). *Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155 (2006). Therefore, in the case at bar, since claimant submitted two interpretations of the April 30, 1999 X-ray in support of his affirmative case, employer was entitled to submit two interpretations in rebuttal under Section 725.414(a)(3)(ii). The administrative law judge therefore properly admitted both rebuttal interpretations of the April 30, 1999 X-ray submitted by employer.

Regarding claimant's additional argument, however, that the administrative law judge erred in allowing employer to submit four readings of the July 8, 2003 CT scan, we note that in *Webber v. Peabody Coal Co*., 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), also issued subsequent to the administrative law judge's decision in this case, the Board clarified its position regarding the admissibility of CT scan evidence under the revised regulations. In *Webber*, the Board held that 20 C.F.R. §718.107, allowing for the admission of "[o]ther medical evidence," such as CT scans, is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. *Webber*, 23 BLR at 1-135. Therefore, we vacate the administrative law judge's evaluation of the CT scan evidence and instruct him, on remand, to reconsider the CT scan evidence in accordance with *Webber*. In addition, in evaluating the relevant qualifications of the CT scan readers, the administrative law judge should do so in accordance with the decision of the United States Court of Appeals for the Seventh Circuit in *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002).

We further vacate the administrative law judge's evaluation of the medical opinion evidence at Section 718.202(a)(4), and instruct the administrative law judge to re-weigh the medical opinion evidence on remand, following his re-evaluation of the X-ray and CT scan evidence, and in light of our holdings as set forth in *Webber* and *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). In re-weighing the opinion of Dr. Cohen, on remand, the administrative law judge should reconsider his determination that Dr. Cohen understated claimant's smoking history. The administrative law judge accorded less weight to the opinion of Dr. Cohen in part because he found the physician had reported "an understated smoking history of 'less than 1/2 to less than one pack of cigarettes per day x 56 years,'" whereas the administrative law judge found that claimant had smoked a full pack a day. Director's Exhibit 20; Decision and Order at 2, 6. We note, however, that while the administrative law judge accurately quoted the smoking history recorded in Dr. Cohen's August 8, 2002 narrative report, as claimant correctly asserts, on remand, the administrative law judge should also consider that in the physician's supplemental report dated December 15, 2005, Dr. Cohen noted that claimant's reported smoking histories ranged from twenty-eight to fifty-seven pack years, which more closely comports with the administrative law judge's findings. Claimant's Exhibit 4; Director's Exhibit 20. Finally, in reevaluating the medical evidence of record on remand, the administrative law judge should

base his determinations on the medical evidence of record and not substitute his own opinions for those of the medical experts.[7]

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7] As claimant correctly contends, the administrative law judge's conclusion that, based on "claimant's much greater exposure to cigarette smoke than to coal mine dust, his continued smoking 18 years after he last was exposed to coal mine dust, and the deterioration in his condition years after he stopped mining but while he is still smoking, it seems much more likely that claimant's obstructive impairment is due to smoking rather than coal mining," approaches an impermissible substitution of the administrative law judge's own opinion for that of the medical experts. Claimant's Brief at 16; Decision and Order at 7.