BRB No. 08-0760 BLA

C.C.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 08/28/2009
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber), Charleston, West Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (02-BLA-5034) of Administrative Law Judge Thomas M. Burke rendered on a subsequent

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). This case is on appeal to the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with at least thirty-three years of coal mine employment based on employer's concession, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718 and 20 C.F.R. §725.309(d). The administrative law judge found that the claim was timely filed, and that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d).[1] Considering the entire record, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, the Board affirmed the administrative law judge's finding that the claim was timely filed, and rejected employer's argument that due process required that liability for the payment of benefits in this case should be transferred to the Black Lung Disability Trust Fund. The Board also rejected employer's arguments that the administrative law judge erred in excluding Dr. Spitz's readings of x-rays dated March 24, 1999, July 11, 2000, May 24, 2001, April 1, 2002, and April 18, 2002 from the record; erred by not allowing the parties to determine which evidence to designate in compliance with the evidentiary limitations set forth at 20 C.F.R. §725.414; and erred in granting claimant's request for the discovery of medical evidence prepared by non-testifying experts. However, the Board vacated the administrative law judge's award of benefits on the merits, and remanded this case for further consideration of the evidence. The administrative law judge was instructed to determine whether claimant established good cause for admitting the readings of the July 2, 2002 CT scan by Drs. Shipley and Spitz into the record pursuant to 20 C.F.R. §725.456(b) and, if so, to leave the record open for at least thirty days for employer to respond to this evidence. The Board further instructed the administrative law judge to consider whether an x-ray reading by Dr. Maki, identified by employer as a July 1, 2002 x-ray, was admissible as a treatment record pursuant to 20 C.F.R. §725.414(a)(4). [*C.C.B.*] *v. Westmoreland Coal Co.*, BRB No. 06-0653 BLA (May 31, 2007)(unpub.).

[1] Claimant's original claim, filed on November 17, 1987, was denied by Administrative Law Judge Robert M. Gleason on September 20, 1989, for failure to establish any element of entitlement. Director's Exhibit 33. Claimant took no further action on this claim.

On remand, claimant withdrew the CT scan interpretations of Drs. Shipley and Spitz from consideration for admission into the record, thus obviating the need for employer to respond to that evidence. The administrative law judge determined that employer had not offered an x-ray interpretation by Dr. Maki for admission into evidence as a treatment record, and, upon a reassessment of the evidence, found that claimant's withdrawal of the two CT scan interpretations did not affect his prior finding that the weight of the x-ray evidence and medical opinion evidence was positive for *pneumoconiosis*. The administrative law judge concluded that the CT scan evidence was not entitled to determinative weight, and that the preponderance of the evidence of record still showed that claimant was totally disabled due to pneumoconiosis. Accordingly, benefits were awarded.

In the present appeal, employer asserts that the administrative law judge failed to comply with the Board's instructions on remand to consider the admissibility of Dr. Maki's x-ray interpretation as a treatment record, and challenges his weighing of the evidence of record on the issue of the existence of pneumoconiosis at Section 718.202(a).[2] Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, declining to address the administrative law judge's findings on the merits, but urging the Board to reject employer's procedural arguments. The Director has incorporated by reference his previous response to employer's arguments in the last appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the procedural issue, employer contends that the administrative law judge failed to follow the Board's remand instructions and erred in not considering Dr. Maki's July 1, 2002 x-ray interpretation. We disagree. On remand, the administrative law judge acknowledged that he was instructed to consider the admissibility of Dr. Maki's x-ray reading as a treatment record, but found that employer "never offered into evidence an x-ray by Dr. Maki," based upon his review of employer's list of exhibits and the Hearing Transcript. Decision and Order on Remand at 2. While

[2] Employer has also reasserted its argument that there is no basis to compel production of non-testifying expert reports when the opposing party has developed similar evidence. Employer's Brief at 4-7. However, because claimant, on remand, withdrew the disputed exhibits he had obtained from employer through discovery, *i.e.*, the CT scan interpretations of Drs. Shipley and Spitz, we need not address this issue.

employer's brief in its appeal to the Board identified Dr. Maki's x-ray report as being contained in Employer's Exhibit 12, the administrative law judge correctly determined that the list of Employer's Exhibits Numbers 1 through 26, admitted into evidence as Employer's Exhibit 27, does not identify any exhibit as containing a report by Dr. Maki. *Id*. Rather, Employer's Exhibit 27 describes Employer's Exhibit 12 as "Report of Dr. Jerome F. Wiot containing his interpretation of the x-ray film dated April 1, 2002 with his curriculum vitae and miscellaneous medical records consisting of four (4) pages submitted under cover letter dated September 17, 2002."[3] *Id*. Noting that the Hearing Transcript reflected that employer "never moved into evidence any x-ray report on the basis that it was a treatment record," the administrative law judge permissibly found that "no consideration can be given to an x-ray report by Dr. Maki." *Id.*; *see* Hearing Transcript at 59-83. As the administrative law judge is afforded broad discretion in dealing with procedural matters, *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*), we conclude that his resolution of this evidentiary matter constitutes a reasonable exercise of his discretion. Therefore, we reject employer's assertions that the administrative law judge failed to comply with the Board's instructions on remand, and erred in failing to weigh Dr. Maki's x-ray interpretation with the remaining x-ray evidence of record.

Turning to the merits, employer challenges the administrative law judge's weighing of the medical opinion evidence, and asserts that the administrative law judge erred in failing to weigh all relevant evidence together at Section 718.202(a), consistent with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2002). Employer's arguments are without merit. In his previous Decision and Order, the administrative law judge permissibly found that the weight of the newly submitted x-ray evidence was sufficient to support a finding of pneumoconiosis at Section 718.202(a)(1),[4]

[3] A review of the Hearing Transcript indicates that the administrative law judge did not admit Employer's Exhibit 12 into evidence, *see* Hearing Transcript at 87, and that the administrative law judge refused to accept provisionally into the record the exhibits that had been offered but not admitted into evidence, relying on *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004), where the Board ruled that "[t]he procedural regulations do not impose a duty to associate with the record proffered exhibits that are not admitted as evidence." *Dempsey*, 23 BLR at 1-63; *see* 20 C.F.R. §§725.456(b)(1), 725.464; 29 C.F.R. §§18.47, 18.52(a).

[4] The administrative law judge determined that the May 24, 2001 and the April 1, 2002 x-rays each received one negative and one positive interpretation, while the April 18, 2001 x-ray received one negative and two positive interpretations for pneumoconiosis. Decision and Order at 15; Director's Exhibit 16; Claimant's Exhibits 2, 5, 11; Employer's Exhibits 2, 4. The administrative law judge further determined that all of the readers were dually qualified Board-certified radiologists and B readers. Decision

based on a numerical preponderance of positive interpretations by qualified readers, and he incorporated this finding into his Decision and Order on Remand. 2006 Decision and Order at 7, 15; Decision and Order on Remand at 3; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). At Section 718.202(a)(4), the administrative law judge accurately summarized the newly submitted medical opinions of record, and determined that Drs. Cohen,[5] Smith,[6] and Rasmussen[7] all diagnosed pneumoconiosis, whereas Drs. Zaldivar[8] and Crisalli[9] found no evidence of pneumoconiosis, with Dr.

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and Order at 15. As all of the x-rays were performed within the span of one year, the administrative law judge reasonably concluded that no x-ray could be considered more probative based on its recency. *Id*.

[5] Dr. Cohen, a B reader who is Board-certified as a medical examiner and in internal medicine and pulmonary diseases, reviewed the medical records in 2002 and diagnosed pneumoconiosis related to coal dust exposure based on employment history, negligible smoking history, physical symptoms, pulmonary function study findings, and his discussion of recent medical literature. Claimant's Exhibit 8.

In supplemental reports of June, 2004, and November, 2004, Dr. Cohen reviewed additional medical records as well as the depositions of Drs. Crisalli and Zaldivar. Reiterating his diagnosis of pneumoconiosis, he disagreed with Dr. Zaldivar's attribution of the pulmonary function study findings to heart disease, and Dr. Crisalli's attribution to "some other undetermined and undiagnosed lung condition." 2006 Decision and Order; Claimant's Exhibits 10, 15.

[6] Dr. Smith, Board-certified in internal medicine and clinical densitometry, treated the miner for multiple conditions on a regular basis for over ten years, and diagnosed pneumoconiosis based on x-rays, CT scans, coal mine employment history, and evidence of progressive pulmonary disease. Employer's Exhibit 28. He considered the smoking history to be insignificant, and found the miner disabled from coal mine employment due to several conditions, including pulmonary disease. He found no signs of congestive heart failure, and did not believe that cardiac disease was the cause of claimant's pulmonary impairment. *Id*.

[7] Dr. Rasmussen performed the DOL evaluation on May 24, 2001, and diagnosed coal workers' pneumoconiosis and COPD/emphysema, both of which he attributed to coal mine dust exposure. He identified claimant's coal mine dust exposure as the only significant risk factor for his impaired lung function, and opined that it was consistent with the pattern of impairment. Director's Exhibit 12.

[8] Dr. Zaldivar, Board-certified in internal medicine, pulmonary diseases and sleep disorders, examined the miner in April, 2001, and concluded that the miner does not have

Zaldivar attributing claimant's pulmonary impairment to underlying coronary artery disease, and Dr. Crisalli indicating that claimant should undergo additional diagnostic testing to determine the cause of his disabling lung condition. 2006 Decision and Order at 9-12, 15-17. After reviewing the underlying documentation and the explanations for the physicians' conclusions, and after consideration of the opinion of claimant's treating physician, Dr. Smith, pursuant to the provisions at 20 C.F.R. §718.104(d), the administrative law judge acted within his discretion in finding that the opinions of Drs. Cohen, Smith and Rasmussen were the most credible and outweighed the contrary opinions of Drs. Zaldivar and Crisalli. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999). In so finding, the administrative law judge permissibly accorded greater weight to the diagnoses of pneumoconiosis by Dr. Cohen "based on his high level of expertise in the field of occupational medicine and pulmonary diseases,"[10] *see Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(*en banc*); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987), and by Dr. Smith, "who has had the opportunity to observe and treat the Claimant on a regular basis over a period of more than ten years," as supported by the opinion of Dr.

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coal workers' pneumoconiosis or any other dust disease of the lungs. He stated that the miner's respiratory impairment would prevent him from performing his usual coal mine employment, but attributed the impairment to coronary artery disease. Director's Exhibit 27. Moreover, he opined that a miner would have to show impairment from pneumoconiosis at the time his coal mine employment ceased in order for the disease to progress in later life. Employer's Exhibit 25 at 35-37; 2006 Decision and Order at 10.

[9] Dr. Crisalli, Board-certified in internal medicine and pulmonary disease, performed a pulmonary evaluation on May 20, 2002, reviewed medical records including those from 1988-89, and provided deposition testimony. Employer's Exhibits 3, 10, 14. He found that the x-ray evidence was negative for pneumoconiosis, and concluded that there was insufficient objective evidence to diagnose pneumoconiosis. He opined that claimant suffered a significant respiratory impairment and cannot perform his usual coal mine employment. He was unable to determine the cause of claimant's disability, but opined that it was unrelated to coal dust exposure, and suggested that claimant undergo further diagnostic testing. *Id*.

[10] The administrative law judge additionally found that Dr. Cohen "demonstrates a high degree of proficiency in the area of occupational lung disease by the large number of published articles and lectures which he has given on related topics." 2006 Decision and Order at 11.

Rasmussen,[11] who also diagnosed pneumoconiosis based on his examination and testing of claimant. 2006 Decision and Order at 17; Decision and Order on Remand at 4; *see Compton*, 211 F.3d 203, 22 BLR 2-162. The administrative law judge also reviewed the conflicting interpretations of a July 1, 2002 CT scan, finding that the record evidence in 2006 supported a finding of pneumoconiosis, as it consisted of three negative and five positive interpretations.[12] 2006 Decision and Order at 18. As the preponderance of the newly submitted x-ray evidence, CT scan evidence and medical opinion evidence in 2006 was positive for pneumoconiosis, the administrative law judge rationally found that claimant had established a change in an applicable condition of entitlement at Section 725.309(d). 2006 Decision and Order at 18; *see Compton*, 211 F.3d 203, 22 BLR 2-162. Weighing all of the record evidence, the administrative law judge determined that, although the preponderance of the x-ray evidence and the medical opinion evidence developed between 1983 and 1988 was insufficient to establish the existence of pneumoconiosis, this evidence was developed at least twelve years prior to the filing of the instant claim for benefits. In view of the progressive nature of pneumoconiosis, the administrative law judge rationally found that the newly submitted evidence was more probative of claimant's current condition, and was entitled to greater weight.[13] *Id.*; *see Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(Order on Recon. *en banc*); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Consequently, the administrative law judge found that the weight of the evidence in the record as a whole was sufficient to establish the existence of pneumoconiosis at Section 718.202(a). 2006 Decision and Order at 18.

[11] We reject employer's assertion that reliance on Dr. Rasmussen's 2001 diagnosis of pneumoconiosis is invalid without some explanation as to why his 1988 "misdiagnosis" does not taint the reliability of the later diagnosis. Employer's Brief at 15-16. While Dr. Rasmussen's 1988 opinion was found to be insufficient to establish entitlement, his 2001 opinion was based on a complete pulmonary evaluation and testing performed thirteen years later. Director's Exhibit 12.

[12] The administrative law judge determined that Drs. Maki, Capiello, Ahmed, Shipley and Spitz all found changes consistent with pneumoconiosis, whereas Drs. Wheeler, Scott and Scatarige interpreted the CT scan as negative for pneumoconiosis. 2006 Decision and Order at 18.

[13] We reject employer's assertion that the administrative law judge improperly created a new legal presumption in acknowledging the progressive nature of pneumoconiosis and in finding the more recent evidence to be more probative. Employer's Brief at 16-18; *see Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(Order on Recon. *en banc*).

On remand, the administrative law judge reconsidered the CT scan evidence of record in view of claimant's withdrawal of the positive interpretations of Drs. Shipley and Spitz, and found that this evidence was not supportive of a finding of pneumoconiosis, as it was, at most, in equipoise, with three positive and three negative interpretations. Decision and Order on Remand at 3. However, citing *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002), the administrative law judge permissibly concluded that, assuming *arguendo* that the CT scan evidence of record was considered to be completely negative, it was not entitled to determinative weight over the positive x-ray evidence and the weight of the medical opinion evidence. Decision and Order on Remand at 3-4. The administrative law judge acted within his discretion in rejecting employer's argument that Dr. Smith would not have diagnosed pneumoconiosis without a positive CT scan, based on Dr. Smith's deposition testimony that it would be very difficult to believe that claimant had a chronic occupational lung process if he had a completely normal CT scan of his chest. Employer's Exhibit 28 at 27. As Dr. Smith diagnosed pneumoconiosis after reviewing positive x-ray and CT scan evidence, and since even the CT scans interpreted as negative for pneumoconiosis were not read as "completely normal" but as showing fibrosis, the administrative law judge properly concluded that employer's argument was speculative. Moreover, the administrative law judge noted that neither Dr. Cohen nor Dr. Rasmussen relied on the July 1, 2002 CT scan to diagnose pneumoconiosis, and Dr. Cohen affirmatively stated that his diagnosis would not change even if the x-ray evidence was reread as negative for pneumoconiosis. Decision and Order on Remand at 4; Director's Exhibit 12; Claimant's Exhibit 10. As substantial evidence supports the administrative law judge's credibility determinations, and his analysis comports with the requirements of *Compton*, 211 F.3d at 203, 22 BLR at 2-162, we affirm his findings that the newly submitted evidence of record is sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), and that the weight of the evidence as a whole is sufficient to establish the existence of pneumoconiosis at Section 718.202(a).

Because employer has not identified any specific legal or factual errors in the administrative law judge's weighing of the medical evidence of record in finding total respiratory disability and disability causation established pursuant to Section 718.204(b), (c), we affirm his findings thereunder, as unchallenged on appeal, and affirm the award of benefits. *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); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is affirmed.

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