BRB No. 04-0410 BLA

HAROLD ALLEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/28/2004
	)	
SHAMROCK COAL COMPANY	)	
	)	
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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Ron E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Jeffrey S. Goldberg (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 (2003-BLA-05523) of Administrative Law Judge Stuart A. Levin denying benefits 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). The administrative law judge credited claimant with at least

nineteen years of qualifying coal mine employment, based on the evidence of record and a stipulation by the parties, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish either the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1)-(4), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in admitting and relying upon medical reports in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. On the merits, claimant contends the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and total disability pursuant to 20 C.F.R. §§718.204(b)(2)(iv). Employer responds that 20 C.F.R. §725.414 is an invalid regulation and that, in any event, claimant waived the evidentiary limitations issue. Employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response, arguing that the administrative law judge erred by failing to require employer to adhere to the evidentiary limitations. Employer has filed a reply brief reiterating its contentions.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Claimant contends that in submitting three medical reports from Drs. Dahhan, Broudy, and Rosenberg employer exceeded the evidentiary limitations set forth in Section 725.414 and that the administrative law judge erroneously failed to strike one of these reports from the record. The Director agrees that employer's third medical report exceeds the evidentiary limits at Section 725.414(a)(3)(i), and contends that the administrative law judge should have required employer to either withdraw one medical report or establish good cause for admitting the additional medical report. These contentions have merit.

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties may submit into the record.

20 C.F.R. §§725.414; 725.456(b)(1). The applicable provision in this case permitted employer to "obtain and submit, in support of its affirmative case . . . no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Employer obtained and submitted three medical reports. Director's Exhibit 11; Employer's Exhibits 2, 4. The administrative law judge accepted, without objection from claimant, employer's medical reports. In the administrative law judge's Decision and Order - Denying Benefits, he relied on employer's medical reports, and found that they outweighed claimant's medical evidence. Decision and Order at 5-10.

At the outset, we reject employer's contention that Section 725.414 is an invalid regulation. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1- , BRB Nos. 03-0615 BLA and 03-0615 BLA-A at 6-8 (Jun. 28, 2004). We likewise reject employer's contention that claimant waived the evidentiary limitations by failing to object below, because the regulation makes plain the limitations are mandatory, and as such, they are not subject to waiver: "Medical evidence in excess of the limitations contained in §725.414 *shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1)(emphasis added).

In this case, the administrative law judge accepted and relied upon employer's three medical reports without rendering the requisite finding of whether employer demonstrated good cause for admitting medical reports in excess of the Section 725.414 limitations. 20 C.F.R. §725.456(b)(1). Consequently, we must vacate the administrative law judge's Decision and Order and remand this case to him for further consideration pursuant to Sections 725.414 and 725.456(b)(1).

Employer contends that its third medical report from Dr. Rosenberg constitutes admissible rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii).[1] The Director responds that Dr. Rosenberg's report does not meet the regulatory definition of rebuttal evidence. We need not address this issue, as we are remanding this case for the administrative law judge to apply Sections 725.414 and 725.456(b)(1). Additionally, in light of our holding regarding the evidentiary issue, we decline to address claimant's allegations of error regarding the administrative law judge's findings on the merits of entitlement.

[1] The applicable regulation specifies that, in rebuttal of claimant's case, a responsible operator may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, [or] arterial blood gas study . . . submitted by the claimant . . . ." 20 C.F.R. §725.414(a)(3)(ii).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge