BRB No. 05-0342 BLA

HIRAM HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEATHERWOOD ENERGY CORPORATION, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 12/16/2005
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

John Logan Griffith (Porter, Schmitt, Jones & Banks), Paintsville, Kentucky, for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 (03-BLA-6099) of Administrative Law Judge Daniel J. Roketenetz awarding benefits 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).[1] The administrative law judge credited claimant with twenty-two years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a "material" change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Turning to the merits of the case, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)[4] and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

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[1]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.

[2]Claimant filed his first claim on May 24, 1994. Director's Exhibit 1. This claim was denied by the Department of Labor on November 4, 1994 because the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that claimant was totally disabled by the disease. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on September 6, 2001. Director's Exhibit 2.

[3]The revisions to the regulation at 20 C.F.R. §725.309 apply to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2. As claimant's most recent claim was filed after January 19, 2001, Director's Exhibit 2, claimant filed a "subsequent claim" as opposed to a "duplicate claim." *Compare* 20 C.F.R. §725.309 *with* 20 C.F.R. §725.309 (2000); Director's Exhibit 2. Thus, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a "change in an applicable condition of entitlement" pursuant to 20 C.F.R. §725.309.

[4]Although the administrative law judge found the evidence insufficient to establish

On appeal, employer contends that the administrative law judge erred in excluding Dr. Dahhan's report from the record pursuant to 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge erred in excluding Dr. Dahhan's report and test results from the record under the evidentiary limitations set forth at 20 C.F.R. §725.414.[5]

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).

Initially, employer contends, and the Director agrees, that the administrative law judge erred in excluding Dr. Dahhan's report from the record pursuant to 20 C.F.R. §725.414. In a report dated February 13, 2004, Dr. Dahhan opined that claimant does not have coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Dahhan also opined that claimant does not have a pulmonary or respiratory disability caused by, related to, or aggravated by the inhalation of coal dust.[6] *Id*. In considering the medical reports submitted by the parties, the administrative law judge, relying on employer's evidence summary form, stated that employer offered Dr. Dahhan's report as rebuttal evidence. Decision and Order at 11 n.9. But the administrative law judge also found that "[Dr. Dahhan's] report does not qualify as rebuttal evidence under Section 725.414(a)(2)(ii)

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total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), he found the evidence sufficient to establish both total disability at 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(b) overall.

[5]None of the parties has challenged the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), that the evidence is sufficient to establish that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii).

[6]Dr. Dahhan opined that from a respiratory standpoint, claimant retains the physiological capacity to continue his previous coal mining work or a job of comparable physical demand. Employer's Exhibit 1.

and (3)(ii)." *Id.* Consequently, the administrative law judge did not consider Dr. Dahhan's report in this case. *Id.*

In its evidence summary form, employer designated Dr. Broudy's report as initial evidence and Dr. Dahhan's report as rebuttal evidence. However, as argued by employer and the Director, employer specifically stated during the hearing that the two reports of Drs. Broudy and Dahhan were going to be its *initial evidence*. Transcript at 7. Although employer's hearing statement changed its designation of Dr. Dahhan's report from rebuttal evidence to initial evidence, the administrative law judge did not consider this statement in addressing the type of medical opinion evidence employer submitted into the record. Thus, since employer is entitled to submit two medical reports in its affirmative case, we vacate the administrative law judge's award of benefits and remand the case to the administrative law judge to admit Dr. Dahhan's report into the record and for further consideration of all the evidence in accordance with the evidentiary limitations. *See* 20 C.F.R. §725.414(a)(3)(i).

Next, in the interest of judicial economy, we will address employer's contentions on the merits. Employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Relevant to the issue of the existence of pneumoconiosis, the record currently consists of the reports of Drs. Baker, Chaney, Broudy, and Wicker. In reports dated October 31, 2001 and November 4, 2002, Dr. Baker opined that claimant suffers from coal workers' pneumoconiosis and an occupational lung disease related to coal dust exposure. Director's Exhibits 14, 34. Similarly, in an undated report and a deposition dated March 8, 2004, Dr. Chaney opined that claimant suffers from coal workers' pneumoconiosis and a lung disease related to coal dust exposure. Director's Exhibit 20; Claimant's Exhibit 2. In contrast, in a report dated December 12, 2001, Dr. Broudy opined that claimant does not suffer from coal workers' pneumoconiosis or a chronic lung disease related to the inhalation of coal mine dust. Director's Exhibit 19. Lastly, in a report dated June 20, 1994, Dr. Wicker opined that claimant does not suffer from pneumoconiosis. Director's Exhibit 1. In considering the conflicting medical opinions, the administrative law judge found that the opinions of Drs. Baker and Chaney outweighed the contrary opinions of Drs. Broudy and Wicker. The administrative law judge permissibly accorded greater weight to the opinions of Drs. Baker and Chaney than to Dr. Wicker's contrary opinion because he found that they are more reflective of claimant's current physical condition.[7] *See generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

[7]In considering the issue of pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge stated, "[t]he negative x-ray rendered seven years prior to the positive interpretations provides little assistance to my analysis due to the progressive nature of pneumoconiosis." Decision and Order at 13. The administrative law judge

Employer argues that "[t]he administrative law judge did not make a finding on why the opinion of Dr. Broudy was not well reasoned and not well documented." Employer Brief at 5. The administrative law judge accorded greater weight to the opinions of Drs. Baker and Chaney than to Dr. Broudy's contrary opinion based on his finding that they are better reasoned and documented. Decision and Order at 12-13. The Administrative Procedure Act (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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, however, the administrative law judge did not explain why he found that the opinions of Drs. Baker and Chaney are better reasoned and documented than Dr. Broudy's contrary opinion, nor is it apparent from the face of the doctors' reports.[8] Thus, since the administrative law judge failed to provide a valid basis for according greater weight to the opinions of Drs. Baker and Chaney than to the contrary opinion of Dr. Broudy, we hold that the administrative law judge erred in finding that the opinions of Drs. Baker and Chaney outweighed Dr. Broudy's contrary opinion at 20 C.F.R. §718.202(a)(4). *Wojtowicz*, 12 BLR at 1-165.

Employer also contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability at 20 C.F.R.

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additionally stated that "Dr. Wicker's opinion will be afforded little weight for the same reason." *Id.*

[8]Claimant designated Dr. Chaney's deposition testimony as rebuttal evidence for the reports of Drs. Broudy and Dahhan in his evidence summary form. In considering Dr. Broudy's report and Dr. Chaney's deposition with regard to the issue of pneumoconiosis, the administrative law judge stated:

> Dr. Broudy made a diagnosis of chronic bronchitis with mild airway obstruction which he attributed to cigarette smoking. Dr. Chaney testified this diagnosis could not be exclusively attributed to the [c]laimant's cigarette smoking, and the [c]laimant's long underground coal dust exposure in a difficult job partially contributed to [c]laimant's chronic bronchitis. As such, I afford Dr. Broudy's determination of chronic bronchitis due to cigarette smoke less weight.

Decision and Order at 13. Although the administrative law judge pointed out that Dr. Chaney disagreed with Dr. Broudy's opinion with respect to the cause of claimant's chronic bronchitis, he did not explain why he found that Dr. Chaney's opinion should be accorded greater weight than Dr. Broudy's opinion on this basis. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

§718.204(b)(2)(iv). Relevant to the issue of total disability, the record currently consists of the reports of Drs. Baker, Chaney, Broudy, and Wicker. In a report dated October 31, 2001, Dr. Baker opined that claimant suffers from a mild impairment and retains the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 14. In a subsequent report dated November 4, 2002, Dr. Baker opined that claimant is totally disabled from performing his usual coal mine job or comparable work in a dust-free environment. Director's Exhibit 34. Similarly, in an undated report and deposition dated March 8, 2004, Dr. Chaney opined that claimant is totally disabled. Director's Exhibit 20. However, in a report dated December 12, 2001, Dr. Broudy opined that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Director's Exhibit 19. Dr. Wicker, in a report dated June 20, 1994, stated that claimant's respiratory capacity could not be determined due to his failure to comply with the testing procedure. Director's Exhibit 1.

Employer argues that the administrative law judge erred in failing to provide "specific findings as to why Dr. Broudy's report was not as well-reasoned and well-documented as the reports of Dr. Baker and Dr. Chaney." Employer's Brief at 6. The administrative law judge accorded greater weight to the opinions of Drs. Baker and Chaney than to Dr. Broudy's contrary opinion because he found that they are better reasoned and documented. Decision and Order at 16-17. However, the administrative law judge did not explain why he found that the opinions of Drs. Baker and Chaney are better reasoned and documented than Dr. Broudy's contrary opinion.[9] As discussed *supra*, the APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. Moreover, although not explicitly raised by employer, the administrative law judge did not consider the inconsistencies in Dr. Baker's reports,

[9]The administrative law judge stated:

> In rebuttal, Dr. Chaney testified, in his deposition, that from Dr. Broudy's spirometry results coupled with the [c]laimant's prior strenuous coal mine job as a roof bolter that Dr. Broudy should have found the [c]laimant unable to return to his previous coal mine employment. Thus, I afford less weight to Dr. Broudy's opinion.

Decision and Order at 17. Although the administrative law judge pointed out that Dr. Chaney disagreed with Dr. Broudy's opinion with respect to whether claimant retained the respiratory capacity to perform his previous coal mine employment, he did not explain why he found that Dr. Chaney's opinion should be accorded greater weight than Dr. Broudy's opinion on this basis. *Wojtowicz*, 12 BLR at 1-165.

namely, Dr. Baker opined that claimant retains the respiratory capacity to perform the work of a coal miner in his 2001 report, but he opined that claimant is totally disabled from performing coal mine employment in his 2002 report. *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984). Thus, since the administrative law judge failed to provide a valid basis for according greater weight to the opinions of Drs. Baker and Chaney than to the contrary opinion of Dr. Broudy, we hold that the administrative law judge erred in finding that the opinions of Drs. Baker and Chaney outweighed Dr. Broudy's contrary opinion at 20 C.F.R. §718.204(b)(2)(iv). *Wojtowicz,* 12 BLR at 1-165.

Finally, employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Relevant to the issue of disability causation, the current record consists of the reports of Drs. Baker, Chaney, and Broudy.[10] Dr. Baker opined that coal dust exposure and cigarette smoking caused claimant's disabling respiratory impairment. Director's Exhibit 34. Similarly, Dr. Chaney opined that pneumoconiosis caused claimant's disability. Director's Exhibit 20; Claimant's Exhibit 2. Dr. Broudy opined that claimant does not suffer from a respiratory impairment that has arisen from claimant's occupation as a coal worker. Director's Exhibit 19. Although the administrative law judge accorded greater weight to the opinions of Drs. Baker and Chaney than to Dr. Broudy's contrary opinion because they are better reasoned and documented, he did not explain why he reached this conclusion about their opinions. Decision and Order at 17-18. Thus, since the administrative law judge failed to provide a valid basis for according greater weight to the opinions of Drs. Baker and Chaney than to the contrary opinion of Dr. Broudy, we hold that the administrative law judge erred in finding that the opinions of Drs. Baker and Chaney outweighed Dr. Broudy's contrary opinion at 20 C.F.R. §718.204(c). *Wojtowicz*, 12 BLR at 1-165.

At the outset on remand, however, the administrative law judge must include Dr. Dahhan's opinion in his consideration of whether the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement since the date of the denial of the prior claim at 20 C.F.R. §725.309. If the administrative law judge finds the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, then he must consider all of the evidence of record to determine whether it supports a finding of entitlement to benefits on the merits under 20 C.F.R. Part 718.

[10]Dr. Wicker did not render an opinion with respect to the issue of disability causation. Director's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and the case is remanded for further proceedings 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