BRB No. 05-0373 BLA

HAROLD L. McCOWAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 12/30/2005
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 – Awarding Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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.

DOLDER, J., Chief Administrative Appeals Judge:

Employer appeals the Decision and Order – Awarding Benefits (03-BLA-6241) of Administrative Law Judge Mollie W. Neal 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). The administrative law judge credited claimant with twenty one and one-quarter years of coal mine employment. Decision and

Order at 2. The administrative law judge found that the weight of the x-ray, CT scan, and medical opinion evidence submitted since the district director's prior denial of benefits, *see* Director's Exhibits 30, 36, establishes invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. The administrative law judge also found that the medical opinion evidence of record establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that the pneumoconiosis arose out of claimant's coal mine employment at 20 C.F.R. §718.203(b). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge failed to consider all of the relevant evidence in finding that claimant established invocation of the irrebuttable presumption at 20 C.F.R. §718.304 and further asserts that that finding is not supported by substantial evidence. Employer specifically asserts that the administrative law judge erroneously "excluded" Dr. Fino's January 15, 2004 report from the record. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief. The Director urges the Board to reject employer's argument that the administrative law judge erred by "excluding" Dr. Fino's January 15, 2004 report. The Director asserts that the administrative law judge properly excluded Dr. Fino's report from the record where two chest x-rays referred to therein by Dr. Fino constitute excess evidence and are not admissible. The Director argues that employer has not established that the report falls within the "good cause" exception to the evidentiary limitations at 20 C.F.R. §725.414. *See* 20 C.F.R. §725.456(b)(1).[1] In reply, employer reiterates its argument that the administrative law judge abused her discretion by excluding Dr. Fino's January 15, 2004 opinion. Employer reiterates its assertion that it has shown "good cause" as to why the administrative law judge should have admitted Dr. Fino's opinion into the record notwithstanding the fact that it is based on excess x-ray evidence. The claimant has not filed a brief in the 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 by 30

---

[1]In a footnote, the Director, Office of Workers' Compensation Programs, states:

> The [administrative law judge] did not consider whether Dr. Fino's opinion would be admissible under the "good cause" provision. Since, as argued herein, employer's "good cause" argument is meritless, the [administrative law judge's] failure to consider the issue was, at most, harmless error.

Director's Response Brief at 2 n.2.

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

Employer alleges error in the administrative law judge's decision not to consider Dr. Fino's January 15, 2004 medical opinion because it is based on inadmissible x-ray evidence. Decision and Order at 11; *see* Employer's Exhibit 2. Employer submitted two reports from Dr. Fino. Dr. Fino examined claimant on September 26, 2003 and submitted a corresponding report dated October 15, 2003. Employer's Exhibit 1. Based on findings on physical examination, x-ray, pulmonary function study, blood gas study, medical, occupational, and social histories, and a review of certain medical records, Dr. Fino offered the following "Diagnoses:"

> This man has a disabling obstructive and restrictive defect. There is significant fibrosis on the CT scan. Taking the entire record into consideration, all of the changes could be consistent with simple and complicated pneumoconiosis. However, I did not note these changes on the previous film that I reviewed in 1997. Therefore, it is entirely possible that a non-occupational disease process is present such as sarcoidosis. It would be extremely helpful to review all old chest films side by side. As a practicing pulmonary physician, it is imperative to be able to review all available chest films on a patient in order to be able to reach a reasoned conclusion. This is how pulmonary medicine is practiced in hospitals and in the office across the country.

Employer's Exhibit 1. In his report dated January 15, 2004, Dr. Fino opined:

> The progression of changes on the chest x-ray is one of non-coal mine related lung condition. The changes are consistent with sarcoidosis or even possible fungal or tuberculous infection. The lack of true rounded mass lesions, nodularity, subpleural blebs and retraction of lung tissue argues against simple or complicated coal workers' pneumoconiosis.
>
> Therefore, it is my opinion, with a reasonable degree of medical certainty, that this man does not suffer from a coal mine dust related pulmonary condition. It is my opinion, within a reasonable degree of medical certainty, that his pulmonary disability would have occurred had he never stepped foot in the coal mines. It is also my opinion that this man requires some type of diagnostic procedure to obtain lung tissue so treatment may be offered to him.

Employer's Exhibit 2. The administrative law judge found that neither the February 23, 1999 x-ray nor the November 28, 1997 x-ray, which were among the x-rays reviewed by

Dr. Fino in his 2004 report, is admissible under 20 C.F.R. §725.414(a)(2) or (a)(3). The administrative law judge stated, "Because Dr. Fino's January 15, 2004 opinion modifying his earlier September 26, 2003 report is based on inadmissible evidence, I decline to consider EX 2." Decision and Order at 11; *see* Employer's Exhibit 2. Employer acknowledges that Dr. Fino's 2004 report is based on excess x-ray evidence. Employer's Brief at 4. Employer argues, however, that the administrative law judge abused her discretion by failing to determine whether employer established "good cause" for the admission of Dr. Fino's January 15, 2004 opinion. Employer further asserts that the administrative law judge had essentially agreed, at the hearing, that employer established "good cause" at 20 C.F.R. §725.456(b)(1) for the admission of Dr. Fino's 2004 report.

We agree with employer's argument that the administrative law judge erred in failing to provide an explanation as to why she declined to consider Dr. Fino's January 15, 2004 opinion in her Decision and Order after indicating at the hearing that Dr. Fino's report would be considered. The record indicates that the administrative law judge made inconsistent rulings on the evidentiary issue. Specifically, employer argued at the hearing that Dr. Fino's statement in his 2003 report, namely that "It would be extremely helpful to review all old chest films side by side," *see* Employer's Exhibit 1, establishes "good cause" for why Dr. Fino, in his 2004 report, reviewed old, and partly inadmissible, x-ray evidence (at employer's request.) Hearing Transcript at 21-29.[2] The administrative law judge considered employer's argument as well as claimant's objection thereto, and stated, "I'm going to treat the second [Dr.] Fino report as simply a supplemental report, and that's permissible. So it will be one report. It's just a supplemental – all of his opinion will be put together." *Id.* at 29. At the conclusion of the taking of claimant's testimony, however, employer raised additional evidentiary matters related, in part, to what x-ray and medical opinion evidence employer relies on in this case, specifically referencing reports rendered by Dr. Fino. The administrative law judge allowed employer time in which to clarify its evidence and allowed claimant time in which to object. *Id.* at 53-57. While the administrative law judge stated at the hearing that she would treat Dr. Fino's 2004 report as supplemental to his 2003 report, as discussed *supra*, she subsequently found, in her Decision and Order, that Dr. Fino's 2003 opinion is equivocal and that Dr. Fino's 2004 opinion "modif[ied]" his 2003 opinion and therefore declined to consider it.

[2]Employer's counsel argued at the hearing that Dr. Fino's 2004 report was necessarily based on several old x-ray films, as Dr. Fino indicated in his 2003 report that he would need to "review all available chest films on a patient in order to reach a reasoned conclusion" as to the presence or absence of simple and/or complicated pneumoconiosis. Hearing Transcript at 22-29; *see* Employer's Exhibit 1. Employer's counsel thus argued that the excess x-ray evidence upon which Dr. Fino's opinion is based is offered to show the reasoned nature of his opinion and is not offered as an effort to "stack the deck." Hearing Transcript at 22-24.

Decision and Order at 11. Because the administrative law judge provided no explanation for her changed ruling in declining to consider Dr. Fino's 2004 report in the Decision and Order, her determination cannot be affirmed. In light of the inconsistent rulings issued by the administrative law judge in this case, we vacate her finding at 20 C.F.R. §718.304 and remand the case.[3] On remand the administrative law judge must reconsider the admissibility of Dr. Fino's January 15, 2004 medical opinion under the evidentiary limitations provided at 20 C.F.R. §725.414 and explain her findings. The administrative law judge must then redetermine whether the evidence of record establishes claimant's entitlement to benefits under 20 C.F.R. §718.304 on the merits of the claim. 20 C.F.R. §718.304; *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

Employer next argues that because Dr. Fino's 2004 report is relevant and material, employer has established "good cause" at 20 C.F.R. §725.456(b)(1) for its admissibility under *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Employer also states that not only is Dr. Fino's 2004 opinion "highly relevant, it is substantively and singularly material." Employer's Reply Brief at 1. Citing *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004), the Director argues that the evidentiary limitations supersede the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood*, and thus, employer's reliance on *Underwood* is misplaced. The Director also notes that the Board, in *Dempsey*, rejected the argument that mere relevance constitutes "good cause" for the admission of evidence that would otherwise be excluded under Section 725.414. *See Dempsey*, 23 BLR at 1-61-62. The Director thus urges the Board to reject employer's argument.

[3]Employer sets forth several arguments in support of its contention that the administrative law judge's finding of invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is not supported by a preponderance of the evidence of record and contains reversible error. Because we herein vacate the administrative law judge's finding at 20 C.F.R. §718.304, we need not address employer's arguments as they are premature.

For the reasons set forth by the Board in *Dempsey*, we find no merit in employer's argument based on *Underwood*. However, on remand, the administrative law judge must make complete findings as to whether employer established "good cause" for the admission of Dr. Fino's 2004 report pursuant to the evidentiary limitations provided at 20 C.F.R. §725.414. 20 C.F.R. §§725.414, 725.456(b)(1).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____
ROY P. SMITH
Administrative Appeals Judge

HALL, J., Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand this case for the administrative law judge to explain her ultimate decision not to consider Dr. Fino's January 15, 2004 report. The revised regulations state, *inter alia*, that any chest x-ray interpretations that appear in a medical report must be admissible under the regulations. *See* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In this case, it is undisputed that Dr. Fino's January 15, 2004 opinion, that claimant does not have simple or complicated pneumoconiosis, is based, in part, on excess x-ray evidence, 20 C.F.R. §725.414(a)(2)(i); *see* Employer's Exhibit 2, and the administrative law judge so found. *See* Decision and Order at 11. I would hold, therefore, that the administrative law judge acted within her discretion in resolving this evidentiary matter by not considering Dr. Fino's January 15, 2004 report at 20 C.F.R. §718.304 because it is based on excess x-ray evidence. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985).

_____
BETTY JEAN HALL
Administrative Appeals Judge