BRB No. 07-0275 BLA

J.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INDEPENDENCE COAL COMPANY, LIMITED	)	
	)	
	)	DATE ISSUED: 12/27/2007
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 on Remand Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Charleston, West Virginia for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; 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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (04-BLA-5044) of Administrative Law Judge Richard A. Morgan issued 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). This case is before the Board for a second time.[1] The Board previously vacated the administrative law judge's April 7, 2005 Decision and Order awarding benefits on the ground that he erred in excluding employer's second rebuttal interpretation of a February 5, 2003 x-ray, contained at Employer's Exhibit 8.[2] [*J.B.*] v. *Independence Coal Co., Ltd.*, BRB No. 05-0621 BLA (Mar. 31, 2006) (unpub.), slip op. at 5-6. Furthermore, because the administrative law judge's evidentiary error influenced his weighing of the evidence at 20 C.F.R. §718.202(a)(1), (4) and 718.204(c), the Board also vacated the administrative law judge's findings under those subsections.[3] *Id*. at 6-8, 10. The Board instructed the

[1] Claimant filed an application for benefits on February 11, 2002. In his Decision and Order dated April 7, 2005, the administrative law judge credited claimant with seventeen years of coal mine employment, and determined that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv), and 718.204(c).

[2] At the hearing, employer submitted two negative readings by Drs. Meyer and Wiot of a February 5, 2003 x-ray to rebut two positive readings by Drs. Baker and Miller of that same x-ray, which were submitted by claimant as affirmative evidence. Director's Exhibits 23, 24; Employer's Exhibits 7, 8. The administrative law judge refused to admit employer's two rebuttal readings because he interpreted 20 C.F.R. §725.414(a)(3)(i) as permitting employer to submit only one interpretation of each x-ray submitted by claimant, as opposed to being allowed to rebut any x-ray "interpretation" proffered by claimant as affirmative evidence. Because the only "x-ray" proffered by claimant as affirmative evidence was the February 5, 2003 x-ray, the administrative law judge permitted employer to submit Dr. Wiot's negative reading in rebuttal to claimant's affirmative readings, but excluded Dr. Meyer's negative reading of the February 5, 2003 x-ray as excessive evidence. On appeal, the Board held that the administrative law judge's evidentiary ruling was in error, in light of the reasonable interpretation of Section 725.414(a)(3)(i) by the Director, Office of Workers' Compensation Programs, as permitting employer to rebut each individual x-ray interpretation submitted by claimant as an affirmative x-ray reading pursuant to 20 C.F.R. §725.414(a)(2)(i). [*J.B.*]. *v. Independence Coal Co., Ltd.*, BRB No. 05-0621 BLA (Mar. 31, 2006) (unpub.), slip op. at 6. Thus, the Board held that the administrative law judge erred in excluding Dr. Meyer's negative reading of the February 5, 2003 x-ray, which had been proffered by employer to rebut one of claimant's affirmative readings of that x-ray. *Id*.

[3] The Board rejected employer's arguments that 20 C.F.R. §725.414 is an invalid regulation, and affirmed the administrative law judge's determination to exclude several items of evidence associated with claimant's state claim for benefits on the ground that the evidence would exceed the evidentiary limitations, and employer had not

administrative law judge on remand to admit Employer's Exhibit 8 into the record, and then to consider whether claimant had satisfied his burden of proving the existence of pneumoconiosis and disability causation. *Id*. at 7-8. In evaluating the x-ray evidence for pneumoconiosis, the Board specifically instructed the administrative law judge then to consider the radiological qualifications of the readers, and any additional qualifications, that may bear on the quality of the x-ray evidence pursuant to Section 718.202(a)(1). *Id*. at 7. In considering whether claimant suffers from either clinical or legal pneumoconiosis, the Board instructed the administrative law judge to "be mindful that a medical opinion of clinical pneumoconiosis which is merely a restatement of an x-ray opinion may not establish the existence of pneumoconiosis at Section 718.202(a)(4)." *Id.* at 8.

On remand, the administrative law judge admitted Employer's Exhibit 8 into the record. Weighing the conflicting x-rays and medical opinions, he determined that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(1) and (4). Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in admitting, under the direction of the Board, Dr. Meyer's negative rebuttal reading of the February 5, 2003 x-ray. Claimant further contends that even if Dr. Meyer's reading was properly admitted into the record, the administrative law judge failed to perform a proper analysis of the x-ray evidence at Section 718.202(a)(1). Claimant also argues that the administrative law judge erred in failing to find that he established the existence of pneumoconiosis based on the medical opinions of Drs. Baker and Ranavaya pursuant to Section 718.202(a)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, asserting that the Board should decline to readdress claimant's arguments as to the

---

demonstrated good cause for its admission into the record. *[J.B.] v. Independence Coal Co.*, BRB No. 05-0621 BLA (Mar. 31, 2006) (unpub.), slip op. at 3-4. The Board affirmed, as unchallenged by the parties on appeal, the administrative law judge's findings of seventeen years of coal mine employment, and his determination that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (3). *Id*. at 3 n. 3. The Board also rejected employer's argument that the administrative law judge erred in his evaluation of the evidence relevant to total disability and affirmed the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). *Id*. at 10.

admissibility of Dr. Meyer's x-ray interpretation as the Board's prior holding constitutes the law of the case on that issue.

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.[4] 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).

Claimant initially argues on appeal that it was error for the administrative law judge to admit on remand, under the direction of the Board, Dr. Meyer's negative reading of the February 5, 2003 x-ray as allowable rebuttal evidence. Claimant's Brief at 10. Claimant specifically requests that the Board revisit its decision to rely on the Director's interpretation of 20 C.F.R. §725.414(a)(3)(ii) to permit employer to rebut each of claimant's affirmative x-ray readings, and not just each affirmative x-ray film. However, because claimant has not set forth any valid exception to the law of the case doctrine, *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in manifest injustice, we decline to revisit our prior holding with regard to the admission of Dr. Meyer's reading into the record. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*)(Hall, C.J., and Nelson, J., concurring and dissenting); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). Furthermore, as noted by the Director, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has expressed its agreement with the Director's interpretation of Section 725.414(a)(3)(ii), and the identical language found in Section 725.414(a)(2)(ii) as allowing for the rebuttal of each x-ray reading submitted by the opposing party as affirmative evidence. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007). Thus, there is no merit to claimant's challenge to the admission of Dr. Meyer's reading.

Turning to the merits of entitlement, claimant argues that the administrative law judge erred in his consideration of the conflicting x-ray evidence for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). As noted by claimant, in addressing the x-ray evidence, the administrative law judge indicated that he was assigning greater weight to

[4] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

the opinions of Drs. Scatarige, Wiot, Meyer and Miller, as they were professors of radiology, in addition to being Board-certified radiologists and B readers. The administrative law judge then stated:

> The claimant's argument that greater weight should be given to Dr. Miller's readings because he reviewed the complete series of the miner's X-rays (in evidence) has some merit. His "1/0" readings are corroborated by those of two B readers, who found the same perfusion. On the other hand, four highly qualified B-reader/Board-certified radiologists found each one of the three X-rays they read negative for pneumoconiosis. Given their consistent readings and excellent qualifications, I give greater credit to the readings of Drs. Wiot, Meyer and Scartarige. Given that the reading by Dr. Willis is consistent with that of the highly-qualified readers and only four months later, I give greater credit to his reading than to Dr. Miller's. Thus, I find the X-ray evidence has not established pneumoconiosis….

Decision and Order on Remand Denying Benefits at 5.

Citing *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), claimant contends that the administrative law judge erred by failing to perform an "x-ray by x-ray analysis of the chest x-ray evidence in order to determine whether pneumoconiosis was present." Claimant's Brief at 16. Claimant submits that "if a chest x-ray by chest x-ray analysis had been performed, then the chest x-ray evidence would have been found positive for the presence of pneumoconiosis, even with the addition of Dr. Meyer's reading of the [February 5, 2003] x-ray." *Id*. Claimant maintains that the x-ray dated December 5, 2003 is positive for pneumoconiosis based on the superior qualifications of Dr. Miller, a Board-certified radiologist, B reader, and assistant professor of radiology, who read the x-ray as positive, in comparison to Dr. Willis, a dually qualified physician, but not a professor of radiology, who interpreted the x-ray as negative for pneumoconiosis.

We agree that the administrative law judge has not properly resolved the conflicts in the x-ray reports. The administrative law judge stated that he accorded greater weight to Dr. Willis's negative reading because it was "consistent" with the negative readings of "highly qualified readers," namely Drs. Wiot, Meyer and Scatarige. However, it was improper for the administrative law judge to credit Dr. Willis's negative reading based on the readings of other films by other doctors. The administrative law judge's decision to credit Dr. Willis's negative reading, over Dr. Miller's positive reading, based solely on the fact that the negative reading of the December 15, 2003 x-ray was "consistent" with other negative readings in the record, ignores the requirements of Section 718.202(a)(1) that the administrative law judge give consideration to the radiological qualifications of the physicians interpreting the x-rays in resolving any conflict in the x-ray reports.

Section 718.202(a)(1) provides specific instructions on how an administrative law judge must weigh conflicting x-ray readings:

> A chest X-ray conducted and classified in accordance with §718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

20 C.F.R. §718.202(a)(1). Because the administrative law judge has not complied with the requirements of Section 718.202(a)(1), we vacate his finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, and his denial of benefits, and remand this case for further consideration. On remand, the administrative law judge should evaluate all of the x-ray evidence to resolve the conflicts in the x-ray reports as required by Section 718.202(a)(1), and he should weigh it with the other evidence relevant to determining the existence of pneumoconiosis (as discussed below). *See Adkins*, 958 F.2d at 49; 16 BLR at 2-61; *see also Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

In light of the administrative law judge's error at Section 718.202(a)(1), we also vacate his finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis. In reaching his credibility determinations at Section 718.202(a)(4), the administrative law judge specifically stated that he weighed the medical opinions "in light of my finding that the x-ray evidence did not establish pneumoconiosis." Decision and Order on Remand at 6. Thus, we vacate the administrative law judge's finding at Section 718.202(a)(4). On remand, the administrative law judge should provide a proper and detailed rationale for the weight accorded the conflicting medical opinions at Section 718.202(a)(4). Thereafter, the administrative law judge must determine whether the evidence is sufficient, overall, to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If the administrative law judge finds that the evidence is sufficient to establish that claimant has pneumoconiosis, the administrative law judge must further consider the evidence relevant to whether claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).

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

SO ORDERED.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge