BRB No. 99-0229 BLA

VIRGIL McCOY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	DATE ISSUED:
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 of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Laura Metcoff Klaus (Arter and Hadden LLP), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-0462) of Administrative Law Judge Frederick D. Neusner awarding 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). In the initial Decision and Order, issued on March 12, 1996, the administrative law judge found that claimant established eighteen years of qualifying coal mine employment and that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(b) and 718.204(c)(1)-(4).[1] Accordingly,

[1]Claimant is Virgil McCoy, the miner, who filed a claim for benefits on May 27, 1988.

benefits were awarded as of February 1, 1994, the date on which the claim was filed. On appeal, the Board held that the administrative law judge properly treated the instant claim as a new claim because claimant withdrew his prior claim. The Board also vacated the administrative law judge's finding of total disability due to pneumoconiosis and the award of benefits and remanded the case for the administrative law judge to clarify whether medical evidence submitted by employer on July 10, 1995 is a part of the record, to reweigh the x-ray evidence of record pursuant to Section 718.202(a)(1), considering only the radiological qualifications of the readers, and to reconsider the medical opinion evidence pursuant to Section 718.204(b) pursuant to *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989) and *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). *McCoy v. Wolf Creek Collieries*, BRB No. 96-0883 BLA (Mar. 23, 1998)(unpub.).

In the instant Decision and Order, the administrative law judge found that employer's proposed exhibits never became a part of the record and cannot be considered or given weight for any purpose. The administrative law judge also noted that the Board did not disturb his prior findings pursuant to Sections 718.203(b) and 718.204(c)(1)-(4), and found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and total disability due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in refusing to consider its evidence and that the administrative law judge's analysis of the remainder of the evidence is irrational and unreasonable. Claimant responds urging affirmance of the award of benefits. In reply brief, employer maintains that claimant waived any objection to the admission of employer's evidence and that claimant has conceded that the administrative law judge did not properly weigh the relevant evidence. The Director, Office of Workers' Compensation Programs, has responded and declines to participate on appeal.

Director's Exhibit 21. After claimant was requested to show cause why the claim should not be denied by reason of abandonment, claimant submitted a letter requesting that the claim be withdrawn and the claim was officially closed on August 23, 1988. *Id*. Claimant filed the instant claim on February 22, 1994. Director's Exhibit 1.

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 that the administrative law judge erred in failing to consider the medical report of Dr. Dahhan and x-ray interpretations by Drs. Dahhan, Lapp, Morgan and Renn, which were submitted by employer on July 10, 1995. Specifically, employer contends that the administrative law judge erred in finding that employer waived the right to present evidence at the hearing pursuant to 20 C.F.R. §725.461(b) due to its unexcused absence from the hearing. Pursuant to Section 725.461(b), the unexcused failure of a party to attend the administrative hearing constitutes a waiver of the right to present evidence at the hearing, and may result in dismissal of the claim. *See* 20 C.F.R. §§725.461(b); 725.465. At the hearing, the administrative law judge noted that there was no appearance for Wolf Creek Collieries (employer) and that notice was sent to employer at the "address given by the District Director at 50 Jerome Lane, Fairview Heights, Illinois 62208, and it was sent care of Ziegler Coal Holding Company." Hearing Transcript at 5. The administrative law judge further stated that the record in this proceeding will consist of the testimony of the witnesses and "those exhibits that I admit into the evidence." *Id.* In the Decision and Order on Remand, the administrative law judge found that because employer did not retain counsel and did not file an appearance until after the date of the hearing, its failure to attend was unexcused and constituted a waiver of employer's right to present evidence. Decision and Order on Remand at 3.

While employer challenges the administrative law judge's finding that it waived its right to present evidence at the hearing, the record does not contain any explanation from employer for its absence from the hearing and employer states in its brief that its absence from the hearing was unexplained. Consequently, the administrative law judge properly found that employer's absence from the hearing was unexcused and acted within his discretion in finding that employer waived its right to present evidence at the hearing. *See* 20 C.F.R. §725.461(b)*; Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (McGranery, J., concurring), *aff'd on recon*., 13 BLR 1-57 (1989)(*en banc*).

Employer also contends that the administrative law judge erred in declining to consider its evidence because claimant waived the requirement that all evidence be exchanged at least twenty days prior to the date of the hearing pursuant to 20 C.F.R. §725.456(b)(2). Pursuant to Section 725.456(b)(2), documentary evidence which is not exchanged with the parties at least twenty days before the hearing may be

admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause why such evidence was not exchanged pursuant to Section 725.456. If evidence is not exchanged within twenty days of the hearing and the parties do not waive the twenty day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the deputy commissioner for consideration of such evidence. 20 C.F.R. §725.456(b)(2).

In support of its contention that claimant waived the twenty day requirement, employer states that claimant agreed to be examined by Dr. Dahhan after the hearing and agreed to the submission of his report and other data following the examination. In its July 10, 1995 letter, employer stated that, pursuant to agreement of counsel, claimant underwent an independent medical evaluation on June 3, 1995 by Dr. Dahhan. Employer further stated in the July 10, 1995 letter, that claimant's counsel agreed that the record be re-opened for the limited purpose of permitting admission of Dr. Dahhan's report and the x-ray interpretations of Drs. Dahhan, Lapp, Morgan and Renn. In his Decision and Order on Remand, the administrative law judge properly found that the record does not contain any evidence of a written agreement between employer and claimant's counsel regarding the admission of the post-hearing evidence and, thus, that the new evidence was not offered in compliance with Section 725.456(b)(1) or (b)(2). Decision and Order on Remand at 3-4. The administrative law judge further properly noted that claimant firmly objected to the admission of the new evidence in its various response briefs. *Id*. Consequently, we affirm the administrative law judge's finding that employer's proposed exhibits never became a part of the record and cannot be considered or given weight for any purpose.

Employer next contends that the administrative law judge erred in considering the interpretations of the B readers of record instead of considering only the x-ray interpretations of the two dually qualified physicians of record pursuant to Section 718.202(a)(1). The record contains eight interpretations of two x-rays, six of which are positive for the existence of pneumoconiosis. Director's Exhibits 6-8; Claimant's Exhibits 1-3. Of the six positive interpretations, five were submitted by physicians who are B readers and one was submitted by a physician who is both a B reader and a Board-certified radiologist. Director's Exhibit 6; Claimant's Exhibits 1-3. The negative readings consist of interpretations by a physician who is neither a B reader nor a Board-certified radiologist and a physician who is dually qualified. Director's Exhibits 7-8.

The administrative law judge noted that one of the dually qualified physicians read the March 18, 1994 x-ray as positive and that the other dually qualified

physician read the March 18, 1994 x-ray as negative. Decision and Order on Remand at 5; Director's Exhibit 7; Claimant's Exhibit 1. The administrative law judge then found that the preponderance of B readers read both x-rays as positive and that the B readers' unanimous positive readings of the January 25, 1995 x-ray confirmed the positive readings of the 1994 film. Decision and Order on Remand at 5; Director's Exhibit 6; Claimant's Exhibits 1-3. The administrative law judge concluded that "the greater quantity of persuasive x-ray evidence based entirely on the radiological qualifications of the readers of record supports a finding that [claimant] has pneumoconiosis..." Decision and Order on Remand at 5.

Contrary to employer's contention that the administrative law judge erred in considering the interpretations of the B readers, the administrative law judge properly noted that the interpretations of the dually qualified physicians are in equipoise and rationally concluded that the preponderance of the remaining interpretations by B readers is positive for the existence of pneumoconiosis. Decision and Order on Remand at 5; *see Woodward v. Director*, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Consequently, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Employer next contends that the administrative law judge erred in failing to examine the evidence pursuant to Section 718.204(b) to determine whether it affirmatively established that pneumoconiosis actually contributed to claimant's pulmonary disability. Employer also argues that the administrative law judge did not examine the medical reports of record to determine whether they were documented by accurate histories or explained with reference to the underlying documentation. The record contains the medical reports of two physicians. Dr. Younes diagnosed severe chronic obstructive lung disease, chronic bronchitis and cor pulmonale, which he stated is due to cigarette smoking with a contribution from exposure to coal dust. Dr. Younes opined that claimant suffers from a severe obstructive ventilatory impairment and is permanently and completely disabled due to his chronic obstructive pulmonary disease. Dr. Younes further stated that each of the conditions diagnosed contributed to claimant's impairment. Director's Exhibit 12. Dr. Baker diagnosed pneumoconiosis, chronic obstructive pulmonary disease, hypoxemia, and chronic bronchitis. Dr. Baker opined that claimant's pneumoconiosis is due to his coal dust exposure and the remaining diagnoses are due to coal dust exposure and cigarette smoking. Dr. Baker further opined that claimant is severely impaired with decreased FEV1, decreased pO2, chronic bronchitis and pneumoconiosis and that

each of the diagnosed conditions contribute fully to claimant's impairment. Claimant's Exhibit 2.

The administrative law judge noted the physicians' findings, listed the objective testing relied upon by the physicians and found that Dr. Baker's opinion is persuasive because of his "explicit and separate" mention of pneumoconiosis in the etiology of the cardiopulmonary diagnosis, his finding that the impairment due to pneumoconiosis was severe, and his explicit indication that coal miner's pneumoconiosis fully contributed to claimant's impairment. Decision and Order on Remand at 6-7. The administrative law judge further found that Dr. Younes's opinion supports Dr. Baker's opinion. *Id.* Contrary to employer's allegation, the administrative law judge was aware of the extent to which the opinions were documented and whether they affirmatively established that pneumoconiosis actually contributed to claimant's impairment rather than playing only a *de minimis* role in claimant's impairment. Moreover, the administrative law judge rationally concluded that claimant sustained his burden of proof that pneumoconiosis is a contributing cause of some discernible consequence to claimant's pulmonary impairment. Decision and Order on Remand at 6-7; *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Finally, employer contends that the administrative law judge erred in crediting Dr. Baker's opinion because Dr. Baker relied on a smoking history that understated claimant's use of cigarettes. As employer alleges, Dr. Baker indicated that claimant has a smoking history of one pack per week for ten years. Claimant's Exhibit 2. In contrast, Dr. Younes stated that claimant has smoked one pack per day since his teens. Director's Exhibit 12. There is no additional evidence in the record or hearing testimony regarding claimant's smoking history. Although the opinions of Dr. Younes and Baker differ as to the extent of claimant's smoking, the administrative law judge rationally found Dr. Baker's opinion to be supported by Dr. Younes's opinion because Dr. Younes concluded that the etiology of claimant's ventilatory impairment is his heavy cigarette smoking with "a contribution from exposure to coal dust." Decision and Order on Remand at 6-7; Director's Exhibit 12; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Additionally, while Dr. Younes did not explicitly identify the degree to which coal dust exposure contributed to the diagnosed conditions, the administrative law judge reasonably found his opinion to be corroborative of Dr. Baker's opinion that pneumoconiosis contributed fully to claimant's impairment. Decision and Order on Remand at 6-7; Director's Exhibit 12; *see Lafferty, supra.* Consequently, we affirm the administrative law judge's finding that claimant did not establish total disability due to pneumoconiosis pursuant to Section 718.204(b).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge