BRB No. 04-0441 BLA

WILLARD L. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINE CREEK COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 02/28/2005
	)	
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 Awarding Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Gregory J. Fischer and Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Sarah M. Hurley (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: Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-5101) of Administrative Law Judge Janice K. Bullard on a miner's 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 initially credited the miner[1] with thirty-five years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 6. Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the chest x-ray and medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4). *Id.* at 6-10. Weighing the x-rays and medical opinions together, 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), 718.203(b). *Id.* at 4, 10. The administrative law judge further found that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). *Id.* at 13-15. Accordingly, the administrative law judge awarded benefits as of February 1, 2001, the month in which the miner's claim was filed.

On appeal, employer contends that the administrative law judge erred in considering x-ray evidence submitted by claimant that exceeds the permissible limitations set out at 20 C.F.R. §725.414. Employer's Brief at 3-5. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging remand.[2] The Director asserts that the administrative law judge erred by failing to apply the evidentiary limitations of Section 725.414 to claimant's x-ray evidence submissions and, therefore, urges the Board to vacate the administrative law judge's award of benefits and remand this case for reconsideration. Director's Brief at 2-3.

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

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[1]Claimant is Willard L. Clark, the miner, who filed his claim for benefits on March 15, 2001. Director's Exhibit 2.

[2]We affirm the administrative law judge's finding of thirty-five years of coal mine employment because this finding is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer contends that the administrative law judge erred in admitting x-ray evidence submitted by claimant in excess of the evidentiary limits imposed by the revised Section 725.414.[3] Employer's Brief at 3-5. The regulation at Section 725.414, in conjunction with 20 C.F.R. §725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406."[4] 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Pursuant to Section 725.414(a)(5)(c), "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing . . . or by deposition." "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).

Prior to the hearing in this case, claimant submitted three interpretations of an August 29, 2001 x-ray,[5] six interpretations of a June 1, 2001 x-ray, and two

[3]Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on March 15, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

[4]Pursuant to 20 C.F.R. §725.406, the Director, Office of Workers' Compensation Programs (the Director), provides a complete pulmonary evaluation of the miner, the results of which are "not . . . counted as evidence submitted by the miner under §725.414." 20 C.F.R. §725.406(b).

[5]The August 29, 2001 film was initially developed by the Director as part of a complete pulmonary examination provided to claimant by the Director pursuant to Section 725.406.

interpretations of an April 11, 2001 x-ray. At the February 12, 2003 hearing, the administrative law judge stated that the parties needed to "narrow down" the evidence that they were going to submit in light of the regulations and to identify which evidence they will submit for their case-in-chief, rebuttal, and rehabilitation. Hearing Transcript at 9-10. Regarding the x-ray evidence, claimant's counsel initially stated that she would offer the two positive interpretations of the August 29, 2001 x-ray rendered by Drs. Miller and Cappiello (Claimant's Exhibits 30 and 31) for claimant's case-in-chief. *Id.* at 10-11. However, counsel later requested that claimant be allowed to designate his x-ray evidence post-hearing because the parties were waiting for employer's submission of Dr. Levinson's January 30, 2003 examination of claimant and related tests, which had not yet been submitted due to an unavoidable delay. *Id.* The administrative law judge approved claimant's counsel's request and, therefore, admitted all of claimant's x-ray evidence "with the proviso that it will be subject to later revision from the Claimant." *Id.* at 14.

Subsequently, employer submitted its evidence relating to Dr. Levinson, but claimant's counsel did not designate claimant's affirmative and rebuttal evidence. On July 14, 2003, claimant submitted three readings of the January 30, 2003 x-ray, which was from Dr. Levinson's examination submitted by employer. By letter dated July 16, 2003, employer objected to claimant's submission of the three x-ray readings of the January 30, 2003 x-ray, stating that it conflicted with claimant's counsel's statements in an earlier conference call with employer and the administrative law judge. Based on employer's letter, from the conference call, employer understood that claimant's counsel was going to submit two interpretations of the January 30, 2003 x-ray to be used for claimant's case-in-chief. Employer stated that claimant's "submission of three films is outside of both the regulations and the agreement reached at the conference" and, therefore, employer urged the administrative law judge to request claimant's counsel to choose the two x-ray interpretations she intended to submit as claimant's case-in-chief. Accordingly, the administrative law judge issued an Order on August 1, 2003 in which she ordered "Claimant [to] identify those X-rays that constitute his case in chief and his rebuttal to Employer and Director's evidence." August 1, 2003 Order at 2. The administrative law judge also noted that "[a]ll other X-ray evidence shall be excluded" and stated that "[f]ailure to comply with this Order, shall result in the exclusion of all of the X-rays submitted in July, 2003 and any rebuttal evidence submitted more than 10 days from [the date of this Order]." *Id.* By Order dated November 10, 2003, the administrative law judge closed the record, noting that claimant's counsel failed to identify the "X-ray evidence according to its significance to Claimant's case." November 10, 2003 Order at 1. Therefore, in accordance with her August 1, 2003 Order, the

administrative law judge excluded from the record claimant's submission of three interpretations of the January 30, 2003 x-ray.[6] *Id.*

In her Decision and Order, the administrative law judge considered eleven x-ray interpretations submitted by claimant, notwithstanding statements the administrative law judge made in her August 1, 2003 Order. Neither the administrative law judge's Decision and Order nor the record reveals that the administrative law judge found good cause for claimant's submission of the additional x-ray evidence. Therefore, as employer asserts, the administrative law judge erred in considering all eleven x-ray interpretations submitted by claimant because these interpretations exceed the limitations imposed by Section 725.414(a)(2)(i).[7] Consequently, we vacate the administrative law judge's Decision and Order and remand this case to the administrative law judge for further proceedings pursuant to Sections 725.414 and 725.456(b)(1). *See Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A (June 28, 2004)(*en banc*)(published).

Regarding the other medical evidence the administrative law judge considered in her Decision and Order, it is difficult to ascertain from the hearing transcript which claimant's exhibits were admitted and which were withdrawn. It is also difficult to determine which medical evidence the parties submitted as their case-in-chief, rebuttal, and rehabilitative evidence. Notwithstanding the lengthy discussion at the hearing between the parties and the administrative law judge about what evidence would be excluded from the record, the administrative law judge considered all the evidence in her Decision and Order. In doing so, the administrative law judge considered five pulmonary function studies submitted by claimant, in excess of the limitations outlined in Section 725.414,[8] and without rendering a good cause determination pursuant to Section 725.456(b)(1). Decision and Order at 11. Therefore, we instruct the administrative law

[6]As the Director notes, claimant has a right to submit at least one rebuttal reading of the January 30, 2003 x-ray submitted by employer. 20 C.F.R. §725.414(a)(2)(ii).

[7]As employer and the Director assert, the administrative law judge's error in failing to apply the evidentiary limitations of Section 725.414 to claimant's x-ray evidence cannot be considered harmless because the administrative law judge awarded benefits based, in part, on her finding that the x-ray evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8]The Board has recently held that the parties cannot waive the regulatory limitations on medical evidence submitted set forth at Section 725.414. *Smith v. Martin County Coal Corp.*, BRB No. 04-0126 BLA (Oct. 24, 2004)(published).

judge on remand to clarify what exhibits were admitted into the record and to request that the parties present their evidence as delineated in Section 725.414, setting forth the evidence submitted as their case-in-chief, Section 725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii), as well as the medical evidence submitted as rebuttal and rehabilitative evidence, Section 725.414(a)(2)(ii), (a)(3)(ii), (iii). *Smith v. Martin County Coal Corp.*, BRB No. 04-0126 BLA (Oct. 24, 2004)(published). The administrative law judge may then, within her discretion, admit any medical evidence submitted in excess of these limitations, pursuant to a finding that the party submitting the evidence has established "good cause" for the submission of the additional evidence. 20 C.F.R. §725.456(b)(1); *Smith*, slip op. at 5; *Dempsey*, slip op. at 10. After determining which evidence is admissible, the administrative law judge must then consider claimant's entitlement to benefits based upon a review of all of the evidence of record.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration 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