BRB No. 04-0455 BLA

JERRY DAVIDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 02/17/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH AND HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5212) of Administrative Law Judge Thomas F. Phalen, Jr. 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] Claimant filed the instant subsequent claim on February 14, 2001. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on August 14, 2002. Director's Exhibit 27. Claimant requested a hearing, which was held on May 29, 2003. The administrative law judge found that claimant had 22 years of coal mine employment, consistent with a prior stipulation by the parties. The administrative law judge considered the new evidence and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge thus found that claimant failed to meet his burden to establish a change in one of the applicable conditions of entitlement since the prior denial pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in admitting and relying upon x-ray readings and medical reports proffered by employer in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Claimant also challenges the administrative law judge's finding that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer responds, urging affirmance of the denial of benefits. With respect to 20 C.F.R. §725.414, employer maintains that the regulation is invalid, and that, in any event, claimant waived the evidentiary limitations issue by failing to specifically object to the admission of employer's exhibits at the hearing. The Director, Office of Workers' Compensation Programs has filed a consolidated brief in response to Claimant's Petition for Review and Employer's Response Brief. The Director argues that the administrative law judge erred by failing to require employer to adhere to the evidentiary limitations. The Director also maintains that the administrative law judge failed to properly weigh the evidence at 20 C.F.R. §718.202(a)(1), (4).

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).

At the outset, we reject employer's contention that 20 C.F.R. §725.414 is an invalid regulation. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir.

[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

2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1- , BRB Nos. 03-0615 BLA and 03-0615 BLA-A at 6-8 (Jun. 28, 2004). Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties may submit into the record. *See* 20 C.F.R. §§725.414; 725.456(b)(1). The applicable provisions state that employer is entitled to "obtain and submit, in support of its affirmative case, no more than two chest x-ray interpretations [and] . . . no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). In rebuttal of claimant's case, employer may submit "no more than one physician's interpretation of each chest x-ray, pulmonary function test, [or] arterial blood gas study… submitted by claimant…." 20 C.F.R. §725.414(a)(3)(ii).

In this case, employer submitted two rebuttal interpretations of the March 24, 2001 x-ray[2] and three medical reports from Drs. Broudy, Rosenberg and Fino. The administrative law judge acknowledged that employer submitted evidence in excess of the evidentiary limitations but refused to exclude any of employer's evidence because claimant did not specifically object at the hearing to the admission of the evidence. In the administrative law judge's Decision and Order - Denying Benefits, he then proceeded to rely on employer's evidence and found that it outweighed claimant's medical evidence relevant to the existence of pneumoconiosis.

The administrative law judge's evidentiary ruling was in error. We specifically reject employer's contention that claimant's failure to object to employer's evidence below constitutes a waiver and thereby precludes application of the evidentiary limitations. The regulation makes plain that the limitations are mandatory, and as such, they are not subject to waiver: "Medical evidence in excess of the limitations contained in §725.414 *shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1) (emphasis added). Because the administrative law judge

[2] Employer argues that, by its plain language, 20 C.F.R. §725.414(a)(3)(i) applies limitations only when employer "obtains" and submits evidence. Employer asserts that since it did not originally obtain the negative x-ray reading by Dr. Barrett of the March 24, 2001 x-ray, and only submitted the x-ray reading after it was withdrawn by the district director, then that reading should not be excluded as excessive evidence. Employer's Brief at 8. The Director, however, correctly points out that the relevant provision for admission of rebuttal evidence does not use the word "obtain" and, therefore, employer's argument is moot. Director's Brief at 10. Pursuant to 20 C.F.R. §725.414(a)(3)(ii), employer was only entitled to submit one rebuttal reading of the March 24, 2001 x-ray, as claimant submitted Dr. Baker's original positive reading of the March 24, 2001 x-ray in support of his affirmative case. Dr. Baker's x-ray reading was obtained in conjunction with claimant's complete pulmonary evaluation as required by 20 C.F.R. §725.406.

accepted and relied upon employer's additional negative rebuttal reading and the additional medical report from Dr. Fino, without first rendering the requisite finding of whether good cause had been established for admitting employer's evidence in excess of regulatory limitations, we vacate the administrative law judge's Decision and Order and remand this case to him for further consideration pursuant to 20 C.F.R. §§725.414 and 725.456(b)(1).[3] *See Smith v. Martin County Coal Corp.*, 23 BLR 1- , BRB No. 04-0126 BLA (Oct. 27, 2004). Because the administrative law judge did not apply the regulation at 20 C.F.R. §725.414, we must vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).

Although this case must be remanded for the administrative law judge to render a specific "good cause" determination pursuant to 20 C.F.R. §725.456(b)(1), in the interest of judicial economy, we will address certain errors raised by claimant and the Director with respect to the administrative law judge's analysis of the new evidence pursuant to 20 C.F.R. §718.202(a)(1), (4), and his ultimate finding at 20 C.F.R. §725.309.

Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. *See* 20 C.F.R. § 718.202(a) (2000) ; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Director's Exhibit 1. The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit has held that, in a case involving the prior regulations, in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993; 997-998; 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id.*; *see also See Tennessee Consolidated Coal Co., v. Kirk*, 264 F.3d 602, 22 BLR 2-288, 2-300 (6th Cir. 2001).

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[3] The administrative law judge stated that, if claimant had objected to Dr. Fino's report, the report would have been excluded on the grounds that Dr. Fino reviewed medical evidence from the prior claim that was not admissible under 20 C.F.R. §725.414(a)(3)(i). Decision and Order at 6, n. 3. We note, however that all evidence previously admitted in the miner's prior claim is admissible with respect to the subsequent claim. *See* 20 C.F.R. §725.309(d)(1).

In weighing the conflicting x-ray evidence for pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge considered nine readings of four x-rays dated March 24, 2001, April 27, 2001 and July 25, 2001. Director's Exhibits 12, 13, 15, 26; Claimant's Exhibit 1, 2; Employer's Exhibit 1. Evaluating each x-ray individually, the administrative law judge found the March 24, 2001 x-ray to be negative for pneumoconiosis based on the weight of the negative readings by Drs. Barrett and Scott, who were dually qualified as Board-certified radiologists and B-readers. Decision and Order at 14. The administrative law judge found the April 27, 2001 x-ray to be positive for pneumoconiosis "based on the more numerous positive interpretations and the fact that a positive interpretation was rendered by a physician with at least equivalent credentials as the physician who rendered the sole negative interpretation." *Id.* Likewise, the July 25, 2001 x-ray was found to be positive for pneumoconiosis based on the superior credentials of Dr. Alexander, a dually qualified physician, who read the x-ray as positive, compared to Dr. Baker, a B-reader, who read the x-ray as negative. *Id.* Finally, the administrative law judge noted that the March 10, 2003 x-ray had only one reading which was negative for pneumoconiosis. Decision and Order at 14. Weighing the x-ray evidence overall, the administrative law judge thus concluded that since two of the x-rays were positive and two were negative for pneumoconiosis, the evidence was in equipoise and claimant failed to carry his burden of proof. *Id.* The administrative law judge further noted that since there were three negative readings by dually qualified physicians compared to two positive readings by dually qualified physicians, the weight of the x-ray evidence was arguably negative for pneumoconiosis. *Id.*

We agree with the Director that the administrative law judge erred in counting the x-ray evidence without performing a qualitative analysis of the various readings. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge did not take into consideration that the most recent x-ray dated March 10, 2003 was read as negative by a physician who is neither a Board-certified radiologist or B-reader. Under the administrative law judge's initial analysis, taking into account the qualifications of the physicians, the x-ray evidence is not equally balanced as there would be two positive and only one negative x-ray for pneumoconiosis. Furthermore, because the administrative law judge erred in admitting an excessive negative rebuttal reading of the March 24, 2001 x-ray, the administrative law judge improperly found that the weight of the readings by dually qualified physicians was positive for pneumoconiosis. Decision and Order at 14.

With respect to 20 C.F.R. §718.202(a)(4), that administrative law judge found that claimant established the existence of pneumoconiosis by applying the later evidence rule and assigning greatest probative weight to the opinions of Drs. Fino and Rosenberg that claimant does not have pneumoconiosis. Decision and Order at 17. The administrative law judge specifically stated that "the opinions of Drs. Rosenberg and Fino are more probative of claimant's condition at the time of the hearing than the opinions rendered by

Drs. Baker and Hussain two years earlier." *Id*. We, however, agree with the Director that the most recent evidence rule has limited application where the evidence demonstrates the progressive nature of pneumoconiosis. *See Woodward,* 991 F.2d at 314, 17 BLR at 2-77 (where the evidence on its face shows that the miner's condition has worsened, the evidence can be reconciled and thus application of the "later evidence is better" theory is permissible. However, where the evidence taken at face value shows that the miner has improved, it is impossible to reconcile the evidence and application of the "later evidence is better" theory is inappropriate. Either the earlier or later results must be wrong, and it is just as likely the later evidence is faulty as the earlier). In this case, application of the most recent evidence rule to resolve the conflict in the medical opinion evidence is illogical since the most recent medical opinions from Drs. Fino and Rosenberg find no evidence of pneumoconiosis. On remand, the administrative law judge may not automatically apply the later evidence rule without performing a qualitative analysis of the conflicting medical opinion evidence. The administrative law judge must provide a rational explanation for the weight accorded the conflicting medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).

Consequently, because the administrative law judge erred in his refusal to apply the evidentiary limitations pursuant to 20 C.F.R. §725.414, we vacate his determination that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1), (4). We remand this case for a "good cause" determination pursuant to 20 C.F.R. §725.456(b)(1), and for further consideration of whether claimant established, based on the new evidence, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In weighing the new evidence at 20 C.F.R. §718.202(a), the administrative law judge must provide a rational explanation for the weight accorded the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis. *See Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107, 2-119 (6th Cir. 2000); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). If claimant establishes the existence of pneumoconiosis on remand, and thereby a change in an applicable condition of entitlement, the administrative law judge must further consider the entire medical record relevant to the issues of entitlement. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 993, 19 BLR at 2-10; *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated, and the case is remanded for further consideration consistent with this decision.

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