BRB No. 06-0421 BLA

ROY W. FINNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITMANN COAL COMPANY	)	DATE ISSUED: 02/28/2007
	)	
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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-5414) of Administrative Law Judge William S. Colwell awarding benefits 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] The administrative law judge credited claimant with forty years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish the presence of complicated pneumoconiosis and thereby sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found the newly submitted evidence sufficient to establish that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. § 718.203(b). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in limiting it to only one reading of the June 26, 2004 x-ray in rebuttal to the two readings of this x-ray in support of claimant's affirmative case. Employer also contends that the administrative law judge erred in failing to weigh the old and new evidence together in determining whether a preponderance of the evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Further, employer contends that the administrative law judge erred in summarily dismissing medical opinions that found an absence of a pulmonary impairment when considering the issue of complicated pneumoconiosis. Lastly, employer contends that the administrative law judge erred in excluding several physicians' reports as excessive under the evidentiary limitations set forth in 20 C.F.R. §725.414 because those reports are relevant. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, agreeing with employer's contention that the administrative law judge erred in limiting employer's x-ray rebuttal evidence to one reading for each x-ray film reviewed by claimant's experts, rather than one reading for each interpretation by claimant in support of his affirmative case. However, the Director urges the Board to reject employer's contention that good cause for admitting medical evidence that exceeds the evidentiary limitations set forth in Section 725.414 is established by the mere fact that such evidence is relevant.

[1] Claimant filed his first claim on October 28, 1986. Director's Exhibit 1. This claim was denied by a Department of Labor claims examiner on March 13, 1987 because the evidence did not show that the pneumoconiosis was caused at least in part by coal mine work and that claimant was totally disabled by pneumoconiosis. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on May 3, 2002. Director's Exhibit 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address employer's contention that the administrative law judge erred in excluding several physicians' reports as excessive under the evidentiary limitations set forth in 20 C.F.R. §725.414 because those reports are relevant evidence.[2] Employer's contention is based on the premise that Section 725.414 violates Section 923(b) of the Act, Section 556(d) of the Administrative Procedure Act, the decision of the United States Supreme Court in *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'd denied*, 484 U.S. 1047 (1988), and the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The Board has rejected these arguments and held that Section 725.414 is a valid regulation. *Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006); *see also Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) *(en banc)*. Thus, since employer has offered no reason for the Board to reconsider this issue, we reject employer's contention that the administrative law judge erred in excluding several physicians' reports as excessive under the evidentiary limitations set forth in 20 C.F.R. §725.414 because those reports are relevant evidence.

Next, we address employer's contention that the administrative law judge erred in limiting it to only one reading of the June 26, 2004 x-ray in rebuttal to the two readings of this x-ray in support of claimant's affirmative case. Employer specifically asserts, and the Director agrees, that the Board's decision in *Ward* requires the administrative law judge to admit Dr. Wheeler's rebuttal x-ray interpretation into the record. Claimant submitted two interpretations of the June 26, 2004 x-ray film by Drs. Alexander and Patel in support of his affirmative case.[3] Director's Exhibit 13; Claimant's Exhibit 1.

[2] The administrative law judge excluded the interpretations of the June 16, 2003 x-ray by Drs. Scott and Scatarige and an interpretation of the May 1, 2003 x-ray by Dr. Scott because they exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414 and employer failed to show good cause for admitting them into the record. Employer's Exhibits 2, 5.

[3] The newly submitted evidence at Section 718.304(a) consists of eleven interpretations of four x-rays, dated August 1, 2002, June 16, 2003, January 21, 2004 and June 26, 2004. Drs. Patel and Miller, dually qualified B readers and Board-certified radiologists, classified the opacities in the August 1, 2002 x-ray as size A. Director's Exhibit 13; Claimant's Exhibit 1. Although Dr. Gaziano, a B reader, classified the August 1, 2002 x-ray as quality 1, Director's Exhibit 13, Dr. Wiot, a dually qualified B

Likewise, employer submitted two interpretations of this x-ray by Drs. Scott and Wheeler to rebut both of the interpretations submitted by claimant. Employer's Exhibit 7. Although he admitted the readings of the June 26, 2004 x-ray by Drs. Alexander, Patel and Scott into the record, the administrative law judge excluded Dr. Wheeler's reading of this x-ray from the record, based on the administrative law judge's interpretation of Section 725.414(a)(3)(ii). According to the administrative law judge, the pertinent regulation only permitted employer to submit one reading in rebuttal to each *x-ray*, as opposed to each *x-ray interpretation*, that claimant submitted in his affirmative case. The administrative law judge specifically stated:

> Section 725.414(a)(3)(ii) states that "The responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray…submitted by the claimant under paragraph (a)(2)(i) of this section…." I construe this language strictly and find that it limits the employer to rebutting each *x-ray*, not each *x-ray interpretation*, submitted by the claimant in his affirmative case, with one physician's interpretation of that x-ray. Accordingly, Dr. Scott's interpretation is admitted into evidence as EX 7, but Dr. Wheeler's is not. Tr. 13-14.

Decision and Order at 2.

Subsequent to the issuance of the administrative law judge's Decision and Order in this case, the Board issued its decision in *Ward* on the admissibility of rebuttal x-ray evidence at 20 C.F.R. §725.414(a)(2)(ii) and (a)(3)(ii). *Ward*, 23 BLR at 1-155. In *Ward*, the Board held that the pertinent language concerning rebuttal x-ray evidence at

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reader and Board-certified radiologist, classified this x-ray as unreadable, Employer's Exhibit 1. Drs. Alexander and Myers, dually qualified B readers and Board-certified radiologists, classified the opacities in the June 16, 2003 x-ray as size A. Claimant's Exhibit 3; Employer's Exhibit 4. Although Dr. Hippensteel, a B reader, read the January 21, 2004 x-ray as positive for simple pneumoconiosis based on an ILO classification of 2/1, Employer's Exhibit 3, Dr. Alexander, a dually qualified B reader and Board-certified radiologist, classified the opacities in this x-ray as size A, Claimant's Exhibit 4. Lastly, Dr. Scott, a dually qualified B reader and Board-certified radiologist, read the June 26, 2004 x-ray as negative for pneumoconiosis, Employer's Exhibit 7, whereas Drs. Alexander and Patel, dually qualified B readers and Board-certified radiologists, classified the opacities in this x-ray as size A, Claimant's Exhibit 6. Taking the qualifications of the physicians into consideration, the administrative law judge found that the preponderance of the x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See* Decision and Order at 12-13; *compare* 20 C.F.R. §718.304(a) *with* 20 C.F.R. §718.202(a)(1).

Section 725.414(a)(2)(ii) and (a)(3)(ii) refers to the x-ray interpretations that are proffered by the opposing party in its affirmative case, rather than the underlying x-ray film. *Id*. Hence, the Board determined that each party may submit one rebuttal x-ray interpretation for each x-ray interpretation the opposing party submits in its affirmative case. *Id*.

In this case, however, the administrative law judge's exclusion of Dr. Wheeler's reading of the June 26, 2004 x-ray from the record prohibited employer from submitting one rebuttal x-ray interpretation for one of the x-ray interpretations submitted by claimant in his affirmative case. Decision and Order at 2. Thus, since the administrative law judge's application of the evidentiary limitations set forth in 20 C.F.R. §725.414 is not in accord with the Board's holding in *Ward*, we vacate his finding that the newly submitted x-ray evidence is sufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and remand the case for further consideration of the evidence thereunder. *Ward*, 23 BLR at 1-155. On remand, the administrative law judge must admit Dr. Wheeler's reading of the June 26, 2004 x-ray into the record as employer's second rebuttal interpretation of this x-ray and reevaluate the x-ray evidence at 20 C.F.R. §718.304(a).

Furthermore, in light of our decision to vacate the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), we also vacate the administrative law judge's finding that the newly submitted evidence is sufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. We therefore remand the case to the administrative law judge for further consideration of the newly submitted evidence at 20 C.F.R. §718.304(a)-(c).

Employer further contends that the administrative law judge erred in failing to weigh the old and new evidence together in determining whether a preponderance of the evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Citing *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), employer asserts that the administrative law judge erred in failing to analyze whether the newly submitted evidence differed qualitatively from the evidence submitted in claimant's prior claim.

The Director, however, argues that the Department of Labor, in amending the regulation at 20 C.F.R. §725.309, adopted the standard set forth in *Rutter*, which does not require a qualitative analysis of the old and new evidence for purposes of determining whether the miner's condition changed. The Director also argues that even if a qualitative analysis were required, a finding that the newly submitted evidence established the presence of complicated pneumoconiosis would also necessarily establish

the worsening of the miner's condition, because the evidence in claimant's prior claim only established the existence of simple pneumoconiosis.

As discussed *supra*, this case involves a subsequent claim. Section 725.309 provides that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309. The administrative law judge stated that "[c]laimant's most recent prior claim was denied after the Department of Labor claims examiner determined that [c]laimant failed to establish that his pneumoconiosis arose out of coal mine employment or that he suffered from a totally disabling respiratory condition." Decision and Order at 11. The administrative law judge additionally stated that "in order for [c]laimant to avoid having his subsequent claim denied on the basis of the prior denial, he must establish one of these elements through newly submitted evidence." *Id*.

Under Section 725.309(d)(3), a claimant establishes a change in an applicable condition of entitlement "only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." 20 C.F.R. §725.309(d)(3). The pertinent regulation does not mention a qualitative comparison of the old and new evidence. Furthermore, in *Rutter*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,[4] did not require a qualitative comparison of the old and new evidence with regard to determining whether the evidence established a "material change in conditions" under the former applicable regulation. *Rutter*, 86 F.3d at 1363 n.11, 20 BLR at 2-237 n.11 (declining to endorse the United States Court of Appeals for the Sixth Circuit's requirement to consider whether the new evidence differs qualitatively from the old evidence). Moreover, no evidence of complicated pneumoconiosis was submitted in the prior claim.[5] Thus, we reject employer's contention that the administrative law judge erred in failing to weigh the old and new evidence together in determining whether a preponderance of the newly submitted evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia. Director's Exhibits 1-3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] The administrative law judge stated that "none of the prior x-rays of record are helpful in determining whether [claimant] has invoked the irrebuttable presumption, because a finding of complicated pneumoconiosis was not made until the August 1, 2002 x-ray was taken." Decision and Order at 13.

Finally, employer contends that the administrative law judge erred in summarily dismissing medical opinions that found an absence of a pulmonary impairment when considering whether claimant was totally disabled by establishing the existence of complicated pneumoconiosis. Employer specifically argues that although the administrative law judge considered the opinions of Drs. Branscomb, Mullins and Hippensteel that claimant does not have pneumoconiosis, the administrative law judge erred in failing to address the doctors' opinions that claimant does not have a pulmonary or respiratory impairment in his weighing of the evidence at 20 C.F.R. §718.304(c).

The administrative law judge found the newly submitted evidence sufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304.[6] In addition to the newly submitted x-ray evidence at 20 C.F.R. §718.304(a), the administrative law judge also considered the newly submitted opinions of Drs. Branscomb, Mullins and Hippensteel at 20 C.F.R. §718.304(c).[7] In a report dated May 19, 2004, Dr. Branscomb opined that claimant does not have coal workers' pneumoconiosis or a pulmonary impairment. Employer's Exhibit 6. In an August 27, 2002 report, Dr. Mullins noted that an x-ray was consistent with coal dust exposure and opined that claimant does not have a pulmonary impairment. Director's Exhibit 13. In a March 4, 2004 report, Dr. Hippensteel noted that claimant's x-ray abnormalities are not typical for coal workers' pneumoconiosis. Employer's Exhibit 3. Dr. Hippensteel also opined that claimant does not have an impairment from coal worker's pneumoconiosis, but has the pulmonary capacity to return to his prior job in the mines. *Id*. During a deposition dated December 20, 2004, Dr. Hippensteel testified that he relied upon claimant's normal results on a pulmonary function study and an arterial blood gas study to find that claimant does not have a pulmonary impairment and that normal results on such tests are somewhat unusual in a case of complicated pneumoconiosis. Employer's Exhibit 8.

The administrative law judge discounted Dr. Branscomb's opinion because Dr. Branscomb was not aware of three x-ray readings by Drs. Alexander and Miller that found Category A opacities. Decision and Order at 14. In addition, the administrative law judge discounted Dr. Mullins's opinion because he did not provide a reason for his

[6] Based on his finding that the newly submitted evidence is sufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge concluded that "[i]t is not necessary to address the remaining evidence." Decision and Order at 14.

[7] The administrative law judge stated that the presence of complicated pneumoconiosis could be established by biopsy evidence at 20 C.F.R. §718.304(b). Decision and Order at 12. We note, however, that there is no biopsy evidence in the record.

failure to diagnose either simple pneumoconiosis or complicated pneumoconiosis despite the fact that his opinion was based, in part, on Dr. Patel's Category A classification of opacities in the August 1, 2002 x-ray. *Id*. at 13. Lastly, the administrative law judge discounted Dr. Hippensteel's opinion because "Dr. Hippensteel did not consider the vast majority of readings that are positive for complicated pneumoconiosis." *Id*. at 14. However, the administrative law judge did not address the opinions of Drs. Branscomb, Mullins and Hippensteel that claimant does not have a pulmonary impairment in considering their opinions with regard to the absence of complicated pneumoconiosis.

A miner need not show that he suffers from a respiratory impairment in order to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (recognizing that while complicated pneumoconiosis may be present without impairment, the disease "usually produces significant pulmonary impairment). However, a physician may consider the absence of a respiratory impairment as one factor in ascertaining whether an x-ray diagnosis of complicated pneumoconiosis is appropriate. *Mullins*, 484 U.S. at 148, 11 BLR at 2-8 (recognizing that evidence regarding impairment may shed light on interpretation of x-ray).

In this case, neither Dr. Branscomb nor Dr. Mullins explicitly premised his or her finding of the absence of complicated pneumoconiosis on the lack of a pulmonary or respiratory impairment. Consequently, the administrative law judge was not required to specifically address their findings of no pulmonary impairment when he evaluated the evidence of complicated pneumoconiosis at Section 718.304. However, during his deposition, Dr. Hippensteel explicitly mentioned his finding of no pulmonary impairment in connection with a question regarding complicated pneumoconiosis. Thus, because the administrative law judge did not consider Dr. Hippensteel's opinion, that claimant lacked a pulmonary impairment, in determining whether the abnormalities seen on claimant's x-rays are complicated pneumoconiosis, the administrative law judge, on remand, must reconsider Dr. Hippensteel's opinion insofar as it is relevant to determining whether claimant has met his burden of establishing the presence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-6, 17 BLR 2-114, 2-117-8 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

If, on remand, the administrative law judge finds the newly submitted evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and thereby sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, he must then consider all of the relevant evidence and determine whether claimant established invocation of the irrebuttable presumption at 20 C.F.R. §718.304 on the merits. *See* 20 C.F.R. §§725.309, 718.1, 718.202(a)(3) and 718.304. Further, if reached, the administrative law judge must

determine whether the pneumoconiosis arose out of coal mine employment on the merits at 20 C.F.R. §718.302. *Compare* 20 C.F.R. §718.302 *with* 20 C.F.R. §718.203(b).

However, if the administrative law judge finds the newly submitted evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, then he must consider any newly submitted medical evidence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §718.203 or total disability due to pneumoconiosis at 20 C.F.R. §718.204 to determine whether claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Furthermore, if the administrative law judge finds the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, he must then determine whether claimant is entitled to benefits on the merits pursuant to 20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and the case is remanded for further proceedings 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