BRB No. 05-0397 BLA

R.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 02/29/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER ON
Party-in-Interest	)	RECONSIDERATION

James D. Holliday, Hazard, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration and Suggestion for Rehearing *En Banc* of the Board's Decision and Order in [*R.C.*] *v. Whitaker Coal Co.*, BRB No. 05-0397 BLA (Jan. 27, 2006)(unpub.). The Board affirmed in part, and vacated in part, the Decision and Order of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), awarding benefits on a living miner's claim and ordered that the case be remanded to the administrative law judge for further consideration. Employer argues that the Board erred in affirming the administrative law judge's finding that claimant's withdrawal of his July 31, 2000 claim was valid. Employer also maintains that the Board did not reach the proper conclusion when it held that the administrative law judge acted within his discretion in excluding Dr. Dahhan's report, admitting the x-ray readings of Drs. Sundaram and Myers, excluding Dr. Barrett's x-ray reading, and weighing Dr. Rosenberg's opinion only under 20 C.F.R. §718.204(b)(2). Claimant has responded, urging the Board to reject employer's motion for reconsideration. The

Director, Office of Workers' Compensation Programs (the Director), has not filed a response to employer's motion.

Initially, we decline to alter our holding that the administrative law judge acted rationally in upholding the validity of the district director's order granting withdrawal of the July 31, 2000 claim. There is no indication in the record, nor does employer argue, that the requirements set forth in 20 C.F.R. §725.306 were not met in this case. Moreover, concerning employer's allegations of prejudice, Section 725.306 does not mandate consideration of the effect that granting a claimant's request for withdrawal will have upon another party. Claimant's completion of a claim form on the same date that the district director issued the order granting withdrawal also did not negate claimant's request for withdrawal, particularly in light of the fact that claimant specifically indicated that his initial claim had, in fact, been withdrawn. *See* Director's Exhibit 2.

Employer also reiterates its argument that its right to due process was violated when the administrative law judge excluded Dr. Dahhan's October 30, 2003 report because it was based, in part, upon evidence submitted with the withdrawn claim, which had not been admitted into the present record. We decline to alter our holding affirming the administrative law judge's finding on this issue. As we indicated in our Decision and Order, 20 C.F.R. §725.306 provides that a withdrawn claim "will be considered not to have been filed." 20 C.F.R. §725.306(b); [*R.C.*], slip op. at 4. In contrast, 20 C.F.R. §725.309(d)(1), specifically mandates admission of the evidence from a prior claim when a subsequent claim is filed, indicating, therefore, that the Department of Labor wished to draw a distinction between withdrawn claims and subsequent claims.

Moreover, the facts of this case support affirmance of the administrative law judge's finding. Employer was aware that the district director granted claimant's request to withdraw his July 31, 2000 claim, as employer objected to the district director's decision at several stages in the proceedings. In addition, although the district director erred in stating that claimant's February 9, 2001 application for benefits was a subsequent claim, the district director did not then consider the evidence submitted with the July 31, 2000 claim. Also, employer obtained Dr. Dahhan's report on October 30, 2003, at which time it was apparent that claimant's earlier claim was being treated as withdrawn. Thus, employer has not substantiated its allegation of a due process violation.

We also decline to alter our holding rejecting employer's argument that the administrative law judge should have admitted and considered the evidence developed in conjunction with the withdrawn claim because it is relevant. The Board has held that the requirement, set forth in 30 U.S.C. §923(b), that all relevant evidence be considered in the adjudication of a claim, does not negate other language in Section 923(b) that authorizes the Department of Labor (DOL) to regulate "the nature and extent of the

proofs and evidence . . . ." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a). *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58 (2004)(*en banc*).

Employer further alleges that the Board erred in concurring with the Director's position that the complete pulmonary evaluation that DOL provided to claimant in conjunction with the withdrawn claim did not have to be made part of the record of the February 9, 2001 claim. The Board agreed with the Director that 20 C.F.R. §725.421(b)(4), which provides that the record transmitted to the Office of Administrative Law Judges "shall include the results of any medical examination or test conducted pursuant to [20 C.F.R.] §725.406," applied only to the DOL exam performed in conjunction with the February 9, 2001 claim. Employer contends that the Board ignored the mandatory nature of Section 725.421(b)(4) and did not explain its decision to concur with the Director on this issue. We reject employer's allegations of error as, in our Decision and Order, we stated clearly that we agreed with the Director's position, "as the plain language of the regulations indicates that only those materials gathered in conjunction with the complete pulmonary evaluation are required to be admitted into the record." [*R.C.*], slip op. at 7; *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998, 19 BLR 2-10, 2-14 (6th Cir. 1994).

Employer next contends that the Board erred in affirming the administrative law judge's decision to admit the positive x-ray readings of Drs. Myers and Sundaram as part of claimant's affirmative evidence under 20 C.F.R. §725.414(a)(2)(i) because the original films were not submitted to DOL as required by 20 C.F.R. §718.102(c), (d). We continue to hold that because employer did not object to the admission of these x-ray readings at the hearing, it waived its right to oppose their admission. [*R.C.*], slip op. at 6, citing *Collins v. Pond Creek Coal Co.*, 22 BLR 1-229, 1-233 n.3 (2005).

Employer also contends that the Board should have held that the administrative law judge erred in failing to admit and consider Dr. Barrett's negative reading of a film dated May 29, 2001. Employer maintains that because this reading was obtained by the Director as part of the complete pulmonary evaluation provided to claimant under 20 C.F.R. §725.406, the administrative law judge should have admitted it into the record pursuant to 20 C.F.R. Sections 725.406 and 725.421(b)(4). We continue to hold that employer's contention is without merit. The plain language of the regulations indicates that only those materials gathered in conjunction with the complete pulmonary evaluation are required to be admitted into the record.[1] Dr. Barrett's reading was not part of the

[1] The Director, Office of Workers' Compensation Programs (the Director), acknowledged that "for an unknown reason," the Department of Labor asked Dr. Barrett to perform the x-ray interpretation. Director's Response Brief at 5. The Director asserted that the report of the examination performed by Dr. Baker on May 21, 2001, which

DOL evaluation nor was it procured to cure a defect in the reading of this x-ray done by Dr. Baker. In addition, employer could have designated Dr. Barrett's reading as part of its affirmative case evidence, but did not do so.

Finally, we reject employer's allegation of error regarding our holding that the administrative law judge acted properly in addressing Dr. Rosenberg's opinion only under Section 718.204(b)(2). In his Decision and Order, the administrative law judge indicated that employer proffered Dr. Rosenberg's medical report for the purpose of rebutting the pulmonary function study (PFS) and blood gas study (BGS) evidence developed by the Director. Decision and Order at 6; Director's Exhibit 18. The evidence summary form submitted by employer confirms this designation. When he summarized the PFS evidence, the administrative law judge indicated that Dr. Rosenberg noted that Dr. Burki had validated the PFS obtained by Dr. Baker during the DOL exam of claimant, but did not discuss it at his deposition. Decision and Order at 6 n.9. Similarly, in setting forth the BGS evidence, the administrative law judge indicated that Dr. Rosenberg reported that the BGS that Dr. Baker obtained was validated by Dr. Burki, but that Dr. Rosenberg did not specifically address this study at his deposition. *Id*. at 7 n.10. Because the administrative law judge considered Dr. Rosenberg's opinion for the purpose designated by employer, there is no merit to employer's argument that the administrative law judge erred in failing to address Dr. Rosenberg's opinion regarding the existence of legal pneumoconiosis and disability causation.

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included a reading of a film obtained on the same date, constituted the complete pulmonary evaluation specified in 20 C.F.R. §725.406.

Accordingly, the Board denies the Motion for Reconsideration With Suggestion for Rehearing *En Banc* submitted by employer and reaffirms the Decision and Order of January 27, 2006.[2]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[2] As a majority of the Board has denied reconsideration, employer's Suggestion for Rehearing *En Banc* is also denied. 20 C.F.R. §801.301(c).