BRB No. 04-0379 BLA

CHARLES H. PHILLIPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 01/27/2005
	)	
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia for claimant.

Dorothea J. Clark and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (02-BLA-5289) of Administrative Law Judge Pamela Lakes Wood 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). Claimant filed his claim on April 17, 2001.

Director's Exhibit 1. The district director issued a Proposed Decision and Order Awarding Benefits on May 6, 2002. Director's Exhibit 31. Employer requested a hearing, which was held on June 26, 2002.[1] Director's Exhibit 36. The administrative law judge awarded benefits on December 31, 2003.[2]

Employer appeals, contesting the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[3] Specifically, employer argues that the administrative law judge erred: (1) by automatically crediting claimant's testimony regarding the length and extent of his cigarette smoking; and (2) in weighing the conflicting medical opinions relevant to the issue of disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, also filed a response brief, noting that the administrative law judge committed harmless error in admitting x-rays and medical opinions proffered by employer in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer filed a reply to the Director's response brief, arguing that the Director has waived his right to object to the administrative law judge's evidentiary admissions.

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).

A. Disability Causation

Employer's first assertion on appeal is that the administrative law judge failed to adequately resolve the conflicting evidence regarding claimant's history of cigarette smoking. Contrary to employer's assertion, the administrative law judge acknowledged that there was a discrepancy between the smoking history accounts contained in certain

[1] The administrative law judge noted in her Decision and Order that the parties agreed to waive the evidentiary limitations under 20 C.F.R. §725.414.

[2] On January 7, 2004, the administrative law judge issued an Erratum to Decision and Order Granting Benefits, amending language in the original decision.

[3] The administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R .§718.204(b)(2) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

medical records and claimant's hearing testimony, but she rationally decided to credit claimant's credible testimony that he previously smoked one-half pack of cigarettes a day between 1957 and 1988. Decision and Order at 4. The administrative law judge determined that claimant had approximately a 15-pack year history of smoking and rejected a conflicting and lengthier smoking history recorded by Dr. Robinette:

> Although the history [c]laimant gave at the hearing is consistent with the one he gave to Drs. Forehand, Dahhan and Castle, Dr. Robinette recorded that he smoked between one and one-and-one-half packs of cigarettes daily during the time that he smoked, amounting to a "35-pack year smoking history at most" ending 12 years earlier. (CX 1). In his interrogatory responses, [c]laimant indicated that he had smoked for 30 years and that on the average, he had in the past smoked [one-half] packs per day, with the most he ever smoked as [one] pack. In the remainder of that subpart, when asked how many years he smoked that much, he put down"58-86 – 28 years." (DX 30). These responses are contradictory, as if he smoked on pack daily for 28 years he could not have smoked an average amount of [one-half] pack per day over a 30-year period. I reconcile these contradictions by accepting the [c]laimant's testimony. Based upon the record before me and [c]laimant's credible testimony, I must conclude that Dr. Robinette's entry was in error." Decision and Order at 4, n. 4.

Because the administrative law judge acted within her discretion in crediting claimant's testimony, we affirm her finding with respect to the length and extent of claimant's smoking history. *See generally Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985) (credibility of witnesses is within the purview of the administrative law judge).

Notwithstanding, we agree with employer that the administrative law judge erred in her consideration of the conflicting medical opinion evidence relevant to the issue of disability causation. First, the administrative law judge misapplied the Board's decision in *Gross v. Dominion Coal Corp.*, 23 BLR 1-10 (2003) to support her conclusion that Dr. Robinette's opinion, that claimant's total respiratory disability was due to his coal mine dust exposure, was rational and legally sufficient to support claimant's burden of proof at 20 C.F.R. §718.204(c).[4] In *Gross*, the Board held that a medical opinion stating that

[4] In *Gross*, employer argued that a medical opinion was legally insufficient to establish that pneumoconiosis was a substantially contributing cause insofar the doctor opined that disability arose from both smoking and coal dust exposure without addressing the relative contributions each factor alone. *Gross v. Dominion Coal Corp.*, 23 BLR 1-10 (2003). Employer argued that "[t]he doctor has merely combined coal dust exposure with cigarette smoking and has made no effort to determine whether claimant would be

pneumoconiosis was one of two causes of the miner's totally disabling pulmonary condition, but which did not attempt to specify the relative contribution of coal dust exposure and cigarette smoking, was legally sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c).[5] Unlike the physician's report in *Gross*, Dr. Robinette "does not address a possible contribution by the miner's smoking" to his respiratory or pulmonary impairment. Claimant's Exhibit 1; Decision and Order at 11. Thus, the administrative law judge should have considered whether Dr. Robinette's opinion was entitled to any probative weight at 20 C.F.R. §718.204(c) in light of the physician's failure to discuss all of the etiological factors for the miner's total respiratory disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Furthermore, the administrative law judge inexplicably stated that "while the reports [of Drs. Robinette and Forehand] lacked a detailed explanation of each physician's reasoning, they are nevertheless well founded and documented." Decision and Order at 11. By definition, a reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A physician must state the basis for his opinion and explain how the objective data supports his diagnosis in order for his opinion to be considered both documented and reasoned. *Id*. Because the administrative law judge has not reconciled her decision to credit the opinions of Drs. Forehand and Robinette with her

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equally disabled as a result of his cigarette smoking alone." *Id*. The Board rejected employer's argument, noting its agreement with the administrative law judge's interpretation of the doctor's opinion as stated that "pneumoconiosis was one of two causes of claimant's totally disabling respiratory condition," and therefore that the opinion was legally sufficient to establish that pneumoconiosis was a substantially contributing cause of the claimant's disability. *Id*.

[5] A miner is totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a "substantial contributing cause" of the miner's disability if it:

> i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id*.

criticism that their opinions lacked a detailed medical rational for their findings, we vacate her finding that the opinions of Drs. Forehand and Robinette are sufficiently documented and reasoned to support claimant's burden of proof at 20 C.F.R. §718.204(c).[6]

Additionally, the administrative law judge erred in rejecting the opinions of Drs. Branscomb and Spagnolo, that claimant respiratory disability was due to smoking and not coal dust exposure, simply because they did not conduct a physical examination. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Employer's Exhibits 2, 3, 6; Decision and Order at 12. The administrative law judge must specifically explain how Drs. Branscomb and Spagnolo were disadvantaged by their failure to conduct a physician examination when they had access to the same medical record presented to the examining physicians and also clearly outlined the findings presented by the examining physicians' reports. *See generally Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir.1994); *Lattimer v. Peabody Coal Co.*, 8 BLR 1-509 (1986).

For these reasons we vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge must specifically consider the reasoning and documentation underlying each of the physicians' reports in deciding the appropriate weight to assign the medical opinions relevant to the issue of disability causation.

B. Evidentiary Limitations:

The Director filed a brief asserting that the administrative law judge erred in admitting evidence in excess of the evidentiary limitation set forth at 20 C.F.R. §725.414. The Director, however, noted that that the administrative law judge's general error in admitting too much evidence could be deemed harmless if the Board affirmed the award of benefits. Given that we vacate the administrative law judge's finding that claimant

[6] In attributing claimant's total disability to coal dust exposure, Dr. Forehand relied in part on the absence of emphysema on claimant's x-rays. In fact, however, numerous other physicians found the existence of emphysema on x-ray. The administrative law judge must, therefore, consider the basis for Dr. Forehand's opinion, that most of claimant's respiratory disability was due to coal dust exposure with little contribution from smoking, and must consider whether, in light of the evidence, that conclusion is reasoned and documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we address the administrative law judge's error with respect to 20 C.F.R. §725.414.

The administrative law judge noted in her Decision and Order that the parties agreed to waive the evidentiary limitations under 20 C.F.R. §725.414. The Director asserts that the evidentiary limitations are mandatory, that the limitations cannot be waived by the parties in the absence of a showing of good cause, and that good cause cannot be manufactured by a simple agreement of the parties to ignore the mandatory limitations. Director's Brief at 1-2. In reply to the Director's brief, employer points out that while the case was pending below, the Director did not raise an objection to the admission of employer's evidence. Employer thus argues that the Director has waived the right to challenge on appeal the administrative law judge's evidentiary ruling under 20 C.F.R. §725.414. Employer's Reply Brief at 2-3.

We reject employer's position that the Director's failure to attend the hearing and thereby object to the admission of any of the evidence before the administrative law judge, constitutes a waiver of the issue of compliance with the evidentiary limitations of 20 C.F.R. §725.414. The regulation makes plain the limitations are mandatory, and as such, they are not subject to waiver; "Medical evidence in excess of the limitations contained in 20 C.F.R. §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).

In this case, although the Director does not specifically identify what evidence is in violation of 20 C.F.R. §725.414,[7] the record reflects that employer submitted four medical opinions. The regulations, however, provide that each party may submit only two medical opinions in support of its affirmative case. Employer submitted two examining physicians' reports from Drs. Dahhan and Castle. There are also two additional non-examining physician reports submitted by employer, which appear to be in violation of the 20 C.F.R. §725.414 limitation. These last two reports are from Drs. Branscomb and Spagnolo. On remand, the administrative law judge must ensure that the parties' evidence is in compliance with 20 C.F.R. §725.414 and reweigh the medical opinions relevant to disability causation consistent with 20 C.F.R. §725.414 and the Board's instructions herein.

[7] The Director correctly points out that any error committed by the administrative law judge in admitting too many x-ray readings is harmless error since the clear preponderance of the x-rays are positive for pneumoconiosis. S*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Furthermore, employer has not challenged the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is hereby 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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JUDITH S. BOGGS
Administrative Appeals Judge