BRB No. 06-0892 BLA

E.E.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	DATE ISSUED: 07/16/2007
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 on Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (03-BLA-6192) of Administrative Law Judge Richard A. Morgan 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). This case has previously been before the Board.[1] Initially, the administrative law judge credited claimant with at least twelve years of coal mine employment[2] and, based on the date of filing, adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.[3] The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Evaluating the merits of entitlement, the administrative law judge again found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2), 718.204(c)(1). Accordingly, the administrative law judge awarded benefits.

Employer appealed, and in [*E.E.*] *v. Buffalo Coal Co.*, BRB Nos. 05-0235 BLA and 05-0235 BLA-A (Feb. 15, 2006)(unpub.), the Board initially rejected employer's challenge to the validity of the evidentiary limits of 20 C.F.R. §725.414. The Board also affirmed, as unchallenged, the administrative law judge's findings that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and that he is now totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Regarding the existence of pneumoconiosis, however, the Board held that the administrative law judge erred in weighing the x-ray and medical opinion evidence at 20 C.F.R. §718.202(a)(1) and (a)(4), and in evaluating the computerized tomography (CT) scans pursuant to 20 C.F.R.

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[1] The complete procedural history of this case is contained in the Board's prior decision in [*E.E.*] *v. Buffalo Coal Co.*, BRB Nos. 05-0235 BLA and 05-0235 BLA-A (Feb. 15, 2006)(unpub.), and is incorporated herein by reference.

[2] The record indicates that claimant's coal mine employment was performed in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The current claim is claimant's fourth application for benefits. His three prior claims were denied because he did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 1-3. His third claim was denied on December 28, 1994 and again, after consideration of additional evidence, on a date not reflected by the record. Director's Exhibit 3. Claimant filed his current claim on August 15, 2001, a date that the parties agree is more than one year after the final denial of his previous claim. 20 C.F.R. §725.309(d).

§718.107(a). Therefore, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4); 718.107, and instructed the administrative law judge, on remand, to reweigh the relevant and admissible x-ray readings, CT scan readings, and medical opinions to determine whether they support a finding of the existence of either clinical or legal pneumoconiosis. 20 C.F.R. §§718.202(a); 718.201. In addition, in light of the Board's holdings at 20 C.F.R. §718.202(a), the Board vacated the administrative law judge's disability causation finding pursuant to 20 C.F.R. §718.204(c)(1) and instructed him to reweigh the medical opinions on that issue after he had reassessed the relevant evidence regarding the existence of pneumoconiosis.

On remand, the administrative law judge again found the evidence sufficient to establish that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding, pursuant to 20 C.F.R. §725.414, two x-ray readings that employer offered at the hearing. Employer also contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence in finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Additionally, employer argues that in considering the cause of claimant's total disability at 20 C.F.R. §718.204(c)(1), the administrative law judge erred in discounting several medical opinions because the physicians did not diagnose pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response agreeing with employer that one of employer's x-ray interpretations was improperly excluded. Employer has filed a reply to claimant's response.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Turning first to employer's challenge to the administrative law judge's evidentiary rulings, we initially reject, as without merit, employer's contention that the administrative

law judge erred in allowing claimant to submit Dr. Miller's rebuttal reading of the Director's positive reading of the October 23, 2001 x-ray. Employer's Reply Brief at 6-7. Claimants are permitted "to submit, in rebuttal of the case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray . . . submitted by the designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section *and by the Director* pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii)(emphasis added). The language of the regulation does not limit a party to rebut a particular item of evidence; rather, it permits a party to respond to a particular item of evidence in order to rebut "*the case presented by the party opposing entitlement.*" 20 C.F.R. §725.414(a)(2)(ii)(emphasis added). Thus, rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but rather, need refute only "the case" presented by the opposing party. Therefore, under the facts of this case, as Dr. Miller's re-reading of the October 23, 2001 x-ray was submitted by claimant in response to the Director's x-ray reading, and in rebuttal of the case presented by employer, we hold that the administrative law judge properly admitted Dr. Miller's x-ray reading into evidence.

We further reject employer's contention that the administrative law judge erred in applying 20 C.F.R. §725.414(a) to exclude from consideration Dr. Spitz's re-reading of the Director's October 23, 2001 x-ray. Hearing Tr. at 51; Employer's Brief at 8; Employer's Exhibit 5a. As provided by the rebuttal provisions of the regulations, both claimant and employer submitted rebuttal interpretations of the October 23, 2001 x-ray. However, employer then attempted to submit an additional reading of this x-ray by Dr. Spitz, in "rebuttal" of claimant's rebuttal reading. As claimant and the Director both assert, because the regulations provide for rebuttal only of affirmative case evidence, the administrative law judge properly excluded employer's second reading of the Director's October 23, 2001 x-ray. *See* 20 C.F.R. §725.414(a)(3)(ii); Claimant's Brief at 24; Director's Brief at 2 n.3.

We find merit, however, in employer's assertion that the administrative law judge erred in applying 20 C.F.R. §725.414(a) to limit employer to only one rebuttal reading of claimant's April 10, 2004 x-ray, rather than permitting employer to rebut both interpretations of that x-ray submitted by claimant as part of his affirmative case. Employer's Brief at 6-7. The Director agrees with employer that the administrative law judge's exclusion of employer's second rebuttal reading of the April 10, 2004 x-ray is contrary to the Board's decision in *Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155 (2006), issued prior to the administrative law judge's decision on remand.

In considering the x-ray evidence proffered by the parties, the administrative law judge found that, although claimant submitted two interpretations of the April 10, 2004 x-ray as his affirmative case evidence, for purposes of rebuttal under 20 C.F.R.

§725.414(a)(3)(ii), claimant submitted only one x-ray. Thus, although employer offered two interpretations of the April 10, 2004 x-ray for its rebuttal evidence, the administrative law judge allowed only one and excluded the second interpretation, that of Dr. Scatarige, a dually-qualified Board-certified radiologist and B reader.

In *Ward*, the Board held that the rebuttal provisions set forth at 20 C.F.R. §§725.414(a)(2)(ii), (3)(ii), permitting each party to submit "no more than one physician's interpretation of each chest X-ray" in rebuttal, refer to the x-ray interpretations that are proffered by the opposing party in its affirmative case, not to the underlying x-ray film. *Ward*, 23 BLR at 1-155. Moreover, subsequent to the administrative law judge's decision and order, the United States Court of Appeals for the Fourth Circuit issued its decision in *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), upholding this interpretation of the rebuttal provisions at 20 C.F.R. §§725.414(a)(2)(ii), (3)(ii). Thus, pursuant to *Blake* and *Ward*, each party may submit one rebuttal x-ray interpretation for each x-ray interpretation that the opposing party submits in its affirmative case, even if the two affirmative case interpretations are of the same x-ray. *Id.* Therefore, since claimant submitted two interpretations of the April 10, 2004 x-ray in support of his affirmative case, employer was entitled to submit two interpretations in rebuttal under 20 C.F.R. §725.414(a)(3)(ii). The administrative law judge, therefore, erred in limiting employer to one rebuttal interpretation of the April 10, 2004 x-ray. In addition, as employer contends, the error was not harmless because the administrative law judge's exclusion of the proffered x-ray led him to conclude that the April 10, 2004 x-ray was positive for pneumoconiosis, and that, therefore, the preponderance of the x-ray evidence as a whole was positive for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order on Remand at 7-8, 12.

Finally, as *Blake* and *Ward* constitute intervening controlling authority, we cannot hold, as urged by claimant, that employer waived its right to contest the exclusion of Dr. Scatarige's x-ray reading by not specifically raising this issue in the prior appeal. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). Thus, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) and remand the case for further consideration. On remand, the administrative law judge must admit Dr. Scatarige's rebuttal interpretation of the April 10, 2004 x-ray, and reevaluate all of the x-ray evidence in light of the additional interpretation.

Employer next contends that the administrative law judge erred in his weighing of the medical opinion evidence in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4). Specifically, employer asserts that the administrative law judge erred in crediting the opinion of Dr. Kowalti, who diagnosed pneumoconiosis, and, by contrast, erred in discrediting the contrary opinion of Dr.

Crisalli. Employer further contends that the administrative law judge failed to weigh and resolve the conflicting medical opinions pursuant to 20 C.F.R. §718.202(a)(4), prior to concluding that claimant established the existence of pneumoconiosis. Although we reject employer's argument that the administrative law judge erred in his analysis of the credibility of each individual medical opinion, we find merit in employer's argument that the administrative law judge did not adequately resolve the conflicting medical opinions to determine whether claimant established the existence of pneumoconiosis.

In evaluating the medical opinion evidence, the administrative law judge initially incorporated by reference his prior detailed summary of the medical opinion evidence, and again found the recent opinions of Drs. Zaldivar, Baker, Ranavaya, and Crisalli, submitted with the current claim, to be the most probative based on their relative recency, in light of the latent and progressive nature of pneumoconiosis. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*)(McGranery, J., concurring and dissenting); Decision and Order on Remand at 10. Of these more recent medical reports, the administrative law judge acted within his discretion in according the greatest weight to Dr. Zaldivar's opinion, that claimant does not suffer from either clinical or legal pneumoconiosis, as well-documented, well-reasoned, and supported by extensive medical data. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 8-9. The administrative law judge further permissibly accorded "slightly less weight" to the opinion of Dr. Baker, diagnosing both clinical pneumoconiosis and chronic obstructive pulmonary disease (COPD) due to both smoking and coal dust exposure because, while Dr. Baker's opinion was well-reasoned and well-documented, it was based on less extensive medical data. *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 9. The administrative law judge also permissibly accorded still less weight to the opinion of Dr. Ranavaya, that claimant has clinical pneumoconiosis, because while Dr. Ranavaya also offered a well-documented and well-reasoned opinion, he based his report on less extensive documentation than Dr. Zaldivar, and he possesses inferior qualifications to the other physicians of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *Clark*, 12 BLR at 1-155; Decision and Order at 9. Finally, the administrative law judge accorded the least weight to the opinion of Dr. Crisalli, that claimant has neither clinical nor legal pneumoconiosis, because Dr. Crisalli's reliance on objective testing that was not submitted into the record pursuant to 20 C.F.R. §725.414 "played a significant role in his conclusion concerning the existence of pneumoconiosis." Decision and Order at 9-10.

After ranking these opinions, as described above, the administrative law judge began his evaluation of all of the evidence of record pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge initially noted that the weight of the x-ray evidence supported a finding of

pneumoconiosis, the CT scan evidence, as a whole, did not support a finding of pneumoconiosis, and the medical opinions made no determinative point "because the reports entitled to the most and the least credit counsel against a finding of pneumoconiosis, and the middle two support its presence . . . ." Decision and Order on Remand at 12. However, the administrative law judge further found that when considering the opinion of Dr. Kowalti, claimant's treating physician, together with the other evidence, "claimant meets the burden of establishing the presence of pneumoconiosis." Decision and Order on Remand at 12.

Turning to employer's arguments, we initially reject employer's allegation that the administrative law judge erred in according "controlling weight" to the opinion of Dr. Kowalti, based on his status as claimant's treating physician. Employer's Brief at 10-14, Employer's Reply Brief at 8-10. The Board fully considered and rejected employer's argument in the prior appeal, and held that the administrative law judge did not give "controlling weight" to Dr. Kowalti's opinion, but rather, acted within his discretion in merely according the physician's opinion "special consideration" based on Dr. Kowalti's credentials, his treatment of claimant for pulmonary problems, and the reasoned and detailed nature of his treatment records. 20 C.F.R. §718.104(d); *see Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). The administrative law judge, on remand, reiterated his earlier assessment of Dr. Kowalti's opinion, and there has been no change in the underlying facts and no relevant, intervening controlling authority on this issue. Decision and Order on Remand at 12. Therefore, because employer has not demonstrated on appeal that the Board's initial determination was either clearly erroneous or a manifest injustice, we decline to depart from our prior holding as law of the case. *See Brinkley*, 14 BLR at 1-151; *Williams*, 22 BRBS at 237.

We further hold that there is no merit to employer's contention that the administrative law judge erred in according the least weight to the opinion of Dr. Crisalli, that claimant has neither clinical nor legal pneumoconiosis, because Dr. Crisalli relied in part on x-ray readings that were not admitted into the record pursuant to 20 C.F.R. §725.414. Decision and Order at 9-10; Employer's Brief at 17.

Specifically, in discussing the documentation supporting Dr. Crisalli's October 10, 2002 opinion, the administrative law judge noted that Dr. Crisalli had reviewed three x-ray readings of a July 1, 2002 x-ray, that were not admitted into the record.[4] In

[4] The July 1, 2002 x-ray was originally performed in conjunction with Dr. Crisalli's examination of the same date. Employer's Exhibit 1. Dr. Crissali reported that Dr. Willis read this x-ray as positive, while Drs. Wheeler, Scott, and Scatarige read this x-ray as negative. Employer's Exhibit 1. Only Dr. Wheeler's negative x-ray reading was admitted into the record.

evaluating the degree to which Dr. Crisalli had relied upon this inadmissible evidence, the administrative law judge noted that the evidence Dr. Crisalli reviewed included several positive x-rays and several medical opinions diagnosing pneumoconiosis, yet the physician ultimately opined that there was "not sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis." Decision and Order on Remand at 9; Employer's Exhibit 1. In addition, the administrative law judge found it significant that the additional x-ray readings, two of which were negative, were of the most recent x-ray available at the time of Dr. Crisalli's report. Thus, the administrative law judge found it "reasonable to conclude" that the additional negative x-ray readings "played a significant role in [Dr. Crisalli's] conclusion concerning the existence of pneumoconiosis." Decision and Order on Remand at 9-10. The administrative law judge further explained that, while he did not find Dr. Crisalli's opinion "inextricably tied" to the inadmissible evidence to the degree that exclusion of the report was warranted, he found it appropriate to accord Dr. Crisalli's opinion diminished weight because his review of the inadmissible readings of the July 1, 2002 x-ray bore adversely on the documentation of the physician's report. Decision and Order on Remand at 9-10. In light of the administrative law judge's careful consideration of the evidence and his thorough explanation for his conclusions, we hold that employer has failed to establish that the administrative law judge abused his discretion in according diminished weight to the opinion of Dr. Crisalli.[5] *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring); *Harris v. Old Ben coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

In addition, contrary to employer's assertion, the administrative law judge was not precluded, on remand, from according less weight to Dr. Crisalli's opinion for reviewing inadmissible evidence, simply because he did not do so in his initial decision. Employer's Brief at 17. An administrative law judge is not bound by prior findings that have been vacated on appeal. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985).

We find merit, however, in employer's final assertion that the administrative law judge erred in failing to resolve the conflicting medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), prior to determining that claimant met his burden to establish the existence of pneumoconiosis. As discussed above, the administrative law judge properly evaluated each medical opinion separately, to determine its credibility. *See Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However,

[5] A review of the administrative law judge's decision does not support employer's additional contention that the administrative law judge also discredited Dr. Crisalli's opinion as based on Dr. Scatarige's reading of the October 23, 2001 x-ray, that was improperly excluded from the record. Decision and Order on Remand at 9-10; Employer' Brief at 17.

while the administrative law judge permissibly accorded great weight to the opinion of Dr. Zaldivar, that claimant does not have pneumoconiosis, and further permissibly accorded "special consideration" to Dr. Kowalti's contrary opinion, the administrative law judge failed to weigh the opinion of Dr. Kowalti *together* with the opinion of Dr. Zaldivar and the other physicians of record pursuant to 20 C.F.R. §718.202(a)(4), or to explain why he, presumably, accorded Dr. Kowalti's opinion the greatest weight. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In addition, the administrative law judge failed to distinguish between clinical and legal pneumoconiosis, in finding the existence of the disease established. *See Held*, 314 F.3d at 187 n.2, 22 BLR at 2-571 n.2. On remand, the administrative law judge should specifically resolve the conflicts in the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) in determining whether claimant has established the existence of either clinical or legal pneumoconiosis.

Therefore, on remand, the administrative law judge should reweigh the relevant and admissible x-ray readings and medical opinions to determine whether they support a finding of the existence of pneumoconiosis. 20 C.F.R. §§718.202(a)(1), (4); 718.201. Following his determinations pursuant to 20 C.F.R. §718.202(a)(1), (4), the administrative law judge should then weigh together all relevant admissible x-ray readings, CT scan readings, and medical opinions to determine whether claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) under *Compton*, 211 F.3d at 203, 22 BLR at 2-162. *See* 20 C.F.R. §§718.202(a); 718.201.

Finally, pursuant to 20 C.F.R. §718.204(c)(1), employer argues that the administrative law judge erred in discounting the opinions of Drs. Crisalli and Zaldivar on the cause of claimant's total disability because the doctors did not diagnose pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1), (4), we also vacate his disability causation finding pursuant to 20 C.F.R. §718.204(c)(1) and instruct him to reweigh the medical opinions on that issue after he has reassessed the relevant evidence regarding the existence of pneumoconiosis.

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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge