BRB No. 04-0708 BLA

PAUL G. DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 06/13/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Paul G. Davis, Madisonville, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Sarah M. Hurley (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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant, representing himself, appeals the Decision and Order (03-BLA-5286) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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 involves a subsequent claim filed on February 26, 2001.[1] After crediting claimant with twenty-nine years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, contending that the administrative law judge erred in finding that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Director also contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant

[1]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on November 14, 1994. Director's Exhibit 1. The district director denied the claim on April 12, 1995. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

Claimant filed a second claim on February 26, 2001. Director's Exhibit 3.

to 20 C.F.R. §718.204(b)(2)(iv). In a reply brief, employer reiterates its contention that substantial evidence supports the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Before addressing the merits of this case, we initially note that the administrative law judge excluded two medical reports that had been submitted by employer. The administrative law judge excluded the reports of Drs. Branscomb and Fino from the record because these physicians considered medical evidence from claimant's prior claim in forming their opinions. Decision and Order at 5-6. The administrative law judge concluded that 20 C.F.R. §725.414(a)(1) barred the admission of the reports of Drs. Branscomb and Fino because they are based in part upon evidence that is inadmissible in the instant claim.[2] *Id.* Contrary to the administrative law judge's finding, the evidence

[2]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 can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R.

relied upon by Drs. Branscomb and Fino is admissible in this case. Section 725.309(d)(1) provides that "[a]ny evidence submitted in connection with any prior claim shall be made part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." 20 C.F.R. §725.309(d)(1). Consequently, the evidence submitted in claimant's prior 1994 claim is properly a part of the record. The administrative law judge, therefore, incorrectly found that the opinions of Drs. Branscomb and Fino were based upon inadmissible evidence pursuant to 20 C.F.R. §725.414. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004); *see also Smith v. Pittsburg & Midway Coal Mining*, BRB Nos. 04-0428 BLA and 04-0428 BLA-A (Nov. 30, 2004) (unpublished). We, therefore, hold that the administrative law judge erred in excluding the reports of Drs. Branscomb and Fino.[3]

---

§725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

[3]The administrative law judge also excluded Dr. Vuskovich's positive interpretations of x-rays dated May 14, 2001 and September 14, 2002 because claimant failed to exchange this evidence with the other parties at least twenty days prior to the hearing. Hearing at 7-8. Although the administrative law judge informed claimant that

We now turn out attention to the administrative law judge's findings on the merits. Claimant's 2001 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1994 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[4] has changed since the date upon which the order denying the prior claim became final. *Id.* The district director denied benefits on claimant's 1994 claim because he found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 1.

The administrative law judge initially addressed whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20

---

he could object to the administrative law judge's ruling, there is no indication that claimant did so. Claimant's failure to object to the administrative law judge's exclusion of this x-ray evidence before the administrative law judge operates as a waiver of his right to raise the issue on appeal. *Pendleton v. United States Steel Corp.*, 6 BLR 1-815 (1984); *see also Taylor v. 3D Coal Corp.*, 3 BLR 1-350 (1981).

The administrative law judge also permissibly excluded employer's submission of Dr. Wiot's negative interpretation of a January 5, 1996 x-ray because it exceeded the evidentiary limitations set out at 20 C.F.R. §725.414. *See* Decision and Order at 4.

[4]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

C.F.R. §718.202(a)(1). The newly submitted x-ray evidence consists of four interpretations of three x-rays taken on February 18, 1998, May 10, 2000 and May 14, 2001.

Dr. Wiot, a B reader, rendered negative interpretations of claimant's February 18, 1998 and May 10, 2000 x-rays. Employer's Exhibit 3. Because there are no other interpretations of these x-rays, the administrative law judge properly found that these x-rays are negative for pneumoconiosis. Decision and Order on 11.

Although Dr. Simpao rendered a positive interpretation of claimant's May 14, 2001 x-ray, Director's Exhibit 14, Dr. Wheeler rendered a negative interpretation of this x-ray. Employer's Exhibit 1. The administrative law judge found that there was no indication in the record that Dr. Simpao or Dr. Wheeler possessed any special radiological qualifications which would entitle their x-ray interpretations to greater weight.[5] Decision and Order at 11. Because the record contained one positive and one negative interpretation of claimant's May 14, 2001 x-ray, the administrative law judge found that claimant failed to establish, by a preponderance of the evidence, that the May 14, 2001 x-ray is positive for pneumoconiosis. *Id.*

[5]Contrary to the administrative law judge's characterization, Dr. Wheeler's x-ray report indicates that he is a B reader. *See* Employer's Exhibit 1. However, had the administrative law judge credited Dr. Wheeler's negative interpretation of claimant's May 14, 2001 x-ray over Dr. Simpao's positive interpretation based upon Dr. Wheeler's superior radiological qualifications, this would only have provided more support for the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis.

Having found that all three of the newly submitted x-rays are insufficient to establish the existence of pneumoconiosis, the administrative law judge found that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1). *Id.* Because it is supported by substantial evidence, the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Inasmuch as there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 11. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[6] *Id.* at 11-12.

The administrative law judge next considered whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The record contains three newly submitted medical reports by Drs. Simpao, Branscomb and Fino. Because the administrative law judge excluded the reports of Drs. Branscomb and Fino, albeit improperly, he was left to consider Dr. Simpao's medical report. Dr. Simpao examined claimant on May 14, 2001.

[6]Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20

In a report dated May 14, 2001, Dr. Simpao diagnosed "CWP 1/2." Director's Exhibit 14. In a questionnaire completed on the same date, Dr. Simpao indicated that claimant suffered from an occupational lung disease which was caused by his coal mine employment. *Id.* Dr. Simpao explained that this diagnosis was based upon "findings on the chest x-ray, arterial blood gas, EKG and pulmonary function testing along with physical findings and symptomatology." *Id.*

The administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was not sufficiently reasoned, stating that:

> Dr. Simpao attempted to properly document his medical report by identifying the clinical findings and objective data upon which he relied. However, he did not identify and explain how specific clinical findings and observations supported his conclusion. For instance, Dr. Simpao detected distant breath sounds, crepitations, and expiratory wheezes, but he did not specifically identify this finding as one upon which he relied to support his conclusion.

Decision and Order at 12.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has consistently held that the administrative law judge, as fact finder, is to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the opinion is based, in determining whether the opinion is documented and reasoned. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Furthermore, the law in the Sixth Circuit is well established that whether a report is sufficiently documented and reasoned is a

---

C.F.R. §718.306.

credibility matter for the fact finder to decide. *Id.* Moreover, the Sixth Circuit has held that the "mere fact that an opinion is asserted to be based upon medical studies cannot by itself establish as a matter of law that it is reasoned and documented." *Rowe, supra*. In this case, the administrative law judge acted within his discretion in finding that Dr. Simpao's diagnosis of pneumoconiosis was not sufficiently reasoned.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We note that the administrative law judge did not consider whether the opinions of Drs. Branscomb and Fino are sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, because neither Dr. Branscomb nor Dr. Fino opined that claimant suffers from pneumoconiosis,[8] their opinions are insufficient to support such a finding. We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[7]The administrative law judge also found that Dr. Simpao's failure to address the role of claimant's smoking history undermined his finding of pneumoconiosis. Decision and Order at 12-13. While Dr. Simpao noted that claimant had smoked one-half a pack of cigarettes a day from 1958 to 1970, Director's Exhibit 14, the administrative law judge found, based on claimant's hearing testimony, that claimant had actually smoked one pack of cigarettes a day during this time period. Decision and Order at 8; *see* Transcript at 24.

[8]In a July 7, 2003 report, Dr. Branscomb opined that claimant did not suffer from either clinical or legal pneumoconiosis. Excluded Employer's Exhibit 4. In a July 29, 2003 report, Dr. Fino did not address whether claimant suffered from pneumoconiosis. Excluded Employer's Exhibit 5.

Having properly found that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge next considered whether another applicable condition of entitlement (total disability) had changed since the date upon which the order denying claimant's prior claim became final.

The administrative law judge initially considered whether the newly submitted pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains one newly submitted pulmonary function study. A pulmonary function study conducted by Dr. Simpao on May 14, 2001 produced qualifying values. Director's Exhibit 14. However, another physician, Dr. Branscomb, subsequently invalidated the results of this study, stating that:

> The FVC's lack plateaus. The MVV is erratic and insufficiently fast and deep. The MVV particularly show [sic] a high level of voluntary control with many breaths smaller than the ordinary breaths taken by a relaxed resting subject. The test is invalid.

Employer's Exhibit 4.

The administrative law judge found that Dr. Branscomb's opinion provided "contrary probative evidence against the presumption that the May 14, 2001 PFT complied with the requirements of Appendix B to Part 718." Decision and Order at 13. The administrative law judge, therefore, found that claimant's May 14, 2001 pulmonary function study could not constitute evidence of the presence of a respiratory or pulmonary impairment. *Id.* at 13-14.

The administrative law judge erred in failing to provide a rationale for crediting

the opinion of Dr. Branscomb, a consulting physician, over that of Dr. Simpao, the administering physician, in regard to the validity of claimant's May 14, 2001 pulmonary function study. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1984). We also agree with the Director that the administrative law judge erred in relying upon Dr. Branscomb's invalidation of claimant's May 14, 2001 pulmonary function study without addressing Dr. Burki's contrary finding. On a form dated June 23, 2001, Dr. Burki indicated that claimant's May 14, 2001 pulmonary function study was acceptable. *See* Director's Exhibit 15. We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i).[9]

The administrative law judge next addressed whether Dr. Simpao's opinion was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In a report dated May 14, 2001, Dr. Simpao opined that claimant suffered from a severe pulmonary impairment. Director's Exhibit 14. Dr. Simpao further opined that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.* The administrative law judge questioned the reliability of Dr. Simpao's disability assessment

[9]Because the administrative law judge properly found that the only newly submitted arterial blood gas study, a study conducted on May 14, 2001, is non-qualifying, we affirm the administrative law judge's finding that the newly submitted arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 14.

Inasmuch as there is no newly submitted evidence of record indicating that the claimant suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant was precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 14.

because it was based in part upon the results of his invalidated May 14, 2001 pulmonary function study. However, because we are unable to affirm the administrative law judge's finding that the pulmonary function study relied upon by Dr. Simapo is invalid, we cannot affirm the administrative law judge's basis for questioning the reliability of Dr. Simpao's disability assessment. Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10]

In light of the foregoing, we also vacate the administrative law judge's finding that claimant failed to establish that any of the applicable conditions of entitlement had changed since the date upon which his prior claim became final. 20 C.F.R. §725.309. On remand, should the administrative law judge find the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in a condition of entitlement under 20 C.F.R. §725.309. Under these circumstances, the administrative law judge would be required to consider claimant's 2001 claim on the merits, based on a weighing of all of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

[10]On remand, the administrative law judge, in his consideration of whether the newly submitted medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(v), should also consider the opinions of Drs. Branscomb and Fino. In a July 7, 2003 report, Dr. Branscomb opined that claimant was not "impaired by virtue of a pulmonary disorder from carrying out his previous coal mine work." Excluded Employer's Exhibit 4. In a July 29, 2003 report, Dr. Fino opined that "[a]ccording to the last pulmonary function study that was performed on [May 14, 2001], [claimant] was disabled." Excluded Employer's Exhibit 5.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

I concur.

_____
JUDITH S. BOGGS
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

Because the administrative law judge determined that Dr. Simpao's opinion regarding the existence of pneumoconiosis was not sufficiently reasoned, I would hold that the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Consequently, I would vacate the

administrative law judge's denial of benefits and remand this case to the district director to allow for a complete pulmonary evaluation and for reconsideration of the merits of this claim in light of all of the evidence of record.

_____

BETTY JEAN HALL
Administrative Appeals Judge