BRB No. 04-0563 BLA

OAKLEY GILBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 03/30/2005
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (03-BLA-5373) of Administrative Law Judge Jeffrey Tureck in a miner's 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). The administrative law judge credited the miner with twenty-eight years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 5. Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* at 3-6. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in permitting employer to exceed the evidentiary limitations set forth at 20 C.F.R. §725.414. Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and Section 718.202(a)(4). *Id.* at 3-6. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that the administrative law judge erroneously permitted employer to exceed the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director, however, contends that the administrative law judge's error in admitting this extra evidence is harmless.[2]

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).

Claimant initially argues that the administrative law judge erred in permitting employer to submit x-ray and medical opinion evidence in excess of the evidentiary

[1]Claimant is Oakley Gilbert, the miner, who filed his claim for benefits on February 21, 2001. Director's Exhibit 2.

[2]We affirm the administrative law judge's finding of twenty-eight years of coal mine employment and his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

limitations set forth at 20 C.F.R. §725.414.[3] The Director asserts that the administrative law judge's error in admitting the extra evidence is harmless.[4] Given the administrative law judge's rationale for evaluating the x-ray and medical opinion evidence, the Director contends that the administrative law judge would have reached the same conclusions if this excess evidence had been excluded. Director's Brief at 1 n.1. As discussed, *infra*, we agree with the Director that the administrative law judge's error in permitting

[3]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. §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), (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).

[4]We reject employer's contention that claimant's failure to object to the admission of evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414 constitutes a waiver of his right to contest this issue on appeal. The Board has held that, unlike Section 725.456(b)(3) which allows the parties to waive the 20-day requirement, Section 725.456(b)(1) does not provide for parties to waive the regulatory limitations on medical evidence submitted in fulfillment of Section 725.414. *Smith v. Martin County Coal Corp.* BLR , BRB No. 04-0126 BLA (Oct. 27, 2004). Thus, while Section 725.456(b)(3) allows the parties to waive the requirement that documentary evidence must be submitted to all other parties at least 20 days prior to the formal hearing, Section 725.456(b)(1) does not provide a comparable waiver provision for evidence submitted under Section 725.414. Rather, Section 725.456(b)(1) specifically states that medical evidence submitted in excess of the Section 725.414 limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.414.

employer to submit x-ray evidence in excess of the evidentiary limitations set out at Section 725.414 was harmless. However, in light of our decision to vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), *see* discussion, *infra*, we instruct the administrative law judge, on remand, to appropriately limit the medical opinion evidence submitted by the parties in accordance with the evidentiary limitations set forth at Section 725.414.

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The record contains eleven readings[5] of eight x-rays. Of these eleven x-ray interpretations, only one is positive for pneumoconiosis. The administrative law judge noted that the only positive interpretation was rendered by Dr. Vaezy, who is neither a B reader nor a Board-certified radiologist. Decision and Order at 3. Eight of the negative readings were rendered by physicians who are either B readers, Board-certified radiologists, or both. The administrative law judge accorded "little weight" to the one positive x-ray reading in the record "as compared to the opinions of the better-qualified experts." *Id.* Relying on the negative readings by the physicians with superior radiological qualifications, the administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. *Id.*

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3-4. Contrary to claimant's assertion, the administrative law judge permissibly considered the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit, because the administrative law judge considered all of the x-ray evidence in the record.

[5]The administrative law judge included a negative interpretation of a May 16, 2001 x-ray by Dr. Burki in his Section 718.202(a)(1) discussion, but Dr. Burki's interpretation of this x-ray cannot be found in the record. Additionally, as noted by the administrative law judge, Dr. Sargent only read the May 16, 2001 x-ray for film quality, Director's Exhibit 8. Decision and Order at 3 n.5.

See Wojtowicz v. Duquesne Light Co., 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Lastly, because the administrative law judge permissibly accorded little weight to the only x-ray reading supportive of claimant's burden at Section 718.202(a)(1), the administrative law judge's error in permitting employer to submit x-ray evidence in excess of the evidentiary limitations set forth at Section 725.414 is harmless.[6] *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In addition to asserting that the administrative law judge erred in permitting employer to exceed the evidentiary limitations of Section 725.414, claimant contends that the administrative law judge erred in finding Dr. Vaezy's opinion insufficient to establish the existence of pneumoconiosis. Claimant's Brief at 4-5. Specifically, claimant contends that the administrative law judge erred in determining that Dr. Vaezy's opinion was based only upon an x-ray reading. Claimant argues that Dr. Vaezy also conducted a physical examination, reviewed claimant's medical and work histories and symptoms, and performed pulmonary function and arterial blood gas studies. *Id.* at 4. The administrative law judge considered the opinions of Drs. Vaezy, Rosenberg, Dahhan, Respher, and Wicker. Decision and Order at 4-6. While Dr. Vaezy found moderate chronic obstructive pulmonary disease[7] and category 1/0 coal workers' pneumoconiosis, Director's Exhibit 9, Drs. Rosenberg, Dahhan, Respher, and Wicker opined that claimant did not suffer from pneumoconiosis. Director's Exhibits 8, 32; Employer's Exhibits 2, 6, 9, 10.

In finding that Dr. Vaezy's opinion was not credible, the administrative law judge found that this physician diagnosed claimant with pneumoconiosis based upon an erroneous positive x-ray reading. Decision and Order at 4. The administrative law judge further found that Dr. Vaezy's subsequent *Pulmonary Residual Functional Capacity*

[6]If the administrative law judge had only considered two of the negative x-ray interpretations submitted by employer, he would have still permissibly accorded little weight to Dr. Vaezy's positive reading based on this physician's lack of radiological expertise.

[7]Because Dr. Vaezy did not identify an etiology for claimant's chronic obstructive pulmonary disease, this diagnosis does not support a finding of "legal" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

Questionnaire[8] did not indicate that the doctor based his diagnosis of coal workers' pneumoconiosis on anything other than his erroneous interpretation of claimant's x-ray. *Id.* Because none of the other physicians of record diagnosed pneumoconiosis, the administrative law judge concluded that claimant failed to meet his burden of proof at Section 718.202(a)(4) *Id.*

Claimant's assertions regarding the administrative law judge's discrediting of Dr. Vaezy's opinion have merit. The administrative law judge found that Dr. Vaezy's reliance on a positive x-ray, pulmonary function study, and *Pulmonary Residual Functional Capacity Questionnaire* was insufficient to constitute a credible opinion. The administrative, however, did not consider that Dr. Vaezy, claimant's treating physician, also relied on several examinations of claimant, as well as claimant's personal and occupational histories. Accordingly, we hold that the administrative law judge did not adequately explain his reasoning for discrediting Dr. Vaezy's finding of pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 2005 WL 492241 (6th Cir. March 4, 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107, (6th Cir. 2000).[9] Consequently, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, after reconsidering which medical opinion evidence is properly admissible, *see* 20 C.F.R. §725.414; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-62 (2004), the administrative law judge is instructed to reconsider whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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[8]In his *Pulmonary Residual Functional Capacity Questionnaire*, Dr. Vaezy found pulmonary infiltrate, moderate chronic obstructive pulmonary disease, and coal workers' pneumoconiosis, 1/0. Director's Exhibit 9. As support for his findings, Dr. Vaezy referred back to his June 4, 2001 report and noted claimant's symptoms of shortness of breath, rhonchi, and coughing. *Id.*

[9]In *Martin v. Ligon Preparation Co.*, 2005 WL 492241 (6th Cir. Mar. 4, 2005), the United States Court of Appeals for the Sixth Circuit found that an administrative law judge did not adequately explain his reasoning for discrediting a physician's finding of pneumoconiosis because it was based on a single positive x-ray reading. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the Sixth Circuit court agreed that "a mere restatement of an x-ray should not count as a reasoned medical judgment under § 718.202(a)(4)." However, the court stated that, contrary to the administrative law judge's determination, two physicians had based their findings of pneumoconiosis on a number of factors, including examinations, the miner's personal and occupational histories, and pulmonary function studies.

On remand, should the administrative law judge find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must consider whether the evidence is sufficient to establish the remaining elements of entitlement. 20 C.F.R. §§718.203, 718.204; *Trent*, 11 BLR at 1-27; *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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.

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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