

BRB No. 05-0595 BLA

PAUL WARD)
)
 Claimant-Respondent)
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 v.)
)
 CONSOLIDATION COAL COMPANY) DATE ISSUED: 03/28/2006
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 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; 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.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (03-BLA-5119) of Administrative Law Judge Alice M. Craft rendered 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 application for benefits on May 14, 2001. Director's Exhibit 2. At the hearing in this case, the administrative law judge excluded several exhibits submitted by employer as exceeding the evidentiary limitations of 20 C.F.R. §725.414, without a showing of good cause by employer for exceeding those limits. Hearing Transcript (Tr.) at 12-13. Among the exhibits the

administrative law judge excluded was a negative reading of a March 5, 2002 x-ray, one of two readings of that x-ray employer submitted to rebut two positive readings of that x-ray submitted by claimant.

In a Decision and Order Granting Benefits, the administrative law judge credited claimant with “approximately 31 years of coal mine employment,”¹ and found that both the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4). In weighing the x-rays, the administrative law judge found the March 5, 2002 x-ray to be positive for pneumoconiosis because “two dually qualified readers found this x-ray to be positive,” while only one read it as negative. Decision and Order at 14. Finding that all of the more recent x-rays of record were positive for pneumoconiosis, the administrative law judge turned to the medical opinions. The administrative law judge found that all of the physicians of record were well-qualified and rendered well-reasoned opinions, but she discounted the opinions of those who concluded that claimant does not have pneumoconiosis because they “based their opinions, at least in part, on their view that the x-ray evidence was negative.” Decision and Order at 16. The administrative law judge determined that employer did not rebut the presumption of 20 C.F.R. §718.203(b) that claimant’s pneumoconiosis arose out of coal mine employment. Additionally, the administrative law judge found that claimant is totally disabled by a respiratory or pulmonary impairment and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2), 718.204(c)(1). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the evidentiary limitations contained at 20 C.F.R. §725.414 are arbitrary and invalid. Employer also contends that the administrative law judge erred in limiting employer to only one reading in rebuttal to claimant’s two readings of the March 5, 2002 x-ray, and then relying on the numerical superiority of claimant’s two positive readings to find that x-ray positive for pneumoconiosis. Additionally, employer argues that the administrative law judge erred in her evaluation of the credentials of various physicians who submitted interpretations of the x-rays. Finally, employer contends that the administrative law judge erred in her analysis of the medical opinions on the issues of pneumoconiosis and disability causation. The Director, Office of Workers’ Compensation Programs (the Director), responds, agreeing with employer that the “parties should be permitted to submit one rebuttal reading for each x-ray reading the opposing party submits as part of its

¹ The record indicates that claimant’s last coal mine employment occurred in Tennessee. Hearing Transcript at 14. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

affirmative case (even if the two readings are of the same x-ray)” Director’s Brief at 2.² Claimant has not responded to this appeal.³

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 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).

Employer contends that the administrative law judge erred in excluding several x-ray readings and medical reports submitted by employer, because 20 C.F.R. §725.414 violates 30 U.S.C. §923(b), 5 U.S.C. §556(d) of the Administrative Procedure Act,⁴ and the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The Board has rejected these arguments and held that 20 C.F.R. §725.414 is a valid regulation. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*). To these arguments, employer adds that 20 C.F.R. §725.414 conflicts with *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh’g denied*, 484 U.S. 1047 (1988). Employer’s reliance on *Mullins* is misplaced. In *Mullins*, the Court held that in a Part 727 claim, 30 U.S.C. §923(b) is satisfied so long as all relevant evidence is considered at some point, at either the invocation stage or rebuttal stage of the claim. *Mullins*, 484 U.S. at 149-50, 11 BLR at 2-8-9. The Court did not address the Department of Labor’s authority to impose limitations on the admission of evidence in black lung claims. We

² In support of his arguments in this case, the Director attaches and refers to the brief he filed with the United States Court of Appeals for the Fourth Circuit in *Elm Grove Coal Co. v. Blake*, No. 05-1108 (4th Cir., appeal filed Jan. 27, 2005).

³ We affirm, as unchallenged on appeal, the administrative law judge’s findings regarding the length of claimant’s coal mine employment and that claimant established that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

therefore reject employer's argument that the administrative law judge could not apply the evidentiary limits of 20 C.F.R. §725.414.

Employer next contends 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 March 5, 2002 chest x-ray, rather than permitting employer to rebut both interpretations of that x-ray submitted by claimant. Employer's Brief at 18, 20. Section 725.414 provides, in relevant part, that claimant and employer may each submit "no more than two chest X-ray interpretations" in support of their affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In turn, the rebuttal provision provides that each party may submit "no more than one physician's interpretation of each chest X-ray . . . submitted" by the opposing party in its affirmative case. 20 C.F.R. §725.414(a)(2)(ii),(3)(ii). Although claimant submitted two interpretations of the March 5, 2002 x-ray as his affirmative case evidence, the administrative law judge apparently concluded that, for purposes of rebuttal under 20 C.F.R. §725.414(a)(3)(ii), claimant submitted only one *x-ray*. She therefore permitted employer to submit only one interpretation of that x-ray on rebuttal. Tr. at 6, 10, 12. Thus, although employer offered two interpretations of the March 5, 2002 x-ray for its rebuttal evidence, the administrative law judge allowed only one and excluded the second interpretation contained at Employer's Exhibit 9. As noted, the administrative law judge found the March 5, 2002 x-ray positive because two qualified readers read it as positive, as opposed to one who read it as negative.

The Director agrees that the administrative law judge's approach was inconsistent with the intent of the rebuttal provision:

Section 725.414(a)(3)(ii) entitles Employer "to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray . . . submitted by the claimant under paragraph (a)(2)(i) . . ." (emphasis added) Contrary to the ALJ's understanding, what is submitted under paragraph (a)(2)(i) is not an X-ray but an X-ray interpretation. This is because the X-ray itself has no meaning: it is just a picture. What has meaning, and therefore what is submitted, is the doctor's interpretation. Consequently, taking the whole provision into consideration, it is the X-ray interpretation to which the opposing party may respond. Thus, if a party submits two interpretations--even if it is of the same X-ray--the opposing party may submit two interpretations in response. . . . To hold otherwise would allow the party submitting two interpretations of the same X-ray--all other things being equal--to always have one more X-ray interpretation than its opponent, unless the opponent acts in the same manner when constructing its affirmative case. Such a scenario encourages a strategy focused on numbers.

Director's Brief at 23-24. The Director notes that one of the Secretary of Labor's goals in enacting 20 C.F.R. §725.414 was to impose identical limitations on claimants and responsible operators that would allow the parties to submit the same amount of evidence. Director's Brief at 24, citing 64 Fed. Reg. 54965, 54995 (Oct. 8, 1999). He contends that this goal will not be met if the rebuttal provision is interpreted to permit "numerical inequality" of x-ray interpretations. Director's Brief at 24.

We agree with the Director's reasonable interpretation of the regulation. *See Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62 (1994). Each party submits "chest X-ray interpretations" in its affirmative case. 20 C.F.R. §§725.414(a)(2)(i),(a)(3)(i). Consequently, "chest X-ray interpretations" are what each party may rebut under 20 C.F.R. §725.414(a)(2)(ii),(a)(3)(ii). Therefore, in the case at bar, since claimant submitted two interpretations of the March 5, 2002 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. We cannot say that the error was harmless, as the administrative law judge's approach led her to conclude that the March 5, 2002 x-ray was positive for pneumoconiosis and that therefore, all of the more recent x-rays were positive for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). 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 employer's second rebuttal interpretation of the March 5, 2002 x-ray, contained at Employer's Exhibit 9, and reevaluate the x-ray evidence in light of the additional interpretation.⁵

Regarding the administrative law judge's consideration of the radiological qualifications of the physicians, we vacate the administrative law judge's finding that Dr. Pathak's British Board-certification in radiology "may be seen as the British equivalent of board certification in the United States," Decision and Order at 14 n.7, as the administrative law judge provided no basis in the record for this determination. On remand, however, the administrative law judge may consider whether Dr. Pathak's British credentials are evidence of additional radiological qualification beyond B-reader status. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Additionally, although we reject employer's argument that Dr. Wiot's status as a "C-reader" mandates that his readings be given the greatest weight, we instruct the administrative law judge to

⁵ The administrative law judge correctly noted that Dr. Wiot's interpretation of a June 5, 2003 x-ray was improperly included in the record as rebuttal evidence for employer, because claimant did not submit any interpretations of a June 5, 2003 x-ray in his affirmative case. *See* 20 C.F.R. §725.414(a)(3)(ii). On remand, the administrative law judge should therefore exclude this interpretation.

consider these qualifications on remand, as they may bear on the quality of the x-ray evidence. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge's analysis of the x-ray evidence affected her weighing of the medical opinion evidence as to the existence of pneumoconiosis. Employer's Brief at 24, 26. We agree. Dr. Crater diagnosed claimant with pneumoconiosis, while Drs. Dahhan and Jarboe concluded that claimant does not have pneumoconiosis. Director's Exhibit 8; Employer's Exhibits 1, 4, 7, 8. The administrative law judge found that all three physicians were "well-qualified pulmonologists" who rendered "documented and reasoned medical opinions." Decision and Order at 16. However, the administrative law judge gave "greater weight" to Dr. Crater's opinion because Drs. Dahhan and Jarboe "based their conclusions, at least in part, on their view that the x-ray evidence was negative. I have found the x-ray evidence to be positive, based on positive readings by better qualified readers." Decision and Order at 16. Because we have vacated the administrative law judge's finding that the x-ray evidence establishes the existence of pneumoconiosis, we cannot affirm the administrative law judge's basis for according greater weight to Dr. Crater's opinion at 20 C.F.R. §718.202(a)(4).

Employer further contends that the administrative law judge did not adequately explain her additional reasons for giving less weight to the opinions of Drs. Dahhan and Jarboe. Employer's Brief at 25. We agree. Both Drs. Dahhan and Jarboe identified reversibility after bronchodilators on claimant's pulmonary function studies as one factor pointing toward a non-coal mine employment-related pulmonary condition. Employer's Exhibits 1, 4, 7, 8. The administrative law judge, however, found that Drs. Dahhan and Jarboe based their conclusions on the results of "a pulmonary function study which, it appears, is not in evidence." Decision and Order at 16. Employer states that "neither Dr. Dahhan nor Dr. Jarboe reviewed any pulmonary function study that is not in evidence." Employer's Brief at 25. Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and instruct the administrative law judge on remand to explain her finding. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Additionally, the administrative law judge should explain the basis for her finding that claimant's pulmonary function studies did not show "significant" reversibility. Decision and Order at 16. Review of the record reflects that the physicians of record rendered opinions on this issue.⁶ *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

⁶ The record reflects that Dr. Dahhan characterized the impairment reversibility as "variable," indicating, in his view, a non-coal mine employment condition. Employer's Exhibit 1 at 3; Employer's Exhibit 7 at 16-17. Dr. Jarboe stated that the pulmonary function study he administered showed a response to bronchodilators, but not at a

On the issue of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge accorded little weight to the opinions by Drs. Dahhan and Jarboe because they opined that claimant does not have pneumoconiosis, and credited Dr. Crater's opinion that pneumoconiosis substantially contributes to claimant's disability. Decision and Order at 17. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), and instruct her to revisit this issue on remand, if reached.

significant level. Employer's Exhibit 4 at 3. However, he opined that claimant's other pulmonary function studies show "significant" reversible airways disease, Employer's Exhibit 8 at 17, with a "significant reversible component." Employer's Exhibit 4 at 5. Dr. Crater did not describe the degree of reversibility. Director's Exhibit 8.

Accordingly, the administrative law judge's Decision and Order Granting 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

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge