BRB Nos. 06-0484 BLA
and 06-0484 BLA-A

BILLY V. POTTER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 03/28/2007
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6186) of Administrative Law Judge Edward Terhune Miller on a claim[1] 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). Employer has filed a cross-appeal. The administrative law judge initially credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-seven years. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that while claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence and total respiratory disability due to pneumoconiosis established by medical opinion evidence. 20 C.F.R. §§718.202(a)(1), (a)(4), 718.204(c).[2] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to respond to claimant's appeal.

On cross-appeal, employer argues that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, that portion of the administrative law judge's decision limiting the number of exhibits employer could submit, pursuant to 20 C.F.R. §725.414, should be overruled. Employer argues that the newly promulgated regulations, that impose limitations on the evidence each party is permitted to submit, are arbitrary, capricious, and violative of Section 923(b) of the Act, the Administrative Procedure Act (APA), 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). Employer also argues that the limits on evidence violate the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), because, in that case, the Fourth Circuit required that all relevant evidence be considered.

[1] Claimant filed his first application for benefits on May 8, 1989, but subsequently requested that that claim be withdrawn. Hearing Transcript at 8-9. On May 19, 2003, claimant filed another claim, which is the subject of the instant appeal. Director's Exhibit 2.

[2] Although claimant phrases his argument in terms of disability causation at 20 C.F.R. §718.204(c), his argument is also relevant to the administrative law judge's finding at Section 718.202(a)(4) and will be considered thereunder.

Therefore, employer argues that the administrative law judge erred in failing to admit Employer's Exhibits 1, 4, 5, and 6 into the record. Claimant has not responded to employer's cross-appeal. The Director responds, contending that because the Board has upheld the validity of the evidentiary limitations pursuant to Section 725.414 and has rejected employer's arguments in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-51 (2004), it should do so herein.[3]

Claimant first contends that, under Section 718.202(a)(1), the administrative law judge erred in discounting the positive x-ray interpretations as inconsistent, notwithstanding that four out of the five readings were by B readers and three were by Board-certified readers. Claimant contends that, because the readings were positive, the administrative law judge erred in discounting them as inconsistent because the profusion levels on the interpretations varied.[4] Claimant further contends that, under Section 718.202(a)(1), the administrative law judge must consider the radiological qualifications of the doctors in assessing the x-ray evidence. In this vein, claimant concedes that Dr. Robinette's positive interpretation of the July 10, 2004 x-ray was outweighed by the negative interpretation of Dr. Wheeler, who was more qualified. Claimant further concedes that Dr. Castle's finding of 0/1 on the June 10, 2004 x-ray was not a positive finding. Claimant contends, however, that the administrative law judge should have found the July 3, 2003 x-ray to be positive, as both Drs. Patel and Alexander, who are dually qualified, read the x-ray as positive, while only Dr. Wiot, who is dually qualified, read the x-ray as negative. Likewise, claimant contends that the positive x-ray interpretation of Dr. DePonte, a dually qualified doctor, should be credited as positive as it was not contradicted. Claimant concludes, therefore, that the administrative law judge should have found that a preponderance of the x-ray evidence was positive and establishes the existence of pneumoconiosis.

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[3] We affirm the administrative law judge's findings of twenty-seven years of coal mine employment and that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 14.

[4] Section 718.102(b) provides, in pertinent part, that a chest x-ray establishes the existence of pneumoconiosis if it is classified as Category 1, 2, 3, A, B, or C according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO-U/C 1971), or subsequent revisions thereof. 20 C.F.R. §718.102(b). Further, a chest x-ray classified as category 0, including sub-categories 0---, 0/0, or 0/1 does not constitute evidence of pneumoconiosis. 20 C.F.R. §718.102(b).

In this case, the administrative law judge found that the x-ray evidence consisted of eight interpretations of four chest films that were all classified in accordance with the regulatory criteria set forth in Section 718.102, and an additional interpretation made for quality only. The administrative law judge noted that Drs. Wiot and Wheeler, dually qualified physicians, read x-rays as negative, as did Dr. Castle, a B reader, while Drs. Patel, Alexander, DePonte, dually qualified readers, read x-rays as positive, as did Dr. Robinette, a B reader. In assessing the probative value of the conflicting x-ray readings, the administrative law judge found:

> [b]ecause all of the subject x-ray films were taken within the space of a year and a half, July 2003 to December 2004, the inconsistency of the classified positive readings appears to be significant, *i.e.*, 1/1, 2/1, 1/1, and 2/2.
>
> The July 3, 2003, film was read as 1/1 and 2/1 by Dr. Patel and Dr. Alexander, respectively, and as negative by Dr. Wiot, all dually qualified. The June 10, 2004, film was read as 1/1 by Dr. Robinette, a B-reader, and negative by Dr. Wheeler, who is dually qualified. Dr. Castle's reading of the April 7, 2004, film as 0/1 is not evidence of pneumoconiosis, and was not reread. Dr. DePonte's reading of the December 3, 2004, film as 2/2 is uncontradicted, but its significantly more positive reading was not corroborated or consistent with the other positive readings of record, and not enough later in time to account for such a change without explanatory evidence.

Decision and Order at 11. Consequently, the administrative law judge concluded that the "near balance of apparently inconsistent positive readings of qualified physicians against the negative readings of similarly or better qualified physicians" rendered the x-ray evidence in equipoise, and claimant failed, therefore, to establish the existence of pneumoconiosis by a preponderance of the evidence under Section 718.202(a)(1). *Id.*

Contrary to the administrative law judge's finding, however, a review of the x-ray evidence shows that the x-ray referred to by the administrative law judge as taken on December 3, 2004 and read positive by Dr. DePonte was actually taken December 3, 2003. Claimant's Exhibit 1. Moreover, this x-ray was reread negative by Dr. Wiot, but positive by Dr. Patel. Employer's Exhibit 3; Claimant's Exhibit 1. Because the administrative law judge did not discuss and consider these additional readings, we vacate the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis and we remand the case for the administrative law judge to

reconsider the entirety of the x-ray evidence.[5] On remand, the administrative law judge must consider the qualifications of the physicians in resolving any conflict between x-ray readings. 20 C.F.R. §718.202(a)(1); *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4 (1999)(*en banc*); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *see also* 20 C.F.R. §718.102; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Turning to Section 718.202(a)(4), claimant contends that the administrative law judge erred in assigning less weight to the affirmative opinion of Dr. Rasmussen, that claimant's respiratory condition was due to coal mine employment and smoking, on the bases that Dr. Rasmussen did not consider the range of medical records that would have provided insight to claimant's disease process over time and Dr. Rasmussen did not consider the possible effects of claimant's history of asthma, allergies or bullous emphysema on his respiratory condition. Claimant contends that the administrative law judge disregarded or overlooked Dr. Rasmussen's December 3, 2003 opinion, discussing claimant's asthma and other conditions and that the administrative law judge erred, therefore, in discounting Dr. Rasmussen's opinion because he considered only two risk factors for claimant's respiratory condition, *i.e.*, coal dust exposure and cigarette smoking. Claimant contends that it appears that the administrative law judge relied solely on Dr. Rasmussen's July 3, 2003 report, identifying coal mine employment and smoking as risk factors, while disregarding or overlooking Dr. Rasmussen's December 3, 2003 report, noting a history of asthma, allergies, and bullous emphysema.

In addressing the July 3, 2003 report of Dr. Rasmussen, the administrative law judge found that the weakness in the report was that it did not consider the range of medical records that would have provided insight into the disease process over time and that it did not consider the possible effects of claimant's history of asthma, allergies or bullous emphysema, which were identified by other examining doctors. The administrative law judge concluded, therefore, that Dr. Rasmussen's more limited analytical approach was not as persuasive as the analysis of Drs. Castle and Hippensteel, who were examining physicians with comparable professional qualifications. Decision and Order at 13.

We agree with claimant that the administrative law judge, while discussing the findings contained in Dr. Rasmussen's report dated July 3, 2003, appears to have either disregarded or overlooked Dr. Rasmussen's subsequent report dated December 3, 2003. Decision and Order at 3-6. A review of the record reveals that Dr. Rasmussen conducted

[5] Dr. Hippensteel's negative reading of a December 8, 2003 x-ray was also not included in the administrative law judge's discussion of the x-ray evidence. Employer's Exhibit 10.

a complete pulmonary evaluation of claimant on December 3, 2003 and discussed the impact of the various risk factors contributing to claimant's moderate loss of lung function, *i.e.*, coal mine dust exposure, cigarette smoking, and asthma. Claimant's Exhibit 1. During the formal hearing held on September 22, 2004, the administrative law judge admitted Claimant's Exhibits 1 and 2, which included the December 3, 2003 report of Dr. Rasmussen and various x-ray interpretations, into the record. Hearing Transcript at 10-13. Consequently, the administrative law judge's reason for discrediting the opinion of Dr. Rasmussen, *i.e.*, that he was not fully aware of all the possible etiologies of claimant's respiratory condition, is erroneous, and the administrative law judge's finding at Section 718.202(a)(4) must be vacated and the case remanded for consideration of all the medical opinion evidence. *See* 20 C.F.R. §§718.201, 718.202(a)(4). On remand, the administrative law judge must consider the qualifications of the physicians and the documentation underlying their opinions.[6] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 1-232 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbin Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, if the administrative law judge finds the existence of pneumoconiosis established at either Section 718.202(a)(1) or (a)(4), the administrative law judge must then weigh all the relevant evidence together, *i.e.*, the x-ray and medical opinion evidence, to determine whether the existence of pneumoconiosis is established. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Further, because we vacate the administrative law judge's finding that pneumoconiosis was not established, we must likewise vacate the administrative law judge's finding that disability causation was not established at Section 718.204(c). If, on remand, the administrative law judge finds the existence of pneumoconiosis established, he must then consider whether pneumoconiosis was a substantially contributing cause of claimant's total respiratory disability. 20 C.F.R. §718.204(c); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

On cross-appeal, employer asserts that the administrative law judge erred in applying the evidentiary limitations, set forth in Section 725.414, to exclude Employer's Exhibits 1, 4, 5, and 6 from the record as excessive. Employer argues that the amended regulations, mandating limits on the evidence that parties may submit, are arbitrary, capricious, and violative of Section 923(b) of the Act, of the APA, and of the Fourth

[6] Claimant contends that it was illogical for the administrative law judge to discount Dr. Rasmussen's opinion in light of Dr. Rasmussen's superior qualifications, *i.e.*, Dr. Rasmussen is nationally recognized for his superior expertise in the field of black lung. Claimant's Brief at 10-11. Claimant also contends that the results of claimant's July 3, 2003 blood gas study and the x-ray evidence support Dr. Rasmussen's conclusions.

Circuit's holding in *Underwood*, 105 F.3d at 951, 21 BLR at 2-32, which require that all relevant evidence be considered.

The Fourth Circuit and the Board have held that the regulation at Section 725.414, placing limits on the evidence to be submitted by each party, is valid and does not contravene the Act or controlling precedent. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], F.3d , 2007 WL 678248 (4th Cir. March 7, 2007); *see Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*). Hence, we affirm the administrative law judge's determination to exclude Employer's Exhibits 1, 4, 5, and 6 in light of the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge