BRB No. 06-0589 BLA

BARNEY EVERETT COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RBM ENTERPRISES, INCORPORATED	)	DATE ISSUED: 03/28/2007
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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:

Employer appeals the Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration (03-BLA-6463) of Administrative Law Judge Joseph E. Kane on a claim filed on May 24, 2001 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). In a Decision and Order dated February 24, 2004, the administrative law judge credited claimant with twenty-nine years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2) and 718.204(c). Accordingly, the administrative law judge awarded benefits. In a subsequent Order dated April 5, 2006, the administrative law judge granted employer's request for reconsideration, but upheld his prior finding that claimant was entitled to benefits.

On appeal, employer challenges the administrative law judge's finding that the claim was timely filed by claimant. Employer also challenges the administrative law judge's decision to strike evidence, *sua sponte*, based on the evidentiary limitations set forth in 20 C.F.R. §725.414. Further, employer challenges the administrative law judge's findings that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that the miner's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response in a letter brief, urging the Board to reject employer's contention that the administrative law judge erred in finding that claimant timely filed his application for benefits. The Director also urges the Board to reject employer's contention that the administrative law judge erred in excluding the opinions of Drs. Rosenberg and Dahhan, based on the evidentiary limitations set forth in 20 C.F.R. §725.414, because the parties did not object to the admission of this evidence. Further, the Director urges the Board to reject employer's contention that the administrative law judge erred in excluding Dr. Broudy's opinion because it exceeded the scope of permissible rebuttal evidence. However, the Director agrees with employer's argument that the administrative law judge abused his discretion in wholly excluding the opinions of Drs. Rosenberg and Dahhan, based upon their reliance upon non-record evidence. Employer has filed a brief in reply to the Director's response brief, reiterating its prior contentions regarding the issues of the statute of

limitations at 20 C.F.R. §725.308 and the evidentiary limitations set forth at 20 C.F.R. §725.414.[1]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that this claim is barred by the statute of limitations. Specifically, employer argues that claimant's uncontradicted testimony that he was told by a doctor that he was totally disabled due to pneumoconiosis triggered the running of the statute of limitations more than three years before the May 2001 claim was filed and requires the denial of this claim as a matter of law. Employer maintains that there can be no additional requirement that a doctor's report has to be included in the record, or that an administrative law judge has to determine that a doctor's report is reasoned and documented, prior to holding that the report starts the running of the limitations period. The Director urges the Board to reject employer's argument, as claimant's hearing testimony in this case is legally insufficient to prove that claimant received a diagnosis of total disability due to pneumoconiosis more than three years prior to his filing of the claim.

In finding that claimant timely filed his May 24, 2001 claim, the administrative law judge determined that employer failed to carry its burden to rebut the presumption of timeliness at 20 C.F.R. §725.308(c). The administrative law judge noted that "[a]t the hearing, [c]laimant testified that in 1995 or 1996 a physician told him he had pneumoconiosis and that he was disabled from coal mine employment because of it. (TR 18-19)." 2005 Decision and Order at 3. The administrative law judge additionally noted that "[c]laimant's statements at the hearing, that he was told he had pneumoconiosis and that he was totally disabled due to pneumoconiosis, *could* operate to trigger the three-year statute of limitations where the miner clearly knew he was totally disabled due to pneumoconiosis and that this disability was caused by his coal mine employment." *Id*. at 4 (emphasis added). Citing the Board's decision in *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993), the administrative law judge also stated that employer did not submit medical records into the record indicating that claimant was aware, or should have been aware, in the exercise of reasonable diligence, that he was totally disabled due to pneumoconiosis arising out of coal mine employment. *Id*. Consequently, the administrative law judge found that employer failed to establish rebuttal of the

[1] Because the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

presumption that claimant's May 24, 2001 claim was timely filed pursuant to 20 C.F.R. §725.308(c). *Id*.

Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a *medical* determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [claimant]" more than three years prior to the filing of his/her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

Employer relies solely on the hearing testimony, provided by claimant before the administrative law judge, to rebut the presumption of timeliness. At the hearing, claimant testified that he quit his coal mine job in 1995 after Dr. Mettu told him that he needed to get out of coal dust. Hearing Transcript at 18. However, claimant testified that Dr. Mettu did not tell him that he had black lung disease at that time. *Id*. Claimant also testified that he could not remember the name of the first doctor who told him that he had black lung disease. *Id*. Nonetheless, when asked on cross-examination by employer's attorney for the date that the doctor told him about his black lung disease, claimant stated, "I'd say in, I forget whether it was '95 - - so it was between '95 and '96, I would say." *Id*. at 19. Employer's attorney also asked, "did they tell you that you were disabled as a result of black lung disease at that time." *Id*. Claimant responded, "Yes, they did." *Id*.

In defining what constitutes a medical determination that is sufficient to start the running of the three year limitations period, the Sixth Circuit court, in *Kirk*, stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at [607], 22 BLR at [2-296]. The administrative law judge's determination that the doctors' statements described by claimant were insufficient to start the running of the limitations period is consistent with the requirement set forth in *Kirk* that the medical opinion of total disability due to pneumoconiosis communicated to the claimant be reasoned. 2005 Decision and Order at 4. Thus, we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness provided at Section 725.308(c) and, therefore, further affirm his finding that the instant claim was timely filed.[2]

[2] Employer and the Director, Office of Workers' Compensation Programs, assert that they disagree with the Board's holding in *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-43 (1993), that 20 C.F.R. §725.308 requires a medical determination of total

Next, employer contends that the administrative law judge erred in excluding, *sua sponte*, the reports of Drs. Rosenberg, Dahhan and Broudy, as well as Dr. Broudy's deposition testimony, based on the evidentiary limitations set forth in 20 C.F.R. §725.414. Dr. Baker examined claimant on September 5, 2001 for the complete pulmonary evaluation provided by the Department of Labor. Director's Exhibit 12. The Director submitted the x-ray reading, pulmonary function study, arterial blood gas study and report of Dr. Baker in support of claimant's affirmative case. Administrative Law Judge's Exhibit 1. Employer submitted the x-ray readings, pulmonary function studies, arterial blood gas studies and reports of Drs. Rosenberg and Dahhan in support of its affirmative case. In addition, employer submitted Dr. Wiot's negative reading of the September 5, 2001 x-ray in rebuttal to Dr. Baker's positive reading of the same x-ray. Employer also submitted Dr. Broudy's report and deposition in rebuttal to the September 5, 2001 pulmonary function and arterial blood gas studies administered by Dr. Baker.

The administrative law judge excluded Dr. Rosenberg's report because Dr. Rosenberg relied on an inadmissible x-ray reading by Dr. Poulos. 2005 Decision and Order at 5. Further, the administrative law judge excluded Dr. Dahhan's report because Dr. Dahhan relied on the same inadmissible x-ray reading by Dr. Poulos, as well as Dr. Rosenberg's objective testing and opinions in rendering his opinion. *Id.* Lastly, the administrative law judge excluded Dr. Broudy's report and deposition because they discussed all the objective testing and opinions of other physicians, rather than appropriate rebuttal evidence to Dr. Baker's pulmonary function study and arterial blood gas study. *Id.*

Employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), by striking medical evidence from the record absent a party's objection and without providing notice to the parties after the record closed. Specifically, employer asserts that the administrative law judge failed to conduct a fair hearing, arguing that a party's failure to object to the admission of

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disability due to pneumoconiosis to be communicated to the miner in writing for the purpose of triggering the three-year limitations period. In light of our disposition of this issue based upon the holding of the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), we need not address this assertion. We are aware, however, of the decision in which the United States Court of Appeal for the Fourth Circuit held that that neither the Black Lung Benefits Act nor the implementing regulation requires that the notice to a miner of a determination of his total disability due to pneumoconiosis be in writing to trigger the start of the three-year statute of limitations clock on black lung claims. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006).

evidence before an administrative law judge constitutes a waiver of the issue of compliance with the evidentiary limitations set forth in 20 C.F.R. §725.414.

The Director contends that the Section 725.414 evidentiary limitations are mandatory and therefore the Board should reject employer's assertion that in the absence of an objection from claimant, the administrative law judge erred in excluding medical evidence from the record. The Director also asserts that there is no bar to an administrative law judge making a final evidentiary ruling in his ultimate decision, given the broad discretion conferred on administrative law judges in resolving procedural and evidentiary issues.

Contrary to employer's assertion, a party's failure to object to the admission of evidence that is before the administrative law judge does not constitute a waiver of the issue of compliance with the evidentiary limitations set forth in 20 C.F.R. §725.414. The regulation at 20 C.F.R. §725.456(b)(1) makes plain that the evidentiary limitations are mandatory, and as such, they are not subject to waiver. The pertinent regulation provides that "[m]edical evidence in excess of the limitations contained in 20 C.F.R §725.414 *shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1) (emphasis added). Further, while he may find "good cause" for admitting additional evidence into the record in accordance with Section 725.456(b)(1), *id*., an administrative law judge is not obligated to conduct, *sua sponte*, an independent assessment as to whether or not "good cause" justifies the admission of evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006). Thus, since the administrative law judge acted within his discretion in excluding medical evidence from the record after the hearing, *sua sponte*, we reject employer's assertion that the administrative law judge violated the APA by striking medical evidence absent a party's objection and without providing notice to the parties after the record closed. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

Employer also argues that the administrative law judge erred in excluding the opinions of Drs. Rosenberg and Dahhan on the ground that their opinions are based, in part, on inadmissible medical evidence. Specifically, employer asserts that the administrative law judge erred in applying the harshest of sanctions under the circumstances of this case where the opinions of Drs. Rosenberg and Dahhan are not inextricably tied to the inadmissible evidence. Employer maintains that because there is nothing in the physicians' opinions to suggest that Dr. Poulos's inadmissible x-ray reading was pivotal to their opinions, the physicians' reference to it is harmless. In addition, employer argues that the administrative law judge's exclusion of the medical opinions of Drs. Rosenberg and Dahhan is based on a mistake of fact. Specifically, employer asserts that it submitted revised opinions by Drs. Rosenberg and Dahhan, as well as additional deposition testimony by Dr. Rosenberg, that does not discuss or cite to Dr. Poulos's inadmissible x-ray reading and opinion.

The Director agrees with employer's argument that the administrative law judge abused his discretion in wholly excluding the opinions of Drs. Rosenberg and Dahhan from the record because of their reliance on non-record evidence. The Director asserts that while it is appropriate to completely disregard a physician's opinion when it is "inextricably tied" to inadmissible evidence, complete exclusion is not a favored option. The Director therefore asserts that because the administrative law judge excluded the opinions of Drs. Rosenberg and Dahhan, without considering whether the doctors' opinions were "inextricably tied" to the inadmissible x-ray reading of Dr. Poulos and without addressing why a lesser sanction would not suffice, the case should be remanded to the administrative law judge so that he can consider options such as redacting the objectionable content in the opinions, asking the physicians to submit new opinions, or factoring in the physicians' reliance upon the inadmissible evidence when deciding the weight to which their opinions are entitled. In addition, the Director argues that there is no reason why the administrative law judge, on remand, cannot admit and consider the revised versions of the reports of Drs. Rosenberg and Dahhan.

As indicated, in his Decision and Order, the administrative law judge excluded Dr. Rosenberg's opinion because Dr. Rosenberg relied upon the inadmissible x-ray and opinion of Dr. Poulos. 2005 Decision and Order at 5. The administrative law judge also excluded Dr. Dahhan's opinion because Dr. Dahhan relied upon the inadmissible x-ray and opinion of Dr. Poulos, as well as the inadmissible opinion of Dr. Rosenberg. *Id*. On reconsideration, the administrative law judge stated that:

> In Dr. Rosenberg's first medical report and deposition, he relied on the chest x-ray reading by Dr. Poulos, which [e]mployer chose not to rely upon for evidence. (DX 27, 28). Then in his supplemental report and deposition, he took into consideration his prior reasoning when forming his opinions. Dr. Dahhan took into consideration Dr. Rosenberg's findings and opinions when forming the opinions in his report. Therefore, the reports and depositions were properly excluded under [*Dempsey*].
>
> However, in reviewing the record upon reconsideration, I find that the objective medical testing conducted by Drs. Rosenberg and Dahhan should have been considered.

2006 Order Granting Motion for Reconsideration at 3. Thus, the administrative law judge excluded both reports and the deposition testimony of Dr. Rosenberg, but found that the objective medical testing that the physicians conducted was admissible. *Id*.

The pertinent regulations provide that each x-ray mentioned in a medical report must be admissible under Section 725.414(a)(2)-(3) or Section 725.414(a)(4), which provides for the admission of hospital and treatment records. 20 C.F.R.

§725.414(a)(2)(i), (3)(i), (4). However, the applicable regulations are silent as to what an administrative law judge should do when evidence that exceeds the evidentiary limitations is referenced in an otherwise admissible medical opinion. Thus, the disposition of this issue is committed to an administrative law judge's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey*, 23 BLR at 1-67. Consequently, an administrative law judge should not *automatically* exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. *Id*. If the administrative law judge finds that the opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Id*. Rather, as acknowledged by the administrative law judge, *see* 2006 Order Granting Motion for Reconsideration at 3, he may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67.

In the instant case, the administrative law judge did not explain how the opinions of Drs. Dahhan and Rosenberg were inextricably tied to their review of the inadmissible medical evidence and not available for consideration of a lesser sanction as mentioned in *Harris*. Thus, we vacate the administrative law judge's decision to wholly exclude the opinions of Drs. Rosenberg and Dahhan and remand the case to the administrative law judge to reconsider the admissibility of the opinions of Drs. Dahhan and Rosenberg in accordance with *Harris*.

Employer further argues that the administrative law judge erred in excluding Dr. Broudy's opinion on the ground that it is inappropriate rebuttal evidence to Dr. Baker's pulmonary function and arterial blood gas studies. Specifically, employer asserts that the pertinent regulations do not limit rebuttal evidence only to assessing the validity of objective tests. Alternatively, employer argues that the administrative law judge's decision to strike Dr. Broudy's entire report was too harsh and drastic of a remedy. Employer maintains that the administrative law judge could have stricken only those portions of Dr. Broudy's report that were inadmissible or allowed Dr. Broudy to cure whatever defects were in his report.

The Director asserts that the administrative law judge correctly found that Dr. Broudy's opinion exceeded the scope of allowable rebuttal evidence. The Director maintains that Dr. Broudy's opinion constitutes a medical report contemplated under the evidentiary limitations set forth at Section 725.414(a)(1), because Dr. Broudy reviewed all the evidence available to him and offered his opinion on all of the essential elements of entitlement. Nonetheless, the Director argues that although the full report is inadmissible, that portion of Dr. Broudy's report in which he discusses Dr. Baker's objective tests would constitute admissible rebuttal evidence. Director's Brief at 10 n.9.

Employer submitted Dr. Broudy's January 16, 2003 report in rebuttal to both the pulmonary function study and the arterial blood gas study administered by Dr. Baker on September 5, 2001. In his report, Dr. Broudy reviewed medical evidence to determine whether claimant has coal workers' pneumoconiosis, an impairment arising out of coal mine dust inhalation, and a disabling respiratory impairment. Director's Exhibit 38. Dr. Broudy indicated that Dr. Rosenberg administered a pulmonary function study and an arterial blood gas study during his November 26, 2001 examination of claimant. *Id*. Specifically, Dr. Broudy stated that "[p]ulmonary function studies showed evidence of severe impairment with severe obstruction" and "there was no improvement after bronchodilation." *Id*. Dr. Broudy also stated that "[b]lood gases on room air at rest were normal." *Id*. With regard to his review of Dr. Baker's September 5, 2001 examination of claimant, Dr. Broudy opined that "[t]he arterial blood gas study was normal" and "[s]pirometry showed severe obstruction." *Id*. Based on his entire review of the medical evidence, Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis or a chronic lung disease due to the inhalation of coal mine dust. *Id*. Further, although Dr. Broudy opined that claimant has a disabling respiratory impairment, he concluded that pneumoconiosis does not contribute to this impairment. *Id*.

In his Decision and Order, the administrative law judge excluded Dr. Broudy's report from the record because, in addition to his consideration of Dr. Baker's pulmonary function study and arterial blood gas study, Dr. Broudy also discussed the objective testing and opinions of the other physicians. 2005 Decision and Order at 5. Further, on reconsideration, the administrative law judge rejected employer's argument that "striking Dr. Broudy's report in whole was a harsh and unnecessary remedy." 2006 Order Granting Motion for Reconsideration at 1. The administrative law judge found that Dr. Broudy's opinion was properly excluded because it exceeded the evidentiary limitations, stating that:

> Dr. Broudy provided a medical opinion report opining [c]laimant did not suffer from pneumoconiosis or a total disability. He reviewed medical evidence besides the pulmonary function and arterial blood gas studies performed by Dr. Baker in forming his opinion and relied on all the evidence as a whole in forming his opinions. Dr. Broudy made no findings on whether Dr. Baker's objective testing was valid or not. He found that the arterial blood gas studies were normal and that the spirometry showed a severe obstruction; the same findings made by Dr. Baker. Basically, [e]mployer tries to use Dr. Broudy's opinion as another medical opinion report.

Id. at 1-2.

We hold that the administrative law judge correctly found that Dr. Broudy's report

exceeded the scope of allowable rebuttal evidence in this case, as Dr. Broudy reviewed medical evidence besides the pulmonary function study and arterial blood gas study performed by Dr. Baker and provided an opinion that went beyond a discussion of this evidence. *Id*. at 1; 20 C.F.R. §725.414(a)(2)(ii), (3)(ii). Nonetheless, employer and the Director are correct in asserting that because Dr. Broudy considered Dr. Baker's pulmonary function study and arterial blood gas study in his report, on remand, the administrative law judge must determine whether Dr. Broudy's discussion of those studies constitutes admissible rebuttal evidence. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67.

Based on the presence of the foregoing evidentiary errors, we vacate the administrative law judge's award of benefits and remand the case for further consideration of whether any portion of the opinions of Drs. Dahhan and Rosenberg is admissible.[3] Further, the administrative law judge, on remand, must consider whether the portions of Dr. Broudy's opinion that discussed the pulmonary function study and the arterial blood gas study evidence constitute admissible rebuttal evidence. After resolving the evidentiary issues, the administrative law judge must reconsider whether claimant has established entitlement to benefits under Part 718 on the merits based upon all of the properly admitted evidence of record.

[3] We reject employer's assertion that the administrative law judge is biased against employer. Employer has not identified any specific evidence in support of its contention and there is none in the record. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration are affirmed in part and vacated in part, and the case is remanded for further proceedings 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