BRB No. 07-0569 BLA

J.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TENNESSEE COAL COMPANY	)	
	)	DATE ISSUED: 03/31/2008
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 Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, 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 (2004-BLA-06493) of Administrative Law Judge Alice M. Craft rendered on a subsequent 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 claimant with at least eleven years of coal mine employment and adjudicated this

subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found that the evidence submitted since the previous denial was sufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4), and 718.204(b)(2)(ii), (iv). Consequently, the administrative law judge found that the newly submitted evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that claimant proved that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits effective May 1, 2003.

On appeal, employer argues that the administrative law judge erred in excluding the depositions of Drs. Dahhan and Rosenberg under 20 C.F.R. §725.458. Employer also challenges the administrative law judge's finding that the newly submitted evidence was sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Employer further contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer additionally challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response by letter, urging the Board to reject employer's arguments regarding the standard used by the administrative law judge in determining whether a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309. Employer has filed a reply brief in response to the letter brief of the Director, reiterating its prior contentions.

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,

[1] Claimant filed his initial claim for black lung benefits on June 25, 1993. Director's Exhibit 1. That claim was denied by the district director on December 10, 1993, because claimant did not establish any elements of entitlement. *Id*. Claimant subsequently requested modification on February 8, 1994. *Id*. On April 19, 1994, the district director denied the request on the ground that claimant did not establish a change in conditions or mistake in a determination of fact with respect to any of the elements of entitlement. *Id*. Claimant took no further action on the claim until filing a subsequent claim on May 30, 2003. Director's Exhibit 3.

and in accordance with applicable law.[2] 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).

Employer initially argues that the administrative law judge erred in failing to admit the depositions of Drs. Rosenberg and Dahhan into the record. Dr. Rosenberg performed a record review and submitted a report dated February 22, 2005. Employer's Exhibit 1. On March 4, 2005, twenty-five days before the hearing, employer's counsel provided claimant's lay representative with notice that Dr. Rosenberg's deposition was scheduled to be taken on March 11, 2005. Hearing Transcript at 10. On March 11, 2005, employer took Dr. Rosenberg's deposition without claimant's participation. Hearing Transcript at 10; Employer's Proposed Post-Hearing Exhibit 2. Dr. Dahhan examined claimant on March 10, 2005, and was deposed by employer on March 21, 2005 without claimant's participation. Hearing Transcript at 11-14; Employer's Proposed Exhibits 3, 4.

At the March 29, 2005 hearing, employer offered into evidence the deposition of Dr. Rosenberg, with the transcript to be submitted post-hearing because it was unavailable at the time of the hearing, and the medical report and deposition of Dr. Dahhan. Hearing Transcript at 10-14. Claimant objected to the admission of Dr. Rosenberg's deposition on the ground that insufficient notice was provided.[3] Hearing Transcript at 10. Claimant objected to the admission of Dr. Dahhan's medical report on the ground that this evidence was not exchanged in accordance with the twenty-day rule. Hearing Transcript at 11-13. Claimant also argued that because employer did not provide him with sufficient notice of Dr. Dahhan's deposition, the administrative law judge was required to exclude it. Hearing Transcript at 13-14. In reply to claimant's objections, employer's counsel indicated that: it provided adequate notice of Dr. Rosenberg's deposition; that Dr. Dahhan's examination was done at the earliest date the doctor had available; and that adequate notice of Dr. Dahhan's deposition was provided. Hearing Transcript at 10-14.

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[2] The record indicates that claimant's coal mine employment occurred in Tennessee. Director's Exhibit 3. 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 (1989)(*en banc*).

[3] Claimant's lay representative stated that "[o]ur objection would be that we received notification via fax on March the 4th about this deposition, and so we feel that the 30-day rule that we just figured out in the last case, also would apply to this case as well." Hearing Transcript at 10.

The administrative law judge sustained claimant's objection to the proffered exhibits and excluded the depositions of Drs. Rosenberg and Dahhan, because thirty days notice was not provided, and to the medical report of Dr. Dahhan, on the ground that the report was not provided to claimant within twenty days of the hearing. 20 C.F.R. §§725.456(b)(1), 725.458; Hearing Transcript at 10-14. In her Decision and Order, the administrative law judge did not elaborate on her decision to exclude the depositions of Drs. Rosenberg and Dahhan or the medical report of Dr. Dahhan.

Employer argues that although it did not provide thirty days prior notice of the depositions of Drs. Rosenberg and Dahhan, as required under 20 C.F.R. §725.458, the administrative law judge erred in not considering whether claimant waived his right to object to the untimely notice. In support of its argument, employer cites to Federal Rule of Civil Procedure 32(d)(1) and the decision of the United States Court of Appeals for the Sixth Circuit in *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 902, 11 BLR 2-94, 2-122 (6th Cir. 1988). Employer's contention has merit.

Under Federal Rule of Civil Procedure 32(d)(1), "[a]n objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice." Fed.R.Civ.P. 32(d)(1). In *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 11 BLR 2-92 (6th Cir. 1988), the Sixth Circuit held that this rule is applicable in cases arising under the Black Lung Act. *Jennings*, 842 F.2d at 902, 11 BLR at 2-95. In the instant case, there is no evidence in the record indicating that claimant's lay representative submitted a written objection to employer prior to either deposition. Although claimant's lay representative had the opportunity to participate in the cross-examination of Drs. Rosenberg and Dahhan, she declined to do so and waited until the hearing to object to the admission of the depositions into evidence on the ground that insufficient notice was given under 20 C.F.R. §725.458. Thus, under these circumstances, we hold, as a matter of law, that claimant waived the untimely notice of the depositions.

Accordingly, we reverse the administrative law judge's decision to exclude the depositions of Drs. Rosenberg and Dahhan pursuant to 20 C.F.R. 725.458, but remand the case to the administrative law judge for reconsideration of the admissibility of these depositions on other grounds. With respect to both depositions, because the administrative law judge did not address whether their admission was barred by application of the twenty-day rule, set forth in 20 C.F.R. §725.456(b)(2), we instruct the administrative law judge to consider this issue on remand. In so doing, the administrative law judge must determine whether claimant waived application of the twenty-day rule under the terms of 20 C.F.R. §725.456(b)(3). If the administrative law judge decides that the twenty-day rule has not been waived by claimant, but that the depositions are admissible, she must make a specific finding as to whether good cause existed for employer's violation of the twenty-day rule. *See Buttermore v. Duquesne Light Co.*, 8

BLR 1-36 (1985). If the depositions are made part of the record, the administrative law judge must also comply with the additional procedures set forth in 20 C.F.R. §725.456(b)(4).

In addition, if the administrative law judge determines that the admission of Dr. Dahhan's deposition is not barred by the twenty-day rule, she must determine whether Dr. Dahhan's deposition testimony is based upon admissible evidence as required under 20 C.F.R. §725.414(a)(3)(i).[4] 20 C.F.R. §725.414(a)(3)(i); *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). If the administrative law judge finds that Dr. Dahhan's testimony regarding pneumoconiosis and total disability due to pneumoconiosis are inextricably linked to inadmissible evidence, she may exclude the opinion. *Harris*, 23 BLR at 1-108; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004)(*en banc*). In the alternative, the administrative law judge may redact the objectionable content, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinions are entitled.

Employer next argues that the administrative law judge erred in finding that the newly submitted evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), employer argues that the administrative law judge erred in failing to compare the prior evidence with the newly submitted evidence in determining whether claimant's condition has worsened. We disagree. Under 20 C.F.R. §725.309(d)(3), a claimant establishes a change in an applicable condition of entitlement "only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." 20 C.F.R. §725.309(d)(3). As the Director argues, the pertinent regulation does not mandate a qualitative comparison of the old and new evidence. The Department of Labor, in amending 20 C.F.R. §725.309, adopted the standard set forth in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), which requires only that a claimant establish a change in one of the elements of entitlement previously adjudicated against him to proceed with his claim. Thus, we reject employer's contention that the administrative law judge was required to conduct a qualitative

[4] Employer does not allege any error in the administrative law judge's exclusion of Dr. Dahhan's March 10, 2005 report of his examination of claimant pursuant to the twenty-day rule set forth in 20 C.F.R. §725.456(b)(2). We affirm the administrative law judge's finding, therefore, as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

comparison.[5]

In order to avoid repetition of error on remand, we will address employer's arguments concerning the administrative law judge's weighing of the evidence under 20 C.F.R. §§718.202(a), 718.204(c), and 725.309(d). With respect to 20 C.F.R. §718.202(a)(1), the administrative law judge initially considered whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis and, therefore, a change in an applicable condition of entitlement pursuant to Section 725.309(d). The administrative law judge rationally found that the film dated July 19, 2003, was negative for pneumoconiosis, as the negative reading by Dr. Hayes, dually qualified as a Board-certified radiologist and B reader, outweighed the positive interpretation by Dr. Baker, a B reader. Decision and Order at 13; Director's Exhibits 10, 13. Regarding the x-ray dated August 27, 2003, the administrative law judge rationally determined that this film is positive, as Dr. Pathak, who is dually qualified, provided a positive reading, while Dr. Dahhan, a B reader, submitted a negative reading. Decision and Order at 13; Director's Exhibits 11, 12; Claimant's Exhibit 1. The administrative law judge permissibly found that the film dated November 4, 2003 is positive for pneumoconiosis, as Dr. Ahmed, who is dually qualified, interpreted it as positive and the record contains no negative readings. Decision and Order at 13; Director's Exhibit 14.

The administrative law judge rationally concluded, therefore, that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as the preponderance of the x-ray evidence was interpreted as positive for pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993). We affirm this finding, therefore, and the administrative law judge's determination that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004).

Employer further argues that when considering the x-ray evidence of record as a whole, the administrative law judge erred in failing to determine that this evidence was in

[5] In setting forth her finding that claimant established a change in two of the applicable conditions of entitlement, the administrative law judge stated that the diagnosis of pneumoconiosis and her finding of total disability "each constitute[d] a *material* change in conditions." Decision and Order at 4 (emphasis added). The latter phrase refers to the prior version of 20 C.F.R §725.309. The administrative law judge noted correctly, however, that under the amended version of the regulation, "[i]n a subsequent claim, the threshold issue is whether one of the applicable conditions of entitlement has changed since the previous claim was denied." Decision and Order at 4; 20 C.F.R. §725.309.

equipoise. Employer contends specifically that the administrative law judge erred in according diminished weight to the negative readings of the September 27, 1993 film because it was remote in time in comparison to the other x-rays of record. We disagree.

The record of claimant's initial claim, and request for modification, contains negative x-ray readings of a film dated September 27, 1993 submitted by Dr. Pharaoh, whose qualifications are not of record, and Dr. Sargent, who is dually qualified. Director's Exhibit 1. The administrative law judge stated that:

> I find that this x-ray was negative for pneumoconiosis. Because it was remote in time, however, I give it little weight. Thus[,] I find that claimant has established that he has clinical pneumoconiosis by virtue of the x-ray evidence submitted in the current claim.

Decision and Order at 13. Based upon the ten year gap between the negative 1993 film and the newly submitted x-rays, the preponderance of which was found to be positive, the administrative law judge rationally determined that the readings of the 1993 film were entitled to little weight. *See Woodward*, 991 F.2d at 320, 17 BLR at 2-87; *see also Adkins v. Director, OWCP***,** 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge also rationally found that the x-ray evidence, when weighed as a whole, is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id*.

With respect to 20 C.F.R. §§718.202(a)(4) and 718.204(c), because the quantity and quality of the medical opinion evidence may be altered by the administrative law judge's evidentiary rulings on remand, we vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). In addition, as employer contends, the administrative law judge did not apply a consistent standard of review when weighing the medical opinions on the issue of whether claimant's respiratory impairment is related to dust exposure in coal mine employment. This issue is relevant to both 20 C.F.R. §§718.202(a)(4) and 718.204(c) in this case, as the administrative law judge relied upon her findings at 20 C.F.R. §718.202(a)(4) on the issue of legal pneumoconiosis to determine that claimant established that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment under 20 C.F.R. §718.204(c).[6] Decision and Order at

[6] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Pursuant to 20 C.F.R.

14-15, 17.

Under 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Pharaoh, Baker, Dahhan, and Rosenberg.[7] Dr. Pharaoh examined claimant on September 27, 1993, at the request of the Department of Labor. Dr. Pharaoh read claimant's x-ray as negative for pneumoconiosis and found no respiratory or pulmonary impairment. Director's Exhibit 1. Dr. Baker examined claimant on behalf of the Department of Labor on July 19, 2003. Dr. Baker diagnosed coal workers' pneumoconiosis 1/0, chronic obstructive pulmonary disease (COPD) with a mild obstructive defect, severe resting arterial hypoxemia, and ischemic heart disease by history. Director's Exhibit 10. In response to the question on the form concerning the etiology of claimant's cardiopulmonary conditions, Dr. Baker indicated that claimant's coal workers' pneumoconiosis was caused by coal dust exposure and that his COPD and hypoxemia were caused by "coal dust exposure/cigarette smoking." *Id*. He further indicated that claimant's severe hypoxemia is totally disabling. *Id*. Dr. Dahhan examined claimant on August 27, 2003 and was deposed on January 15, 2004. Director's Exhibits 11, 12. Dr. Dahhan found that claimant's x-ray was negative for clinical pneumoconiosis and diagnosed a totally disabling respiratory impairment attributable to smoking and sleep apnea. *Id*. Dr. Rosenberg reviewed claimant's medical records dated 1993 to 2003 and concluded that he is not suffering from coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Rosenberg indicated that claimant is totally disabled from a respiratory standpoint due to conditions unrelated to coal dust exposure. *Id*.

The administrative law judge accorded little weight to Dr. Pharaoh's opinion on the ground that it "was based on an out-of-date physical examination and objective testing." Decision and Order at 15. The administrative law judge discredited the opinions in which Drs. Rosenberg and Dahhan stated that claimant is not suffering from a respiratory or pulmonary impairment related to coal dust exposure, finding that neither physician adequately explained why coal dust exposure did not contribute to claimant's

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§718.204(c), "[a] miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in Sec. 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1).

[7] The administrative law judge found that the opinion of Dr. Isber, claimant's treating physician, was not probative of the existence of pneumoconiosis, as Dr. Isber did not address whether claimant had pneumoconiosis and did not offer an opinion as to the cause of the chronic obstructive pulmonary disease and chronic respiratory failure that he diagnosed. Decision and Order at 14; Director's Exhibit 14.

respiratory impairment. *Id*. at 14. The administrative law judge found that Dr. Baker's opinion was well-documented and well-reasoned and determined that it was sufficient to establish the existence of clinical and legal pneumoconiosis. *Id*. at 14-15. The administrative law judge then relied upon her weighing of the medical opinion evidence at 20 C.F.R. §718.202(a)(4) to determine that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Decision and Order at 17.

Employer argues that the administrative law judge did not properly weigh the evidence relevant to the existence of legal pneumoconiosis, as she "impermissibly shifted the burden of proof" to employer to establish that coal dust was not a factor in claimant's respiratory impairment. Employer's Brief at 12. Employer also contends that in determining that Dr. Baker's diagnosis of legal pneumoconiosis was reasoned and documented, the administrative law judge engaged in a less rigorous analysis of Dr. Baker's opinion than she applied to the opinions of Drs. Dahhan and Rosenberg. We agree. In contrast to the opinions of Drs. Dahhan and Rosenberg, Dr. Baker's report does not contain an explanation of his conclusion that coal dust exposure was a contributing cause of claimant's COPD and hypoxemia. Absent an explicit consideration of this factor, employer's allegation that the administrative law judge improperly shifted the burden of proof to employer to establish that claimant's COPD and hypoxemia are not significantly related to or substantially aggravated by dust exposure in coal mine employment has merit. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). We must vacate, therefore, the administrative law judge's finding that Dr. Baker's opinion was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In light of the administrative law judge's reliance upon her weighing of the evidence at 20 C.F.R. §718.202(a)(4) to determine that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c), we also vacate the administrative law judge's finding that Dr. Baker's opinion was sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.204(c).

Based upon the administrative law judge's appropriate finding that claimant proved the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), she need not reconsider on remand whether claimant has established that element of entitlement at 20 C.F.R. §718.202(a)(4). The administrative law judge must, however, reconsider whether claimant has established, by a preponderance of the evidence of record, that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Due to the interrelationship between the definitions of legal pneumoconiosis and total disability due to pneumoconiosis, and the nature of the evidence in this case, the administrative law judge must determine whether each physician's opinion regarding the cause of claimant's lung disease *and* totally disabling respiratory impairment is reasoned and documented. In so doing, the administrative law judge must examine the entirety of the physicians' written reports and deposition testimony, if admitted, and set forth the rationale

underlying her findings. *See* Administrative Procedure Act, 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), 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is reversed in part, affirmed in part, and vacated in part, and the case is remanded to the administrative law judge 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