BRB No. 08-0565 BLA

D.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY	)	
	)	DATE ISSUED: 03/10/2009
Employer-Respondent	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Richard H. Risse (White & Risse LLP), Arnold, Missouri, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Benefits (06-BLA-5500) of Administrative Law Judge Donald W. Mosser rendered on a subsequent[2] claim filed

[1] Claimant is the widow of the deceased miner, J.C., who died on March 12, 2005, while his claim was pending. Director's Exhibit 30. Claimant did not file a survivor's claim.

[2] The miner's initial claim for benefits, filed on April 3, 1998, was denied by a claims examiner on July 27, 1998 for failure to establish any element of entitlement. Director's Exhibit 1. The record does not reflect that the miner took any further action, until filing the instant subsequent claim on November 2, 2001. Director's Exhibit 4.

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 "at least" twenty-three years of coal mine employment[3] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Decision and Order at 3. The administrative law judge found that the new evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant therefore established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). On the merits of entitlement, the administrative law judge determined that the evidence did not establish the existence of pneumoconiosis or that the miner's totally disabling impairment was due to pneumoconiosis under 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in designating claimant's computerized tomography (CT) scan as rebuttal evidence under 20 C.F.R. §§718.107, 725.414(a)(2)(ii), contrary to claimant's designation as affirmative evidence. Claimant further asserts that the administrative law judge erred in his consideration of the CT scan and medical opinion evidence pursuant to 20 C.F.R. §§718.107(b), 718.202(a)(4), 718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.[4]

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).

[3] The law of the United States Court of Appeals for the Seventh Circuit is applicable as the miner was last employed in the coal mining industry in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc)*.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-three years of qualifying coal mine employment, as well as the existence of a totally disabling respiratory impairment and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was 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).

Pursuant to 20 C.F.R. §718.107, employer designated Dr. Wiot's negative interpretation of an October 22, 1994 CT scan as affirmative evidence. Employer's Exhibit 4. Subsequently, claimant designated Dr. Cohen's positive interpretation of the same CT scan as affirmative evidence. Claimant's Exhibit 5. In response to Dr. Cohen's interpretation, employer designated Dr. Spitz's negative interpretation of the October 22, 1994 CT scan as rebuttal evidence. *See* 20 C.F.R. §725.414(a)(3)(ii). Claimant received notice of this designation two days before the scheduled hearing. Claimant objected to the late notice of the rebuttal evidence and requested an opportunity to rehabilitate Dr. Cohen's report. In an Order issued on August 22, 2007, the administrative law judge determined that Dr. Wiot's CT scan interpretation constituted employer's affirmative CT scan evidence, and that Dr. Cohen's CT scan interpretation "should be considered rebuttal evidence." August 22, 2007 Order. Further finding that Dr. Spitz's CT scan interpretation was in excess of the evidentiary limitations, the administrative law judge determined that it should be excluded from consideration. The administrative law judge therefore denied claimant's request for additional time to rehabilitate Dr. Cohen's report in light of Dr. Spitz's interpretation. *Id*.

Initially, claimant asserts that the administrative law judge erred in redesignating Dr. Cohen's CT scan interpretation as rebuttal evidence. As employer asserts, however, because Dr. Spitz's report was excluded from consideration, "it is difficult to see how the Claimant was harmed." Employer's Brief at 12. We agree with employer. Because Dr. Spitz's CT scan report was not admitted into the record, claimant's request for an extension of time to rehabilitate Dr. Cohen's report was moot. Further, because the October 22, 1994 CT scan interpretations of Drs. Wiot and Cohen were the only CT reports of record, any error the administrative law judge may have made in designating Dr. Cohen's report as rebuttal evidence rather than claimant's affirmative evidence, was harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We find merit, however, in claimant's assertion that the administrative law judge failed to fully analyze the conflicting CT scan interpretations of Drs. Cohen and Wiot. In considering the CT scan evidence of record, the administrative law judge stated:

> The two CT scan reports produced varying interpretations from the physicians that interpreted [it]. At best, these CT scans represent unstable evidence that the Seventh Circuit Court of Appeals has ruled is not

> conclusive. *Consolidation Coal Co. v. Director, OWCP*, [*Stein*], 294 F.3d 885, [22 BLR 2-409] (7th Cir. 2002).

Decision and Order at 13. As claimant asserts, the administrative law judge did not address whether the parties showed that CT scans are medically acceptable and relevant to establishing pneumoconiosis, *see* 20 C.F.R. §718.107(b), and it is unclear from the administrative law judge's decision why he found both CT scan reports to be "unstable." We therefore vacate the administrative law judge's findings pursuant to Section 718.107(b), and remand the case for further consideration. On remand the administrative law judge must address whether a foundation was laid for admitting the CT scan interpretations, and then reconsider the probative value of the conflicting interpretations. In so doing, the administrative law judge must determine whether Drs. Cohen and Wiot are qualified by knowledge, training or expertise to review CT scans for the presence or absence of pneumoconiosis, and, if so, whether the physicians applied recognized and accepted medical principles in a reliable way. *See Stein*, 294 F.3d at 893, 22 BLR at 2-423; *Peabody Coal Co. v. McCandless*, 255 F.3d. 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001). Further, the administrative law judge must explain his findings.

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. Drs. Houser and Cohen diagnosed the miner with chronic obstructive pulmonary disease (COPD) caused by both smoking and coal mine dust exposure. Director's Exhibit 11; Claimant's Exhibit 4. By contrast, Drs. Renn and Castle opined that the miner's respiratory condition was due entirely to tobacco abuse. Employer's Exhibits 6, 7, 12, 13. Finding "the opinions of Drs. Renn and Castle to be reasonable and rational, especially when compared against the conflicting opinions of Drs. Cohen and Houser," the administrative law judge determined that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 12. The administrative law judge explained that the opinions of Drs. Castle, Renn, and Cohen were entitled to equally diminished weight, because these physicians reviewed evidence that had been submitted in the miner's previous claims.[5] Decision and

[5] The administrative law judge stated:

> It should be noted that Drs. Castle, Renn, and Cohen reviewed inadmissible evidence from the miner's previous claims when forming their opinions. Each physician stated that he reviewed, among other things, Dr. Feltt's medical report from 1998 and several inadmissible pulmonary function studies and chest x-rays from as early as 1996. This evidence was not listed in the evidence summary forms of either party, and even if it were it would not have been admitted into evidence as it is outside the evidentiary limitations. When physicians consider inadmissible evidence, the administrative law judge has the option of excluding the reports, redacting

Order at 13 n.6. The administrative law judge further explained that he preferred the opinions of Drs. Renn and Castle, because Drs. Renn and Castle explained that coal mine dust cannot cause severe emphysema in the absence of coal workers' pneumoconiosis, Employer's Exhibits 12 at 74-75, 13 at 26, and because Dr. Renn explained that coal dust exposure was unlikely to have caused the miner's bronchitis, given the late development of his shortness of breath. Decision and Order at 13; Employer's Exhibit 12 at 19. By contrast, the administrative law judge explained that the opinions of Drs. Houser and Cohen were not well-reasoned, because "Dr. Houser summarily opine[d] that [the miner's] COPD is due to cigarette smoking and coal dust exposure, but then provide[d] no evidence or rationale to support his opinion," Decision and Order at 12, and "Dr. Cohen provide[d] no rational[e] as to why he related [the miner's] emphysema to coal dust exposure, other than the fact that coal dust exposure can cause emphysema." *Id*. at 13.

Claimant contends that the administrative law judge erred in finding that Dr. Cohen failed to explain his opinion. We agree. As claimant asserts, Dr. Cohen reviewed the results of two clinical examinations, objective tests and treatment records, and based his opinion, that both smoking and coal dust exposure significantly contributed to the miner's obstructive impairment, on current scientific knowledge and the miner's work and medical histories. Claimant's Brief at 8-9. Dr. Cohen explained that the only risk factors that the miner was exposed to were his 60-75 pack years of smoking and 22 years of coal mine dust exposure, and that the effect of one year of post-1970 occupational dust exposure was equivalent to smoking approximately 1/2 pack per day. Claimant's Exhibit 4 at 14. Because the administrative law judge did not address Dr. Cohen's rationale for finding that coal mine dust exposure was a significant contributing cause of the miner's COPD, we vacate the administrative law judge's finding under Section 718.202(a)(4), and remand this case for further consideration. *See* 20 C.F.R. §718.201(a)(2),(b). On remand, while the administrative law judge is not bound to credit Dr. Cohen's opinion, he must consider the entirety of Dr. Cohen's opinion and rationale, and explain his credibility determination. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988).

> the objectionable content, asking the physicians to submit new reports, or factoring in the physicians' reliance upon the inadmissible evidence when deciding the weight to which their opinions are entitled. Each of the physicians considered the same inadmissible evidence. Therefore, I will give each report equally diminished weight for their reliance on the inadmissible evidence.

Decision and Order at 13 n.6 (citations omitted).

We further find merit in claimant's assertion that the administrative law judge failed to state a valid a reason for discounting Dr. Houser's opinion. The entirety of the administrative law judge's analysis of Dr. Houser's opinion was: "Dr. Houser summarily opine[d] that [the miner's] COPD is due to cigarette smoking and coal dust exposure, but then provide[d] no evidence or rationale to support his opinion." Decision and Order at 12. As claimant contends, however, Dr. Houser conducted a complete pulmonary evaluation, and based his opinion on his examination of the miner, the miner's objective studies, and accurate exposure histories. Claimant's Brief at 9-10. Because the administrative law judge did not address the underlying basis of Dr. Houser's opinion, the administrative law judge must reconsider the probative value of Dr. Houser's opinion on remand. In sum, the administrative law judge must assess the validity of Dr. Houser's opinion in light of its reasoning and underlying basis, and explain his findings. *See Burns*, 855 F.2d at 501.

Claimant additionally asserts that the administrative law judge selectively analyzed and failed to state a valid reason for crediting the opinions of Drs. Renn and Castle. We agree. To the extent the administrative law judge accepted the opinions of Drs. Renn and Castle, that coal mine dust does not cause significant or severe emphysema, such as that suffered by the miner, in the absence of clinical pneumoconiosis, the administrative law judge failed to explain why he found this view to be more "reasonable and rational" than Dr. Cohen's opinion that "[o]bstructive lung disease from coal mine dust can occur in the . . . absence of CWP, and in the presence of x-rays which are negative, and can be associated with significant clinical impairment." Claimant's Exhibit 4 at 12; *see Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-235, 2-237, (7th Cir. 2007); Claimant's Brief at 10; Employer's Exhibits 12 at 74-75, 13 at 26. Further, the administrative law judge did not address claimant's argument that the contrary opinions of Drs. Renn and Castle contradict the view of prevailing medical science as found by the Department of Labor.[6] *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 492, 23 BLR 2-18, 2-29 (7th Cir. 2004); Employer's Exhibits 12 at 74-75, 13 at 26; Claimant's Brief at 12; Claimant's Closing Brief at 10-11. Consequently, the administrative law judge must reconsider the opinions of Drs. Renn and Castle on remand and explain his credibility determinations. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04; *Shores*, 358 F.3d at 492, 23 BLR at 2-29; *Livermore v. Amax Coal Co.*, 297 F.3d 668, 672, 22 BLR 2-399, 2-402 (7th Cir. 2002).

[6] As claimant states, she raised this issue before the administrative law judge in her closing brief. Claimant's Brief at 12; Claimant's Closing Brief at 10.

We additionally find merit in claimant's and employer's assertion that the administrative law judge erred in giving less weight to the opinions of Drs. Castle, Renn, and Cohen because these physicians considered the medical evidence that was filed in the miner's prior claim. Section 725.309(d) expressly admits prior claim evidence without it being counted for either party in the evidentiary limitations. *See* 20 C.F.R. §725.309(d)(1). Consequently, on remand, the administrative law judge must bear in mind that the evidence contained in the miner's prior claim is part of the record, and that in relying on this evidence, Drs. Castle, Renn, and Cohen did not consider inadmissible evidence. Further, in considering whether the medical opinion evidence establishes the existence of pneumoconiosis under Section 718.202(a)(4), on remand, the administrative law judge must consider all relevant evidence of record, including evidence submitted with the prior claim. *See* 20 C.F.R. §725.309(d)(1).

In light of our determination to vacate the administrative law judge's findings as to the existence of pneumoconiosis, we additionally vacate his finding that claimant did not establish that pneumoconiosis was a substantially contributing cause of the miner's total disability under 20 C.F.R. §718.204(c). If reached, on remand, the administrative law judge must again consider the relevant evidence on this issue and explain his credibility determinations pursuant to Section 718.204(c). *See Burns*, 855 F.2d at 501.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge