BRB No. 07-0799 BLA

A.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 05/28/2008
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Decision and Order Denying Benefits (2005-BLA-06008) of Administrative Law Judge Janice K. Bullard 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). The miner's current subsequent claim was filed on March 29, 2004, following the denial of his third claim on the ground that claimant did not establish that he was totally disabled.[1] Dir. Ex. 5. Following the

[1] The miner's initial claim was denied in 1981; the denial was affirmed on appeal. [*A.B.*] *v. Bethlehem Mines Corp*., BRB No. 81-1170 BLA (Apr. 11, 1984) (unpub.). Claimant's second claim was filed in 1986 and denied in 1991. Claimant's third claim

dismissal of the responsible operator from the case, the administrative law judge denied claimant's motion to exclude all the evidence developed by the operator. Tr. at 7. The administrative law judge granted claimant's motion to submit, post-hearing, a report by Dr. Begley. *Id.* at 25-28. After claimant submitted this report, the Director, Office of Workers' Compensation Programs (the Director), filed a motion to exclude it as it exceeded the scope of the regulation at 20 C.F.R. §725.414 and addressed issues beyond those permitted by the administrative law judge. In response, claimant agreed to submit conforming evidence. By Order dated November 16, 2006, the administrative law judge excluded the initial report offered and permitted claimant to submit the opinion of Dr. Begley addressing only a reading of the October 6, 2005, CT scan. Claimant submitted this report to the administrative law judge on November 29, 2006. *See* Claimant's Exhibits 5, 6.

Subsequently, the administrative law judge addressed the merits of claimant's claim for benefits. The parties stipulated that claimant had at least thirty years of coal mine employment and that he has simple pneumoconiosis arising out of coal mine employment. Decision and Order at 3. The administrative law judge found, however, that claimant is not totally disabled and that claimant therefore did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, claimant's subsequent claim was denied.

Relevant to the current appeal, the administrative law judge excluded in her Decision and Order Dr. Begley's report concerning claimant's October 6, 2005, CT scan, despite previously admitting it. Decision and Order at 3. The administrative law judge stated that the Board's decision in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon. en banc*, 24 BLR 1-1 (2007), demonstrated that the admission of Dr. Begley's report had been in error, as claimant had already offered into evidence Dr. Schaaf's interpretation of this CT scan. The administrative law judge thus considered only Dr. Schaaf's report, which was relevant to the existence of pneumoconiosis, but not to total disability. Claimant's Exhibit 4; Decision and Order at 9. Claimant appeals the administrative law judge's exclusion of Dr. Begley's report, contending that the administrative law judge erred in failing to give him the opportunity to designate which interpretation of the CT scan he wished to introduce into evidence. The Director has filed a motion to remand, agreeing with claimant that the administrative law judge erred in failing to allow claimant to choose which CT scan interpretation to offer into evidence.

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was filed in 1997. Director's Exhibit 3. It was denied in 1998, *id.*, and the denial was affirmed on appeal to the Board. [*A.B.*] *v. Bethenergy Mines, Inc.*, BRB Nos. 98-1491 BLA and 98-1491 BLA-A (Aug. 12, 1999) (unpub.). In each case, the claim was denied due to claimant's failure to establish that he was totally disabled.

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).

In order to be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see, e.g., Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[2] In addition, as this is a subsequent claim, claimant must establish that there is a change in condition as to one of the elements of entitlement previously adjudicated against him. 20 C.F.R. §725.309(d); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The existence of pneumoconiosis arising out of coal mine employment was established in the prior and present claims for benefits, but the prior claim was denied because claimant did not establish that he was totally disabled. Claimant contends that the excluded opinion of Dr. Begley establishes that he has complicated pneumoconiosis, and that he is thereby provided with an irrebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.204(b)(1), 718.304. Claimant thus contends that he has established a change in an applicable condition of entitlement and is entitled to benefits.[3]

We agree with claimant and the Director that the administrative law judge erred in not providing claimant an opportunity to designate which interpretation of the October 6, 2005, CT scan he wished to offer into evidence. In its decision in *Webber*, 23 BLR 1-123, the Board held that the regulation at Section 718.107(a), 20 C.F.R. §718.107(a), in conjunction with the regulation at 20 C.F.R. §725.414, limits each party to one reading of a CT scan as part of its affirmative case.[4] Significantly, however, the Board rejected the

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit inasmuch as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Section 718.107(a) states:

> The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or

contention that "a party may submit only the first, or original, results of each test or procedure, rather than the best interpretation of each test or procedure. . . ." *Webber*, 23 BLR at 1-135. The Board held that "each party may choose which set of results to submit, for each test or procedure, in order to best support its position." *Id.*

In this case, therefore, the administrative law judge erred in excluding Dr. Begley's interpretation of the CT scan in favor of the interpretation of Dr. Schaaf, without first giving claimant the opportunity to designate which interpretation he wished to offer into evidence. *Id.* As a result, we must vacate the denial of benefits and remand the case so that the administrative law judge may afford claimant this opportunity. If claimant designates Dr. Begley's interpretation of the October 6, 2005, CT scan for admission, the administrative law judge must determine if the opinion is sufficient to establish that claimant has complicated pneumoconiosis, entitling him to the irrebuttable presumption that he is totally disabled due to pneumoconiosis and establishing a change in an applicable condition of entitlement pursuant to Section 725.309, 20 C.F.R. §725.309. 20 C.F.R. §§718.204(b)(1); 718.304(c); *see Labelle Processing Co.*, 72 F.3d 308, 20 BLR 2-76; *Hillibush v. U.S. Dept. of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); *Webber*, 23 BLR at 1-135.

> a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

20 C.F.R. §718.107(a). Although CT scans are not referenced in Section 725.414, 20 C.F.R. §725.414, the Board held that in order to give full effect to the purpose of the admission of only limited rebuttal evidence, each party is limited to one reading of a CT scan as part of its case in chief. *Webber*, 23 BLR at 1-135. As claimant's subsequent claim was filed in 2004, the provisions of Section 725.414 are applicable. 20 C.F.R. §725.2.

Accordingly, we grant the Director's motion to remand. The administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further proceedings consistent with this decision.

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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REGINA C. McGRANERY
Administrative Appeals Judge