BRB No. 06-0894 BLA

DANIEL AKERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TBK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/30/2007
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL INCORPORATED	)	
	)	
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 Attorney Fee Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Wes Addington and Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Attorney Fee Order (04-BLA-6003) of Administrative Law Judge Paul H. Teitler 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).[1] The administrative law judge accepted the parties' stipulations that claimant had sixteen years of coal mine employment,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge excluded from the record two physicians' reports submitted by employer because he found that the reports did not comply with the evidentiary limitations set forth in 20 C.F.R. §725.414(a). Without addressing whether claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). Further, the administrative law judge found the newly submitted evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits. In a subsequent Attorney Fee Order, the administrative law judge considered claimant's counsel's petitions for fees and employer's objections thereto, and awarded fees of $7,481.25 and $1,350.00, conditional on a final award of benefits.

On appeal, employer 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. In addition, employer challenges the administrative law judge's findings that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at

[1] Claimant previously filed a claim for benefits on September 1, 1988, which was finally denied by Administrative Law Judge Rudolf L. Jansen on June 27, 1991 on the grounds that claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant took no further action with respect to the denial of this claim. He filed the instant claim on March 4, 2002. Director's Exhibit 3.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the record indicates that claimant's last year of coal mine employment occurred in Kentucky. Director's Exhibit 4; *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Section 718.202(a)(1), (4) and that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). Employer also argues that the administrative law judge erred in finding that the miner's total disability is due to pneumoconiosis at Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's evidentiary rulings and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with employer's contention that the administrative law judge erred in excluding the supplemental opinions of Drs. Fino and Dahhan, based on the evidentiary limitations set forth in Section 725.414. Consequently, the Director requests that this case be remanded "so that the [administrative law judge] may admit and consider these reports." Further, the Director urges the Board to reject employer's allegations of error regarding the administrative law judge's application of Section 725.309. Employer has filed a brief in reply to claimant's and the Director's response briefs, reiterating its prior contentions on appeal.

In its appeal of the Attorney Fee Order, employer argues that the administrative law judge erred in awarding claimant's counsel an excessive hourly rate as well as approving an unreasonable number of hours of services. Claimant responds, urging affirmance of the fee award. The Director has indicated that he will not respond to employer's appeal of the fee award.

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).

Employer initially contends that the administrative law judge erred in finding a "material change in condition" established based on the newly submitted x-ray evidence. Employer's Brief at 12. Contrary to employer's contention, the administrative law judge did not actually render a finding as to whether claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). We need not remand the case to the administrative law judge for consideration of this issue, however, as employer conceded that the newly submitted evidence is sufficient to establish that claimant is totally disabled, as "[a] review of the spirometric, arterial blood gas and reasoned medical opinions clearly indicates that the claimant is disabled from performing his past work."[3] Employer's Brief at 7; *see* Director's Brief at 3 n.3. As such, a change

[3] Pursuant to 20 C.F.R. §725.309(d), when a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim

in an applicable condition of entitlement is established under Section 725.309(d), as a matter of law, because claimant is now totally disabled. 20 C.F.R. §725.309(d); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *White v. New White Coal Co.*, 23 BLR 1-1 (2004). Consequently, error, if any, on the administrative law judge's part in failing to render a specific finding on this issue is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), and it is not necessary to address employer's arguments with respect to this issue.

Employer next raises several allegations of error regarding the administrative law judge's decision to exclude the supplemental reports of Drs. Fino and Dahhan because they exceeded the evidentiary limitations set forth in Section 725.414.[4] Employer's Brief at 17-20. At the hearing, the administrative law judge admitted all of the evidence proffered by the parties without addressing whether it was in compliance with the evidentiary limitations. Hearing Transcript at 5-6. In his Decision and Order, the administrative law judge treated each document from a physician as a separate medical report and found that:

> The record includes medical reports written by Dr. Ammisetty, Dr. Dahhan and Dr. Fino. Two of these reports, of Drs. Dahhan and Fino, include the

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became final." 20 C.F.R. §725.309(d); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *White v. New White Coal Co.*, 23 BLR 1-1 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis or that he was totally disabled, in order to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

[4] The terms of 20 C.F.R. §725.414(a) limit employer to "no more than two medical reports" in its affirmative case. 20 C.F.R. §725.414(a)(3)(i). In "rebuttal of the case presented by the claimant," employer could submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the claimant . . . ." 20 C.F.R. §725.414(a)(3)(ii). A showing of "good cause" was necessary to exceed these limits. 20 C.F.R. §725.456(b)(1).

> deposition testimony of the doctor, as allowed by 20 C.F.R. [§]725.414(c). Additional reports submitted by Employer, written by Drs. Dahhan and Fino (marked as Employer's Exhibits 8 and 9) are not considered here as they exceed the limitations on evidence. Rehabilitative reports are only allowed if the opposing party has presented rebuttal evidence to that physician's initial report. 20 C.F.R. [§]725.414(a)(2)(ii) and (3)(ii). In such a case, the physician is permitted to submit an additional statement, rehabilitating his initial report. Here, I find that Dr. Ammisetty's report did not include a response to Dr. Dahhan or Dr. Fino's reports that would constitute rebuttal evidence, and therefore additional statements from [Drs.] Dahhan or Fino are not permitted.

Decision and Order at 5.

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 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by striking Dr. Dahhan's and Dr. Fino's supplemental reports from the record absent claimant's objection and without providing notice to the parties. Employer's Brief at 18-19; *see* 20 C.F.R. §725.455. Employer also contends that that the administrative law judge erred in finding that the supplemental reports exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414. *See* Decision and Order at 5. The Director concurs with the latter argument, maintaining that the administrative law judge's treatment of the original and supplemental reports as two separate medical reports for purposes of the evidentiary limitations does not comport with the regulations.

Employer's contention that the administrative law judge's exclusion of the supplemental reports violated the APA is without merit. The evidentiary limitations set forth at Section 725.414 are mandatory and, therefore, the administrative law judge must apply them even if the parties do not object to the admission of excess evidence. *Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004). In addition, because the evidentiary limitations are a known standard, the parties are on notice that they apply and cannot, therefore, claim surprise if the administrative law judge excludes evidence thereunder without first providing notice. *Jordan v. Director, OWCP*, 892 F.2d 482, 487-88 (6th Cir. 1989)(parties are deemed to have constructive knowledge of published federal regulations).

We concur, however, with the Director's position that, pursuant to 20 C.F.R. §§725.414(a)(1) and 725.457(d), the supplemental reports of Drs. Fino and Dahhan constituted medical reports and should have been treated as part of the physicians' original reports for the purposes of the evidentiary limitations. Section 725.414(a)(1) defines a medical report as a "written assessment of the miner's respiratory or pulmonary

condition" that is "prepared by a physician who examined the miner and/or reviewed the available admissible evidence" 20 C.F.R. §725.414(a)(1). Under Section 725.457(d), a physician who appears as a witness may "testify as to any other medical evidence of record." 20 C.F.R. §725.457(d). The Director maintains that under these regulations, a party's expert may comment on the opposing party's medical reports or objective evidence and that there is no requirement that a physician's written assessment of the miner's condition be contained in a single document. Thus, according to the Director:

> In preparing their reports, Dr[s]. Fino and Dahhan did nothing more than what is allowed under the regulations – examine and test the miner, review the admissible medical evidence and provide a written assessment of the miner's pulmonary condition. Given that fact, and given that Dr. Fino's and Dr. Dahhan's original and supplemental medical reports were submitted into evidence at the same time, there was no reason for the ALJ to treat the original and supplemental reports as two separate reports for the purposes of the evidentiary limitations.

Director's Brief at 4.

We are persuaded that the Director's interpretation of the regulations is a reasonable one and, therefore, is entitled to deference. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 996, 19 BLR 2-10, 2-14 (6th Cir. 1994); *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62-63 (1994). Moreover, the Director's position is consistent with our holding in *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006). In *Brasher*, Dr. Broudy had examined the miner in 2001 and 2002 and prepared separate reports of each examination. The Board affirmed the administrative law judge's decision to exclude Dr. Broudy's second report, holding that "where a physician's reports constitute two separate written assessments of the [miner's] pulmonary condition at two different times, an administrative law judge may properly decline to construe them as a single medical report under the evidentiary limitations." *Brasher*, 23 BLR at 1-146-47. It follows that where a second report merely reflects a physician's review of admissible evidence developed after he prepared his initial report, the second report does not constitute a separate medical report under Section 725.414(a)(1).

Accordingly, we vacate the administrative law judge's finding with respect to the supplemental reports of Drs. Dahhan and Fino and remand this case to the administrative law judge for reconsideration of their admissibility under Section 725.414(a)(3)(i). In light of our ruling on the evidentiary issues raised by employer, we also vacate the administrative law judge's determinations under Sections 718.202(a)(4), 718.203(b), and

718.204(c), as his findings may change on remand in light of his consideration of the supplemental reports of Drs. Dahhan and Fino.[5]

Employer has also raised specific allegations of error regarding the administrative law judge's consideration of the newly submitted evidence pursuant to Sections 718.202(a)(1), (a)(4) and 718.204(c), which we will now address. Under Section 718.202(a)(1), the administrative law judge indicated that he would not consider the newly submitted x-ray readings contained in claimant's hospital records, as they were not classified in accordance with the ILO system referenced in 20 C.F.R. §718.102(b). Decision and Order at 4. The administrative law judge considered, therefore, seven readings of five x-rays. The June 12, 2002 x-ray was interpreted as negative for pneumoconiosis by Drs. Hussain and Wiot, who are Board-certified radiologists and B readers.[6] Director's Exhibit 13; Employer's Exhibit 3. The October 19, 2002 x-ray was read as negative for pneumoconiosis by Dr. Dahhan, a B reader. Employer's Exhibit 1. Since there were no positive readings of these two x-rays, the administrative law judge found that the June 12, 2002 and October 19, 2002 x-rays were negative for pneumoconiosis. Decision and Order at 4. The October 11, 2004 x-ray was read as positive for pneumoconiosis by Drs. Cappiello and Ahmed, who are Board-certified radiologists and B readers. Claimant's Exhibits 3, 4. The October 13, 2004 x-ray was interpreted as negative for pneumoconiosis by Dr. Halbert, a Board-certified radiologist and a B reader, and the February 10, 2005 x-ray was read as negative by Dr. Fino, a B reader. Employer's Exhibits 5, 10. Noting the "progressive nature of pneumoconiosis" and that the radiological qualifications of Drs. Cappiello and Ahmed were "superior" to those of Drs Halbert and Fino, the administrative law judge found that that the existence of pneumoconiosis was established by the x-ray evidence. Decision and Order at 4-5.

Employer asserts that the administrative law judge erred in "dismissing the negative readings by Drs. Poulos and West on the pretext that their readings did not comply with ILO requirements." We disagree. Pursuant to 20 C.F.R. §718.102(e), "no chest [x]-ray shall constitute evidence of the *presence or absence* of pneumoconiosis unless it is conducted and reported in accordance with the requirements of this section." 20 C.F.R. §718.102(e) (emphasis supplied). The regulatory language pertaining to the reporting of an x-ray interpretation provides that "[a] chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C" under the ILO system and that "[a] chest

[5] In light of employer's concession that claimant is now totally disabled from performing his usual coal mine work, the administrative law judge need not address the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2) on remand.

[6] Dr. Barrett, a Board-certified radiologist and B reader, read the June 12, 2002 x-ray for quality only. Director's Exhibit 14.

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). Because the reporting requirements set forth at Section 718.102(b) specifically reference the ILO classification system, an x-ray report that does not include any classification does not comport with Section 718.102(e). We affirm, therefore, the administrative law judge's exclusion of the x-ray readings included in claimant's hospital records from consideration under Section 718.202(a)(1).

Employer also argues that the administrative law judge erred in finding that Dr. Halbert was only qualified as a B reader. This contention has merit. As noted previously, the record indicates that Dr. Halbert is a Board-certified radiologist as well as a B reader. Employer's Exhibit 5 at 5. The administrative law judge's mischaracterization of Dr. Halbert's credentials affected his finding that the positive readings by dually qualified readers established that the weight of the x-ray evidence was positive. That finding, in turn, affected the determination that pneumoconiosis was established because the administrative law judge relied on the qualifications of the readers to resolve the conflict in the evidence. We therefore vacate the administrative law judge's determination that claimant established the existence of pneumoconiosis under Section 718.202(a)(1), and instruct the administrative law judge to reevaluate all of the x-ray evidence in light of Dr. Halbert's actual qualifications. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Moreover, because claimant has already established a change in an applicable condition of entitlement, the administrative law judge must weigh all of the x-ray evidence of record on remand, rather than merely the newly submitted x-ray evidence, to determine whether claimant has proven the existence of pneumoconiosis on the merits.

Employer further contends that the administrative law judge erred in improperly relying "on the notion that pneumoconiosis is progressive and degenerative" in his analysis of the x-ray evidence. Employer's Brief at 13-14. The United States Court of Appeals for the Sixth Circuit in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), held that an administrative law judge can prefer the more recent x-ray evidence only if it shows a worsening in the claimant's condition that would be consistent with the premise that pneumoconiosis is a progressive disease. *Woodward*, 991 F.2d at 319-20, 17 BLR at 2-84-85. In the present case, the administrative law judge applied the "later evidence" rule, after finding that the early x-rays were read as negative while two years later, there were two uncontradicted positive x-rays. Decision and Order at 4. The administrative law judge also relied, however, upon his finding that two negative readings of subsequent x-rays, by Drs. Halbert and Fino, were entitled to less probative weight because Drs. Halbert and Fino were not dually qualified as Board-certified radiologists and B readers. *Id*. In light of our decision to vacate the administrative law judge's finding with respect to the Dr. Halbert's qualifications, we must also vacate the administrative law judge's determination that the chronology of the newly submitted x-ray evidence supported

reliance upon the "later evidence" rule to resolve the conflict in the x-ray evidence under Section 718.202(a)(1).

In view of the foregoing, we also vacate the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge relied on the x-ray evidence, in part, in determining the weight to accord to the medical opinions under Sections 718.202(a)(4) and 718.204(c). Thus, his findings on remand may affect his conclusions regarding the existence of pneumoconiosis and total disability due to pneumoconiosis. Decision and Order at 6. We therefore instruct the administrative law judge to reconsider whether the medical opinion evidence, in its entirety, is sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis in light of his findings on remand regarding the x-ray evidence and the supplemental medical opinions of Drs. Fino and Dahhan.

When reconsidering the medical opinion evidence on remand, in accordance with employer's meritorious allegations of error, the administrative law judge is instructed to make a finding as to the length of claimant's smoking history and determine the credibility of Dr. Ammisetty's opinion in light of the smoking history upon which he relied. In addition, the administrative law judge must address the medical opinions of Drs. Hussain, Annaathula and Raschella and determine whether the evidence of record as a whole is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, and total disability due to pneumoconiosis. Further, in accordance with employer's meritorious allegation of error with respect to the issue of total disability causation, we instruct the administrative law judge that if he finds on remand that clinical or legal pneumoconiosis or both have been established, he should determine whether the disability causation opinions of the physicians who do not find disability caused by either type of pneumoconiosis are based on premises inconsistent with his pneumoconiosis finding, rather than automatically rejecting them. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 516, 22 BLR 2-625, 651-2 (6th Cir. 2003).

In light of our decision to remand for further findings on evidentiary matters and on the merits of the claim under 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b), and 718.204(c), we decline to address employer's contentions with respect to the dispositions of claimant's counsels' fee requests at this stage in the proceedings.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Attorney Fee Order are vacated 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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JUDITH S. BOGGS
Administrative Appeals Judge