

BRB No. 05-0271 BLA

WAYNE BUSH)
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 Claimant-Petitioner)
)
 v.)
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 LEECO, INCORPORATED)
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 and)
)
 JAMES RIVER COAL COMPANY) DATE ISSUED: 10/18/2005
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Claimant appeals the Decision and Order (03-BLA-5363) of Administrative Law Judge Jeffrey Tureck denying benefits 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 administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, arguing that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.¹

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The x-ray evidence consists of interpretations of three x-rays taken on June 15, 2001, July 27, 2001 and August 13, 2003. Although Dr. Hussain, a reader with no special radiological qualifications, interpreted claimant's June 15, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 11, Dr. Wiot, a B reader, interpreted this x-ray as negative for the disease.² Director's Exhibit 42. The administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation of claimant's June 15, 2001 x-ray over Dr. Hussain's positive interpretation of this film based upon Dr. Wiot's superior qualifications. *See Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); Decision and Order at 3. The administrative law judge also noted that Dr. Wiot and Dr. Broudy, both B readers, interpreted claimant's July 27, 2001 x-ray as negative for

¹Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

²Dr. Sargent interpreted claimant's June 15, 2001 x-ray for quality purposes only. *See* Director's Exhibit 12.

pneumoconiosis. Decision and Order at 3; Director's Exhibits 35, 39. The only other x-ray interpretation of record is negative for pneumoconiosis.³ Because it is based upon substantial evidence,⁴ the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Claimant contends that the administrative law judge erred in admitting x-ray evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414.⁵

³Dr. Dahhan interpreted claimant's August 13, 2001 x-ray as negative for pneumoconiosis. Employer's Exhibit 5.

⁴In challenging the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* In this case, the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Moreover, claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

⁵Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may 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 opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical

Claimant specifically contends that employer was improperly allowed to submit three x-ray interpretations as part of its affirmative case.

Employer was entitled to submit no more than two x-ray interpretations in support of its affirmative case. 20 C.F.R. §725.414(a)(3)(i). In its Evidence Summary Form, employer elected to submit, in support of its affirmative case, Dr. Broudy's negative interpretation of claimant's July 27, 2001 x-ray and Dr. Wiot's negative interpretation of claimant's July 27, 2001 x-ray.⁶ See Employer's Exhibit 1. However, the administrative law judge subsequently allowed employer to submit a third x-ray interpretation; Dr. Dahhan's negative interpretation of claimant's August 13, 2003 x-ray. See Employer's Exhibit 5. Because employer had already designated two x-ray interpretations as its affirmative evidence, the administrative law judge erred in permitting employer to submit an additional x-ray interpretation.⁷ However, we hold that the administrative law judge's error is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As discussed, *supra*, the administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation of claimant's June 15, 2001 x-ray over Dr. Hussain's positive interpretation of this film based upon Dr. Wiot's superior qualifications. There are no other positive x-ray interpretations in the record. Thus, even had the administrative law

report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

⁶Employer also submitted Dr. Wiot's negative interpretation of claimant's June 15, 2001 x-ray in rebuttal of the x-ray interpretation provided by the Department of Labor. Employer's Exhibit 1. Claimant does not challenge employer's submission of this x-ray.

⁷Because the parties are permitted to offer evidence in rebuttal of the case presented by the opposing party, employer asserts that it did not submit x-ray evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer's Brief at 10. We disagree. Employer's submission of Dr. Wiot's negative interpretation of claimant's June 15, 2001 x-ray constitutes admissible rebuttal evidence. However, the other three x-ray interpretations submitted by employer (Dr. Broudy's negative interpretation of claimant's July 27, 2001 x-ray; Dr. Wiot's negative interpretation of claimant's July 27, 2001 x-ray; and Dr. Dahhan's negative interpretation of claimant's August 13, 2003 x-ray) were not submitted in rebuttal of the case presented by the opposing party. In fact, there are no other interpretations of the July 27, 2001 and August 13, 2003 x-rays in the record.

judge excluded Dr. Dahhan's negative interpretation of claimant's August 13, 2001 x-ray, the administrative law judge's basis for discrediting the only positive x-ray interpretation of record would remain valid.

Claimant finally contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.⁸ 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). In the instant case, claimant selected Dr. Hussain to perform his Department of Labor sponsored pulmonary evaluation. *See* Director's Exhibit 10. Dr. Hussain examined claimant on June 15, 2001. Director's Exhibit 11. In a report dated June 15, 2001, Dr. Hussain diagnosed pneumoconiosis. *Id.* Dr. Hussain based his diagnosis of pneumoconiosis upon (1) his positive interpretation of claimant's June 15, 2001 x-ray; (2) the results of a June 15, 2001 pulmonary function study (which he interpreted as revealing mild airways obstruction); and (3) claimant's history of coal dust exposure. *Id.*

Claimant argues that the Director failed to provide him with a credible pulmonary evaluation because the administrative law judge discredited Dr. Hussain's diagnosis of pneumoconiosis. Claimant's Brief at 4. Claimant notes that the administrative law judge found that Dr. Hussain's diagnosis of pneumoconiosis was "not credible." *See* Decision and Order at 4. The Director contends that a "close examination of the [administrative law judge's] decision reveals that [he] merely found Dr. Hussain's opinion outweighed by the other evidence of record and not unreasoned *per se*." Director's Brief at 2. We agree with the Director. The administrative law judge accorded less weight to Dr. Hussain's diagnosis of pneumoconiosis because the June 15, 2001 x-ray that he interpreted as positive for pneumoconiosis was interpreted by Dr. Wiot, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of his opinion. Decision and Order at 4. The administrative law judge further found that the pulmonary function study conducted by Dr. Hussain was outweighed by subsequent pulmonary function studies that resulted in normal values.⁹ *Id.* Thus, we agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of

⁸Employer contends that the Director, Office of Workers' Compensation Programs (the Director), "does not have a duty to provide an examination that must be found credible by the judge deciding the case." Employer's Brief at 11. Employer argues that the Director fulfilled his duty by providing claimant with "an opportunity for a complete pulmonary evaluation." *Id.* at 12.

⁹Claimant does not challenge the administrative law judge's bases for discrediting Dr. Hussain's diagnosis of pneumoconiosis.

the Act, *see Hodges, supra; Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*), that “in practical effect,” the administrative law judge merely found that Dr. Hussain’s diagnosis of pneumoconiosis was less credible because it was called into question by other, more probative evidence. Director’s Brief at 2. Consequently, we reject claimant’s contention that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate his claim.

Accordingly, the administrative law judge’s Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge