BRB No. 05-0308 BLA

CARL R. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUMPHREY'S ENTERPRISES	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 10/26/2005
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Carl R. Morgan, Coeburn, Virginia, *pro se*.[1]

Philip J. Reverman, Jr. (Boehl, Stopher & Graves, LLP), Louisville, Kentucky, for employer.

Sarah M. Hurley (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.

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[1]Judy M. Stapleton, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Stapleton is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (04-BLA-6042) of Administrative Law Judge Thomas M. Burke 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). After crediting claimant with approximately twenty-seven and one-half years of coal mine employment, 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 generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, contending that the administrative law judge admitted x-ray evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director also argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). In a response to the Director's Motion to Remand, employer contends, *inter alia*, that the Director waived his right to object to the admission of the x-ray evidence in this case.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

We initially address the Director's contention 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.[2] The Director argues that the administrative law judge erred in

[2]Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the

permitting employer to submit rebuttal x-ray evidence in response to x-ray evidence admitted as medical treatment records pursuant to 20 C.F.R. §725.414(a)(4).

The regulations provide that "[n]otwithstanding 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). Claimant's treatment records include Dr. Deponte's interpretations of x-rays taken on June 15, 2001, January 15, 2002 and July 15, 2002. *See* Director's Exhibit 26. Dr. Deponte's x-ray interpretations were properly admitted into the record as a part of claimant's medical treatment records. *See* 20 C.F.R. §725.414(a)(4). However, at the hearing, the administrative law judge permitted employer to reply to Dr. Deponte's x-ray interpretations by submitting Dr. Wiot's negative interpretations of claimant's June 15, 2001, January 15, 2002 and July 15, 2002 x-rays.[3] *See* Transcript at 27-28.

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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 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).

[3]The administrative law judge found that there was "no limitation on the evidence that [employer could] use to reply to the treatment records that [claimant] submitted." Transcript at 28.

We agree with the Director that the administrative law judge erred in permitting employer to submit, as its right under the regulations, x-ray evidence in response to Dr. Deponte's x-ray interpretations. There is no direct regulatory authority for the rebuttal of hospitalization and medical treatment records that are received into evidence pursuant to 20 C.F.R. §725.414(a)(4). In its second notice of proposed rulemaking, the Department of Labor explained that:

> The Department believes that proposed subsection (a)(4) would require the admission of any medical record relating to the miner's respiratory or pulmonary condition without regard to the limitations set forth elsewhere in Sec. 725.414….The Department has not included an independent provision governing rebuttal of this evidence. As a general rule, this evidence is not developed in connection with a party's affirmative case for or against entitlement, and therefore the Department does not believe that independent rebuttal provisions are appropriate. Any evidence that predates the miner's claim for benefits may be addressed in the two medical reports permitted each side by the regulation. If additional evidence is generated as the result of a hospitalization or treatment that takes place after the parties have completed their evidentiary submission, the ALJ has the discretion to permit the development of additional evidence under the "good cause" provision of Sec. 725.456.

64 Fed. Reg. 54996 (Oct. 8, 1999).

We, therefore, hold that the administrative law judge failed to provide a proper basis for admitting Dr. Wiot's negative interpretations of claimant's June 15, 2001, January 15, 2001 and July 15, 2002 x-rays into the record.[4]

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[4]Employer contends that the Director, Office of Workers' Compensation Programs, waived his right to object to employer's x-ray evidence by not timely objecting to its admissibility. We need not address this contention. At the hearing, claimant's lay representative objected to the admission of employer's rebuttal x-ray evidence as excessive. *See* Transcript at 28. Claimant is currently representing himself on appeal. Under these circumstances, the Board may address the issue of whether or not the administrative law judge erred in permitting employer to admit x-ray evidence in excess of the evidentiary requirements. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Employer also argues that its rebuttal x-ray evidence could have been admitted under the "good cause" exception. *See* 20 C.F.R. §725.456(b)(1) (Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record

We now turn our attention to the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. In his consideration of the x-ray evidence, the administrative law judge stated:

> The miner has not established that he suffers from pneumoconiosis. The October 16, 2002 x-ray is positive for pneumoconiosis. The interpretations of the February 25, 2003 and August 1, 2003 x-rays are in equipoise and are insufficient to support a finding of pneumoconiosis. The remaining three x-ray studies do not support a finding of pneumoconiosis. The majority of the interpretations by B-readers showed no radiographic evidence of pneumoconiosis. The preponderance of the x-ray evidence does not support a finding of pneumoconiosis.

Decision and Order at 6.

The administrative law judge properly found that Dr. Deponte's interpretations of claimant's June 15, 2001, January 15, 2002 and July 15, 2002 x-rays do not support a finding of pneumoconiosis.[5] *See* Director's Exhibit 26.

Dr. Alexander, a B reader and Board-certified radiologist, and Dr. Pathak, a B reader, interpreted claimant's October 16, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 26. Dr. Wiot, a B reader, interpreted this x-ray as unreadable. Employer's Exhibit 2. The administrative law judge found that claimant's October 16, 2002 x-ray was positive for pneumoconiosis. *See* Decision and Order at 6. Although the administrative law judge did not provide an explicit basis for his finding, it is supported by substantial evidence: Two of the three B readers who interpreted claimant's October 16, 2002 x-ray found it positive for pneumoconiosis.

The administrative law judge found that claimant's February 25, 2003 and August 1, 2003 x-rays were "in equipoise" and, therefore, insufficient to support a finding of pneumoconiosis. *See* Decision and Order at 6. While Dr. Baker, a B reader, interpreted claimant's February 25, 2003 x-ray as positive for pneumoconiosis, Director's Exhibit 13, Dr. Spitz, a similarly qualified physician, interpreted it as negative for the disease. Employer's Exhibit 1. Consequently, the administrative law judge properly found that

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in the absence of good cause."). However, the administrative law judge did not make a clear finding to that effect.

[5]Although Dr. Deponte interpreted these x-rays as revealing interstitial lung disease, he did not interpret them as positive for pneumoconiosis. Director's Exhibit 26.

the interpretations of claimant's February 25, 2003 x-ray was "in equipoise." Decision and Order at 6.

The administrative law judge noted that while Dr. Pathak, a B reader, interpreted claimant's August 1, 2003 x-ray as positive for pneumoconiosis, Dr. Dahhan, a similarly qualified physician, interpreted this x-ray as negative for the disease. Decision and Order at 5-6; Director's Exhibit 25; Claimant's Exhibit 2. The administrative law judge, therefore, found that the readings of this x-ray were also "in equipoise." Decision and Order at 6. The Director, however, contends that the administrative law judge should have accorded greater weight to Dr. Pathak's x-ray interpretation because he is Board-certified in Radiology in Great Britain. Director's Brief at 5-6; *see* Claimant's Exhibit 2. On remand, the administrative law judge may consider whether the radiological qualifications of Dr. Pathak, as well as the radiological qualifications of the other physicians, entitle their x-ray interpretations to any additional weight. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Moreover, having found that claimant's October 16, 2002 x-ray was positive for pneumoconiosis, the administrative law judge failed to explain why this evidence was called into question by the fact that two subsequent x-rays taken on February 25, 2003 and August 1, 2003 were found to be "in equipoise." 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) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The administrative law judge also found that the majority of the x-ray interpretations rendered by B readers is negative for pneumoconiosis. Decision and Order at 6. However, in making this finding, the administrative law judge improperly included Dr. Wiot's negative interpretations of claimant's June 15, 2001, January 15, 2002 and July 15, 2002 x-rays. As discussed, *supra*, the administrative law judge failed to provide a proper basis for admitting this evidence into the record.

In light of the above-referenced errors, we vacate 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) and remand the case for further consideration.

Inasmuch as there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 4 n.5.

Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[6] *Id.*

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[7] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly discredited Dr. Mullins' diagnoses of pneumoconiosis contained in his treatment notes because the doctor failed to provide any reasoning or rationale for his conclusion that claimant suffered from pneumoconiosis.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 8.

In a report dated February 25, 2003, Dr. Baker diagnosed coal workers' pneumoconiosis. Director's Exhibit 9. The administrative law judge, however, properly discredited the diagnosis of coal workers' pneumoconiosis rendered by Dr. Baker because he found that it was merely a restatement of an x-ray opinion. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Decision and Order at 8.

Dr. Baker also diagnosed chronic bronchitis attributable to "coal dust exposure/cigarette smoking." Director's Exhibit 9. The administrative law judge found that Dr. Baker did not opine on the extent to which claimant's coal dust exposure caused

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[6]Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[7]"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[8]The record contains Dr. Mullins' treatment notes from 1998 to 2000. *See* Director's Exhibit 26. Although Dr. Mullins diagnosed mild pneumoconiosis on two occasions, he did not provide a basis for either of these findings. *Id.*

his chronic bronchitis. Decision and Order at 8. Because Dr. Baker listed a substantial coal mine employment history of over thirty years (ending in 1995) and a smoking history of a few cigarettes a day for 7-8 years (ending over 40 years ago), the Director contends that "it would be perfectly reasonable to conclude that claimant's coal mine employment was a significant contributor to claimant's chronic bronchitis." Director's Brief at 6-7. The administrative law judge, however, discredited Dr. Baker's opinion because the doctor failed to *explain* the basis for his conclusion that claimant's chronic bronchitis was due in part to his coal dust exposure. Decision and Order at 8.

Citing *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990), the Director contends that to be credible, a medical report need not explicitly delineate the doctor's reasoning and that diagnoses without elaboration are "minimally sufficient." In *Poole*, the Seventh Circuit held that an administrative law judge properly decided that a physician's medical reports were reasoned, notwithstanding the fact that the physician completed the Department of Labor forms without elaborating upon his diagnoses, opinion as to causation or medical assessment. The Seventh Circuit, however, noted that the Board was not empowered to reweigh the evidence. In this case, the administrative law judge found that Dr. Baker's opinion was not sufficiently reasoned. Despite the fact that the Department of Labor form completed by Dr. Baker requests a rationale for his opinion regarding the etiology of his cardiopulmonary diagnoses, Dr. Baker failed to provide one. Under these circumstances, we hold that the administrative law judge permissibly found that Dr. Baker's opinion was not well reasoned.[9] *Clark*, *supra*; *Lucostic*, *supra*.

Because it is supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

On remand, should the administrative law judge find the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), he

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[9]The remaining medical opinion evidence of record is insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In support of his affirmative case, claimant submitted medical reports prepared by Drs. Emery and Grover. Neither of these physicians diagnosed pneumoconiosis. *See* Director's Exhibit 26. Employer submitted the medical reports of Drs. Dahhan and Branscomb. In a report dated August 11, 2003, Dr. Dahhan opined that there was no evidence of occupational lung disease or pulmonary disability secondary to the inhalation of coal dust. Director's Exhibit 25. In a report dated July 14, 2004, Dr. Branscomb opined that there was no evidence to indicate the presence of an occupational lung disease associated with coal mine dust exposure. Employer's Exhibit 3.

must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence is sufficient to establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis, he must consider whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 and whether claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[10]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration 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

[10]Employer does not contest the fact that claimant is totally disabled. *See* Transcript at 10.