BRB No. 06-0159 BLA

ELWOOD FARLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHARPLES COAL CORPORATION	)	DATE ISSUED: 10/31/2006
	)	
Employer-Petitioner	)	
	)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Legal Clinic, Washington and Lee University), Lexington, Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; 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 (04-BLA-5641) of Administrative Law Judge Daniel L. Leland 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). Claimant filed a subsequent claim on July 10, 2001, which was

awarded by the district director on September 25, 2003. At employer's request, a hearing was held on May 17, 2005. In a Decision and Order issued on October 7, 2005, the administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of coal workers' pneumoconiosis, and thus he found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Weighing all of the evidence on the merits of entitlement, the administrative law judge further found that claimant was totally disabled due to coal workers' pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge erred in excluding the deposition testimony of Dr. Wiot. Employer also challenges the administrative law judge's findings with regard to the existence of pneumoconiosis, total disability, and causation of disability. Claimant responds, urging affirmance of the administrative law judge's evidentiary ruling, and his award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, urging the Board to affirm the administrative law judge's decision to exclude Dr. Wiot's deposition testimony because it was proffered in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414(c). The Director has declined to address the merits of claimant's entitlement to benefits.

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).

After consideration of the administrative law judge's Decision and Order, the briefs of the parties, and the issues presented on appeal, we are unable to affirm the award of benefits in this case. We specifically vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis and causation of his disability. Initially, however, we address the administrative law judge's evidentiary ruling under 20 C.F.R. §725.414(c).

A. Evidentiary Exclusion of Dr. Wiot's testimony:

At the hearing, employer proffered the deposition testimony of Dr. Wiot, a Board-certified radiologist, who interpreted two chest x-rays and a CT scan taken on February 15, 1998 relevant to the instant case. Employer also proffered the examination reports and deposition testimony of Drs. Zaldivar and Crisalli. Although the administrative law judge admitted all of this evidence into the record at the hearing, upon further reflection, he revised his ruling in his Decision and Order, holding that Dr. Wiot's deposition testimony was inadmissible under Section 725.414(c) since Dr. Wiot had reviewed only chest x-rays and he had not prepared a "medical report." Decision and Order at 2.

Employer argues that the administrative law judge erred in excluding Dr. Wiot's testimony because it constitutes relevant evidence. Employer interprets the administrative law judge's ruling as a blanket preclusion of testimony by a radiologist in any federal black lung claim. The Director, however, contends that employer misinterprets the evidentiary limitations as precluding the admission of testimony by a radiologist, such as Dr. Wiot. The Director asserts that testimony by a radiologist is admissible under Section 725.414(c) only if it constitutes one of a party's two affirmative medical reports or if good cause is shown to admit the testimony in excess of the evidentiary limitations. Director's Brief at 2. In the instant case, because employer had already proffered its limit of two medical reports as affirmative evidence[1] by submitting the reports of Drs. Crissalli and Zaldivar, the Director contends that Dr. Wiot's deposition testimony was properly excluded under Section 725.414(c). *Id*.

We agree that the administrative law judge properly excluded Dr. Wiot's deposition testimony pursuant to Section. 725.414 The revised regulation governing witness testimony provides that "[n]o person shall be permitted to testify as a witness at the hearing, or pursuant to deposition . . . unless that person meets the requirements of [Section] 725.414(c)." 20 C.F.R. §725.457(c). The revised regulation at Section 725.414(c) further provides that "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." 20 C.F.R. §725.414(c). In this case, Dr. Wiot read chest-x-rays and a CT scan but the doctor did not prepare a "medical report" as defined at Section 725.414(a)(1). *See* 20 C.F.R. §725.414(a)(1). Nonetheless, Dr. Wiot's deposition testimony could still be admitted "in

[1] The revised regulation at 20 C.F.R. §725.414 provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted as the opposing party's case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit one piece of rehabilitative evidence. *Id.* Notwithstanding these limits, "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). Each x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report referenced in a medical report must either be admissible under the 20 C.F.R. §725.414(a) limits, or be admissible as a hospitalization or treatment record under 20 C.F.R. §725.414(a)(4). 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1). "A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section." 20 C.F.R. §725.414(a)(1).

lieu of" a medical report if employer "submitted fewer than two medical reports as part of [its] affirmative case . . . ." *Id*. Under such circumstances, Dr. Wiot's testimony would "be considered a medical report for purposes of the limitations provided by this section." 20 C.F.R. §725.414(c). However, because employer had already submitted its limit of two affirmative case medical reports by Drs. Crisalli and Zaldivar pursuant to Section 725.414(a)(3)(i), Dr. Wiot's testimony could not be admitted as a medical report for the purposes of Section 725.414(c). *See* 20 C.F.R. §725.414(a)(3)(i); Director's Exhibit 18; Employer's Exhibit 1. Accordingly, we affirm the administrative law judge's decision to exclude Dr. Wiot's deposition testimony pursuant to Section 725.414(c).[2]

Additionally, based on the foregoing discussion, we reject employer's assertion that Section 725.414 is facially invalid because it prohibits a party from submitting the testimony of a radiologist. *See Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-58-59 (2004)(*en banc*) (rejecting the argument that Section 725.414 imposes arbitrary limits on evidence). Contrary to employer's assertion, by its terms, the regulation at Section 725.414(c) permits a party to submit the testimony of a physician who did not prepare a medical report, including the testimony of a radiologist, so long as the party has submitted fewer than two affirmative medical reports or has demonstrated good cause for the admission of that testimony. 20 C.F.R. §725.414(c).

Notwithstanding, as we are remanding this case for further consideration on the merits of entitlement, we direct the administrative law judge on remand to consider whether Dr. Wiot's deposition testimony is admissible for the limited purpose of addressing the medical acceptability of the CT scan presented in this case. The administrative law judge rejected Dr. Wiot's opinion that the CT scan was negative because he found that the doctor failed to adequately address whether it was medically acceptable to rely on a CT scan, which is not a high resolution scan, to exclude a diagnosis of pneumoconiosis. Dr. Wiot discussed the use of both standard and high definition CT scans, and their reliability, extensively in his deposition testimony. Employer's Exhibit 13 at 16-39. Because Dr. Wiot not only testified with respect to his x-ray interpretations, but also with regard to the medical acceptability of the February 15, 1998 CT scan, we direct the administrative law judge to specifically address whether a portion of Dr. Wiot's deposition addressing the CT scan evidence may be admissible under Section 718.107(b). *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en*

[2] The administrative law judge also found that employer did not establish "good cause" for exceeding the limits of 20 C.F.R. §725.414 with additional evidence. *See* 20 C.F.R. §725.456(b)(1). Order Ruling on Rebuttal Evidence (Dec. 30, 2003) at 2-3. On appeal, employer raises no specific argument that the administrative law judge abused his discretion in this regard.

banc) (Boggs, J., concurring); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

B. X-ray Evidence for Pneumoconiosis:

In considering the x-ray evidence at 20 C.F.R. §718.202(a)(1), the administrative law judge found that the record contains ten interpretations for the presence of pneumoconiosis by eight physicians of x-rays dated September 27, 2001, February 25, 2002, July 10, 2003 and December 8, 2003. Of the eight physicians, three dually qualified physicians and two B-readers read the x-rays as positive for pneumoconiosis while two dually qualified physicians and one B-reader read the same x-rays as negative for pneumoconiosis. Director's Exhibits 14, 27, 33; Claimant's Exhibits 1, 3, 4; Employer's Exhibits 1A, 2. In weighing these conflicting readings, the administrative law judge concluded: "As a preponderance of the board certified radiologists/B-readers and a preponderance of the B-readers have diagnosed pneumoconiosis, I find that the x-ray evidence demonstrates the presence of pneumoconiosis." Decision and Order at 7.

Citing to *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), employer asserts that the administrative law judge merely "counted heads" of the physicians rendering positive versus negative readings, and that this approach to weighing the x-ray evidence lacks any rational basis. Employer's Brief at 6. Employer's assertion of error has merit. The administrative law judge has not explained the basis on which the five positive x-ray readings provided by the four dually qualified physicians and one B-reader carry greater weight than the five negative x-ray readings provided by two dually qualifying physicians and one B-reader.[3] *See Adkins*, 958 F.2d at 49, 16 BLR at 2-61; Decision and Order at 7. This omission requires us to vacate his Section 718.202(a)(1) finding.

Furthermore, employer contends that the administrative law judge erred by failing to defer to either Dr. Wiot's or Dr. Wheeler's radiological experience or their status as professors of radiology. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302

[3] The administrative law judge has not explained why the number of readers is dispositive. Employer asserts that the readings of the four x-rays of record are in equipoise. The February 25, 2002 and July 10, 2003 x-rays were each read by one dually qualified reader as positive for pneumoconiosis and one dually qualified physician as negative for pneumoconiosis. Similarly, the x-ray dated September 27, 2001 has one positive reading for pneumoconiosis by a B-reader, one positive reading by a dually qualified physician, and one negative reading by a dually qualified physician. The December 28, 2003 x-ray has one negative reading by a B-reader, one positive reading by a dually qualified physician, and one negative reading by a dually qualified physician.

(2003); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003). In this regard, employer accurately points out while the administrative law judge refused to look at qualifications beyond Board-certification or B-reader status at Section 718.202(a)(1), he specifically credited claimant's medical expert, Dr. Cohen, at Section 718.202(a)(4) because he found that Dr. Cohen, while Board-certified in pulmonary medicine, had also "published numerous articles and delivered numerous lectures on occupation pulmonary disease." Decision and Order at 8. Employer maintains that the administrative law judge's consideration of the qualifications of the physicians is not consistent between Sections 718.202(a)(1) and (4). Employer's Brief at 10.

Employer's arguments have merit.[4] Although the additional qualifications of Drs. Wiot and Wheeler do not mandate that their opinions be accorded greatest weight, the administrative law judge must reconcile his analysis of the evidence. We vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis based on a preponderance of the negative x-ray readings, and instruct the administrative law judge to consider the professorships and/or publications of Drs. Wiot and Wheeler, and address whether that status entitles their opinions to greater weight at Section 718.202(a)(1). Although the additional qualifications of Drs. Wiot and Wheeler do not mandate that their opinions be accorded greatest weight for that reason alone, the administrative law judge is instructed to address whether those qualifications have any bearing with regard to the quality of the conflicting x-ray evidence. *See Chaffin*, 22 BLR at 1-255.

C. The CT Scan Evidence for Pneumoconiosis:

Employer also challenges the administrative law judge's finding that the CT scan evidence is supportive of a finding of pneumoconiosis. The record contains four interpretations of a February 15, 1998 CT scan. In conjunction with his reading, Dr. Alexander noted that the CT scan was not a high resolution scan and therefore he felt it was inadequate for determining the presence of pneumoconiosis. Dr. Alexander nonetheless opined that the CT scan showed opacities consistent with pneumoconiosis. As noted by the administrative law judge, Dr. Wheeler also acknowledged that the CT scan was suboptimal, stating that "Non- contrast lung settings should have been made because IV scan was necessary to diagnose or rule out pneumoconiosis." Decision and Order at 7. Both Drs. Wheeler and Wiot opined that the CT scan was negative for pneumoconiosis. The fourth reading was by Dr. Meyer who stated that the CT revealed

[4] Employer argues that: "If presentations, publications and various other professional involvements enhance the credentials of a pulmonologist, there is no reason why the same should not hold true for the credentials of radiologists." Employer's Brief at 11.

some evidence of pneumoconiosis such that would appear on an x-ray as 0/1 profusion. The administrative law judge credited Dr. Meyer's reading as a positive reading for simple pneumoconiosis and further credited Dr. Alexander's positive reading over employer's experts.

Employer contends that the administrative law judge's treatment of the CT scan evidence was irrational since he credited the opinion of a physician who found the CT scan to be both inadequate for diagnosing pneumoconiosis but also diagnostic of the disease. Employer's Brief at 8. Employer asserts that "if Dr. Alexander's reading is accepted and the CT scan was, as Dr. Alexander claimed, not useful for detecting coal worker's pneumoconiosis, then there cannot be a finding that the CT evidence is positive for pneumoconiosis." *Id*.

Employer's argument has merit. We agree that the administrative law judge failed to give proper consideration to the opinion of Drs. Wiot and Wheeler because he found that these doctors failed to "fully [address] the question of whether the CT scan was adequate to exclude pneumoconiosis." *Id*. Contrary to the administrative law judge's finding, Dr. Wiot wrote in his October 7, 2004 report that a CT scan is "beneficial in confirming or denying [the] presence of simple coal workers' pneumoconiosis, and can be beneficial in recognizing complicated coal workers' pneumoconiosis when it is not evident on the routine chest x-rays." Employer's Exhibit 8.

With respect to Dr. Wheeler, he also agreed with Dr. Alexander that claimant's CT scan was useless for detecting pneumoconiosis because it is not a high definition or high contrast scan. The administrative law judge, however, held Dr. Wheeler to a higher standard than Dr. Alexander because he required Dr. Wheeler to rule out the possibility of pneumoconiosis, relying on Dr. Alexander's statements. The administrative law judge's ruling presumes that a general CT scan may show the presence of pneumoconiosis but that such a CT scan cannot "rule out" the absence of pneumoconiosis. The administrative law judge, however, has failed to explain the basis for his credibility determination regarding the reliability of the CT scan evidence. We therefore agree with employer that the administrative law judge's analysis is inconsistent, and that he has failed to adequately explain why he choose to accept Dr. Alexander's opinion that the CT scan evidence is consistent with pneumoconiosis rather than the contrary opinions of Drs. Wiot and Wheeler. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Consequently, we vacate the administrative law judge's finding that the CT san evidence is supportive of a finding of pneumoconiosis, and direct him to reconsider that evidence on remand.

D. Medical Opinion Evidence for Pneumoconiosis:

Employer's final contention is that the administrative law judge erred in weighing the medical opinions relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and in rejecting the opinions of Drs. Zaldivar and Crissalli, that claimant does not have coal workers' pneumoconiosis or any respiratory impairment attributable to his coal mine employment. Under Section 718.202(a)(4), the administrative law judge discredited Dr. Zaldivar's opinion that claimant has idiopathic pulmonary fibrosis and not legal or clinical pneumoconiosis, noting that the doctor's diagnosis was based in part on his own negative reading "which is against the weight of the x-ray evidence." Decision and Order at 7. The administrative law judge further found that, "[Dr. Zaldivar's] assertion that pneumoconiosis *only* causes rounded, not linear opacities was contradicted by [Section] 718.102(b) which provides that an x-ray can demonstrate pneumoconiosis even if the x-ray shows irregular opacities." Decision and Order at 7 (emphasis added). Citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 174, 19 BLR 2-268 (4th Cir. 1995), the administrative law judge further found that since Dr. Zaldivar stated that "pneumoconiosis only causes an obstructive defect[,]" he was unable to credit Dr. Zaldivar's opinion that the miner's restrictive impairment was unrelated to coal dust exposure as he found Dr. Zaldivar's opinion to be contrary to the Act, specifically the definition of pneumoconiosis at Section 718.201, which includes both restrictive and obstructive respiratory disorders. *See* Decision and Order at 7.

We agree with employer that the administrative law judge mischaracterized Dr. Zaldivar's testimony regarding the radiographic evidence for pneumoconiosis. Contrary to the administrative law judge's finding, Dr. Zaldivar did not state that pneumoconiosis "only causes rounded opacities, not linear, opacities[.]" Decision and Order at 7. Dr. Zaldivar specifically acknowledged that a reading of 1/1, t/q "could be pneumoconiosis[,]" but he also stated that "t densities are linear densities which are not typical densities of coal workers' pneumoconiosis." Employer's Exhibit 10 at 15.

The administrative law judge further erred in his application of *Warth*. In *Warth*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. *See Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269. In *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit clarified its holding in *Warth* and explained that an administrative law judge was precluded from relying on a physician's opinion that was based upon an erroneous assumption that coal mine employment *can never cause* chronic obstructive pulmonary disease. *Stiltner*, 86 F.3d at 337, 20 BLR at 2-246.

In this case, contrary to the administrative law judge's suggestion, applying the language of *Warth* to the regulatory language of Section 718.201, Dr. Zaldivar did not testify that pneumoconiosis can never cause a restrictive impairment. Dr. Zaldivar likewise did not testify that pneumoconiosis "only" causes an obstructive respiratory impairment. Rather, Dr. Zaldivar opined that restriction can be seen in advanced cases of pneumoconiosis, i.e., progressive massive fibrosis of coal workers' pneumoconiosis, which may cause shrinkage of the lungs (restriction) and also interfere with gas exchange, but which will be "readily visible radiographically as large masses." Employer's Exhibit 10 at p. 27. Because Dr. Zaldivar has recognized that coal dust exposure may result in a restrictive lung disorder, as well as an obstructive respiratory disorder, as contemplated by Section 781.201, the administrative law judge erred in rejecting Dr. Zaldivar's opinion relevant to the etiology of claimant's respiratory impairment as being contrary to the Act. *See Stiltner*, 86 F.3d at 337, 20 BLR at 2-246; *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269.

Lastly, we agree that the administrative law judge improperly discredited the opinions of Drs. Zaldivar and Crisalli, that the miner did not have pneumoconiosis, because their opinions were based in part on negative x-ray readings that were "against the weight of the x-ray evidence." Decision and Order at 7; *see Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986); *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985). Thus, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

We, therefore, remand the case for further consideration of the x-ray, CT scan and medical opinion evidence relevant to the existence of clinical and legal pneumoconiosis. Additionally, because we have instructed the administrative law judge to reconsider the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (a)(4), we also instruct the administrative law judge to reconsider the opinions of Drs. Zaldivar and Crisalli relevant to causation of disability, since the administrative law judge's Decision and Order reflects that he discredited employer's experts on this issue because they did not diagnose pneumoconiosis. On remand, if necessary, the administrative law judge is instructed to determine whether claimant satisfied his burden of proof to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

E. Total Disability

Employer asserts that the administrative law judge's erred in finding that claimant is totally disabled by a respiratory or pulmonary impairment. Contrary to employer's assertion, the administrative law judge had discretion to credit the documented opinions of Drs. Zaldivar and Cohen, that claimant is totally disabled, based on the results of diffusion capacity tests dated February 25, 2002 and December 8, 2003, which showed a moderate to severe diffusion impairment.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the administrative law judge properly rejected the contrary opinion of employer's expert, Dr. Crissalli, because he found that Dr. Crissalli "vacillated" on the issue of total disability, first testifying that he did not know if claimant is totally disabled, and then later stating that claimant was not totally disabled. Decision and Order at 9. We therefore affirm the administrative law judge's finding that claimant established his total disability based on the medical opinions considered under 20 C.F.R. 718.204(b)(2)(iv).

[5] Contrary to employer's assertion, an administrative law judge may properly find total disability in reliance on a medical opinion containing non-qualifying blood gas and pulmonary function studies. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985).

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge 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