BRB No. 06-0260 BLA

McCRAY AMBURGEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JONES FORK OPERATION	)	DATE ISSUED: 10/31/2006
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (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-5528) of Administrative Law Judge Joseph E. Kane 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). Based on the date of filing, November 25, 2002, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, observing that, *inter alia*, the parties' agreed that claimant established eighteen years of coal mine employment. Decision and Order-Awarding Benefits at 2; Hearing Transcript at 8. On considering the evidence, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis and that it was totally disabling.[1] Employer further asserts that the evidentiary limitations in 20 C.F.R. §725.414 are invalid, and that the administrative law judge erred by refusing to admit medical evidence submitted by employer in excess of the evidence limitations. Claimant responds that substantial evidence supports the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter asserting that the evidentiary limitations are valid, but will not otherwise participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grills Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer initially contends that the administrative law judge erred by excluding medical evidence submitted by employer in excess of the evidentiary limits imposed by revised Section 725.414, asserting that this regulation is invalid because it conflicts with

[1] The administrative law judge found that the evidence failed to establish the existence of clinical pneumoconiosis.

Section 413(b) of the Act, 30 U.S.C. §923(b), which requires that "all relevant evidence shall be considered." as well as the similar holding of the United States Supreme Court in *Mullins Coal Co. of Va. v. Director, OWP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Employer further argues that the evidentiary limitations violate Section 23(a) of the Longshoremen's and Harbor Workers' Compensation Act (the LHWCA), 33 U.S.C. §923(a), as incorporated by 30 U.S.C. §923(a), by imposing "technical or formal" rules of procedure, and also contravenes Section 7(c) of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 33 U.S.C.§919(d) and 30 U.S.C. §932(a), which requires that all parties receive a full and fair hearing. Employer also implies that the excluded evidence should be admitted under the "good cause" provisions of 20 C.F.R. §725.456(b).

We find no merit in employer's assertions. The United States Court of Appeals for the District of Columbia Circuit, and the Board have rejected the arguments that the evidentiary limitations violate the provisions of Section 413(b) of the Act, that all relevant evidence be considered, or the APA, which specifically allows for the exclusion of irrelevant, or unduly repetitious evidence. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*). Similarly, Section 725.414 does not violate Section 23(a) of the LHWCA, as this provision may be varied by regulation of the Secretary who is authorized to issue regulations deemed appropriate to carry out the provisions of the Act. 30 U.S.C. §932(a); *see Director, OWCP v. National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977).[2] Moreover, employer has not asserted a basis for admitting this evidence pursuant to the "good cause" provisions of Section 725.456(b). Accordingly, we hold that the administrative law judge did not err in excluding employer's evidence which exceeded the limitations contained in Section 725.414.

Employer next contends that the administrative law judge erred in crediting the opinion of Dr. Baker over the opinions of Drs. Repsher and Rosenberg to find the existence of legal pneumoconiosis established.[3] Employer contends that the administrative law judge erred in finding that the opinions of Drs. Repsher and Rosenberg were not reasoned and erred in not taking into account the expertise of Drs.

[2] Employer also cites the holding in *Underwood v. Elkay Mining Corp.*, 105 F.3d 946, 21 BLR 2-25 (4th Cir. 1997), in support of its argument. However, the Board has also held that Section 725.414 does not conflict with the decision in *Underwood. Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*).

[3] Section 718.201(a)(2) provides in pertinent part that the definition of legal pneumoconiosis includes chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Repsher and Rosenberg, who were B-readers and Board-certified in Internal Medicine and Pulmonary Disease, in evaluating their opinions. Employer further argues that the administrative law judge's consideration of the doctors' opinions was based on faulty analysis.[4] *See* Employer's Exhibits 2, 3, 5, 8-10.

Turning first to Dr. Baker's opinion, the administrative law judge was not required to reject Dr. Baker's opinion diagnosing the existence of legal pneumoconiosis as inconsistent because the doctor failed to definitively diagnose an occupational lung disease due to coal dust exposure in his initial report, while diagnosing it in a subsequent report, as it was within the administrative law judge's discretion to consider Dr. Baker's findings as a whole, and credit his more recent positive diagnosis of chronic obstructive pulmonary disease due to smoking and coal dust exposure. Decision and Order Awarding Benefits at 5, 9, 12; Claimant's Exhibit 6; Director's Exhibits 11, 14; *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *see* 20 C.F.R. §718.206. Moreover, we find no merit in employer's assertion that Dr. Baker's opinion is equivocal because the doctor opined that he could not distinguish between the effects of coal dust exposure and cigarette smoking on claimant's totally disabling lung disease, as Dr. Baker opined that the effects of claimant's smoking and his coal dust exposure were equally part of claimant's condition. Likewise, the administrative law judge did not err by finding that Dr. Baker's opinion was supported by the medical literature, rather than crediting Dr. Repsher's opinion that Dr. Baker misinterpreted the medical literature. Decision and Order at 5-9, 12; Employer's Exhibits 2, 5, 9, 10; Claimant's Exhibit 6; Director's Exhibits 11, 14; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We also reject employer's argument that the administrative law judge failed to consider the qualifications of employer's physicians as the administrative law judge noted that Drs. Repsher, Rosenberg and Baker were all pulmonary specialists. Decision and Order-Awarding Benefits at 5-7; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).

In considering Dr. Rosenberg's opinion, however, the administrative law judge accorded less weight to Dr. Rosenberg's opinion because he determined that Dr. Rosenberg's finding that the "chronic obstructive changes present were not due to coal mine dust exposure was based primarily on his finding that there is no chest x-ray evidence of medical pneumoconiosis." Decision and Order at 8. The administrative law

[4] Drs. Rosenberg and Repsher found that claimant did not have coal workers' pneumoconiosis and opined that claimant was totally disabled due to cigarette smoking, not coal dust exposure.

judge further noted that claimant's pulmonary function studies did not indicate the presence of any interstitial form of coal workers' pneumoconiosis, but that the doctor did not explain why the pulmonary function studies demonstrated the absence of legal pneumoconiosis. The administrative law judge further found that Dr. Rosenberg offered no explanation for why claimant's chronic obstructive pulmonary disease was not due to both smoking and coal dust exposure, except for claimant's negative x-ray reading. Thus, the administrative law judge found that Dr. Rosenberg's opinion, *i.e.*, that chronic obstructive pulmonary disease is not due to coal mine employment and that pneumoconiosis is present only with a positive chest x-ray to be in conflict with the regulations, which do not require positive x-ray changes in order to diagnose the existence of legal pneumoconiosis. Decision and Order at 8; Employer's Exhibits 3, 8; *see* 20 C.F.R. §718.201.

Although Dr. Rosenberg's February 27, 2004, report states that "without the presence of complicated disease, and for that matter any micronodularity, [claimant's] disabling COPD has not been caused or hastened by the past inhalation of coal mine dust exposure," Employer's Exhibit 3, Dr. Rosenberg's March 21, 2005, deposition indicates that although coal dust exposure can cause obstructive lung disease, his opinion in the present case was also based on medical studies that indicate that coal dust related reductions in the ratio of claimant's FEV_1 divided by the FVC, would not have produced the type of obstructive impairment seen in claimant. Dr. Rosenberg also based his findings on claimant's improvement after administration of bronchodilators. Employer's Exhibit 8. Thus, as the administrative law judge did not fully consider the entire rationale that Dr. Rosenberg expressed in his deposition, we agree with employer that remand of the case is required for the administrative law judge to reconsider the evidence [before determining if this physician's opinion is in conflict with the regulations]. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Adams v. Bethlehem Mines Corp.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350 (1985); *Hoffman v. B&G Construction Co.*, 8 BLR 1-65 (1985).[5]

Likewise, the case must be remanded for the administrative law judge to reconsider Dr. Repsher's opinion. Employer contends that the administrative law judge erred in according it less weight because it was not in accord with the regulations and "the prevailing view of the medical community." Decision and Order at 8-9. Employer contends that the medical literature credited by Dr. Repsher does not contradict either the regulations of the prevailing view of the medical community, but instead, lends support

[5] Because the miner last worked in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

to Dr. Repsher's opinion that, in this particular case, claimant's total disability was not caused by coal dust exposure. Employer further contends that the administrative law judge overlooked the fact that Dr. Repsher's medical data supported his conclusions and that the administrative law judge erred in finding that Dr. Repsher's opinion was based solely on negative x-ray. Employer's Brief 19-23.

Although the administrative law judge acknowledged that Dr. Repsher discussed his opinion, that claimant's chronic obstructive pulmonary disease was not due to coal mine dust exposure, in great detail in two deposition, she nonetheless found Dr. Repsher's opinion "less persuasive" because Dr. Repsher stated that the medical literature does not establish any basis for the regulatory provision that an obstructive lung disease can be caused by coal dust exposure, and the Department of Labor, during its rulemaking procedures, had recognized that that view was contrary to the prevailing view of the medical community and the substantial weight of the medical and scientific literature, *citing Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

Contrary to the administrative law judge's finding, however, Dr. Repsher did acknowledge that chronic obstructive pulmonary disease could be caused by coal mine employment, and, the doctor never stated that medical literature does not establish any basis for so finding. Employer's Exhibit 10 at 15. On remand, therefore, the administrative law judge must consider Dr. Repsher's opinion in its entirety. *See Island Creek Coal Co. v. Stiltner*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). This case must, accordingly, be remanded, for the administrative law judge must reconsider the opinions of Drs. Rosenberg and Repsher along with the opinion of Dr. Baker on the issue of legal pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, 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