BRB No. 07-0127 BLA

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| R.L. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | DATE ISSUED: 10/31/2007 |
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| CONSOLIDATION COAL COMPANY | ) | |
| | ) | |
| 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.

John Cline, Piney View, West Virginia , for claimant.

Ashley M. Harman and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Jonathan L. Snare, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (05-BLA-5467) of Administrative Law Judge Daniel L. Leland (the administrative law judge) 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). The administrative law judge credited claimant with twenty-six and one-half years of coal mine employment and adjudicated this subsequent miner's claim pursuant to 20 C.F.R. Part 718, based on claimant's April 7, 2004 filing date.[1] Initially, the administrative law judge excluded the CT scan readings by Dr. Wiot, Employer's Exhibit 7, and Dr. Zaldivar's reading of a March 1, 2006 x-ray, Employer's Exhibit 9, as improper rebuttal evidence under 20 C.F.R. §725.414. Addressing the merits of entitlement, the administrative law judge found that the evidence submitted since the prior denial established total disability pursuant to 20 C.F.R. §718.204(b)(2). He then found that the preponderance of the x-ray, CT scan and medical opinion evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In addition, the administrative law judge found that the weight of the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the medical evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding the CT scan readings of Dr. Wiot, arguing that these readings were submitted as affirmative evidence, not rebuttal evidence and, therefore, are properly admissible into the record under Section 725.414. Employer further challenges the administrative law judge's weighing of the remainder of the medical evidence, arguing that this evidence is insufficient to establish the existence of either clinical or legal pneumoconiosis. Likewise, employer contends that the administrative law judge erred in finding that the medical opinion evidence established disability causation pursuant to Section 718.204(c). In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal. Initially, the Director concurs with employer that the CT scan readings of Dr. Wiot are admissible in this case because employer submitted them as affirmative readings of the CT scans and not as rebuttal of the treatment records. In addition, the Director asserts that if the Board affirms either the administrative law judge's finding of clinical or legal pneumoconiosis, then it should

[1] Claimant filed his initial application for benefits on June 10, 1999, which was denied by the district director on December 1, 1999, because claimant did not establish any of the elements of entitlement. Director's Exhibit 1.

affirm the administrative law judge's disability causation finding as he properly rejected the opinions of Drs. Zaldivar and Castle because they did not diagnose pneumoconiosis.[2]

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).

Pursuant to Section 718.202(a)(1), the administrative law judge found that the preponderance of the x-ray evidence was positive and, therefore, sufficient to establish the existence of pneumoconiosis. Specifically, he considered each of the x-ray films individually, in conjunction with the qualifications of the physicians providing the readings, and found the June 23, 2004 film to be positive because the negative interpretation by Dr. Wiot, a B reader and Board-certified radiologist, was outweighed by the positive readings of Drs. Patel and Alexander, both of whom are also dually-qualified. Decision and Order at 7; Director's Exhibits 9, 10; Claimant's Exhibit 7. Similarly, the administrative law judge found the September 15, 2004 film to be positive, as the negative reading by Dr. Wiot was outweighed by the two positive readings submitted by Drs. Cappiello and Alexander. Decision and Order at 7; Claimant's Exhibits 7, 8; Employer's Exhibit 1. The administrative law judge found that the July 20, 2005 film was positive, as the positive readings by Drs. Cappiello and Alexander outweighed the negative reading by Dr. Castle, a B reader. Decision and Order at 7; Claimant's Exhibits 7, 8; Employer's Exhibit 4.

Employer contends that the administrative law judge did not properly assess the radiological qualifications of the physicians providing the x-ray readings, arguing that B readers are presumed equally qualified to physicians who are dually-qualified as B readers and Board-certified radiologists. Employer's Brief at 5. Employer also contends that the administrative law judge erred in relying on the weight of the positive readings and did not render a meaningful analysis of the x-ray readings. Employer's Brief at 7. In addition, employer contends that the new regulations do not "level the playing field," but merely shift the advantage to claimant in establishing the existence of pneumoconiosis by a preponderance of the evidence. Employer asserts that claimant unfairly benefits because he is allowed to select the physician who administers the pulmonary evaluation

[2] Since the parties do not challenge the administrative law judge's decision to credit claimant with twenty-six and one-half years of coal mine employment or his finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

required by the regulations, thereby essentially permitting claimant to submit an additional set of evidence that supports his affirmative case. Employer's Brief at 6-7.

Initially, we reject employer's contention that Section 725.414 is not valid, as it does not "level the playing field" in the admission of evidence, but rather, provides claimant the opportunity to submit a greater amount of evidence. Contrary to employer's contentions, the United States Court of Appeals for the Fourth Circuit,[3] within whose jurisdiction this case arises, and the Board, have held that the evidentiary limitations in Section 725.414 are valid and do not violate any party's right to due process. *Elm Grove Coal Co. v. Director, OWCP [Blake],* 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *see Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006*); Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*). Moreover, contrary to employer's argument, an administrative law judge may accord greater weight to an x-ray interpretation rendered by a physician who is dually-qualified, than to a reading performed by a physician who is only a B reader. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*).

Thus, based upon the administrative law judge's accurate review of the x-ray evidence, including the radiological qualifications of the physicians and the ILO classification of the film, the administrative law judge acted within his discretion as fact-finder in determining that the positive readings of the three films outweighed the negative readings. Decision and Order at 7; 20 C.F.R. §§718.102, 718.202(a)(1); *see Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). We, therefore, affirm the administrative law judge's finding that the preponderance of the x-ray evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Prior to addressing employer's allegations of error regarding the merits of the administrative law judge's finding that claimant established the existence of both clinical and legal pneumoconiosis at Section 718.202(a)(4), we will consider employer's argument that the administrative law judge erred in excluding certain CT scans from his consideration of the relevant evidence thereunder. The administrative law judge found that the record includes the interpretations of CT scans dated September 27, 2004, February 3, 2005, August 8, 2005 and January 4, 2006, which were admitted as part of claimant's treatment records, and that employer submitted interpretations of these CT scans by Dr. Wiot. Decision and Order at 2; Claimant's Exhibits 2, 9; Employer's

[3] This claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment occurred in West Virginia. Director's Exhibit 4; *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Exhibit 7. Based upon his finding that Section 725.414 does not permit a party to submit evidence to rebut the medical evidence contained in treatment records, however, the administrative law judge excluded Dr. Wiot's CT scan interpretations as improper rebuttal evidence. Decision and Order at 2, *citing Henley v. Cowin & Company, Inc.*, BRB No. 05-0788 BLA (May 30, 2006)(unpublished).

Employer and the Director contend that the administrative law judge erred in excluding the CT scan readings of Dr. Wiot, as improper rebuttal to treatment records. We agree. Contrary to the administrative law judge's characterization of this evidence as rebuttal evidence, employer is entitled to submit CT scan evidence as affirmative evidence pursuant to 20 C.F.R. §718.107. Specifically, as the Director asserts, the regulations provide for the admission of CT scan readings as affirmative case evidence under Section 718.107, which allows for the admission of "[t]he results of any medically accepted test or procedure reported by a physician and not addressed [in Sections 718.102-718.106] which tends to demonstrate the presence or absence of pneumoconiosis… or a respiratory or pulmonary impairment." Director's Letter Brief at 2, *citing Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006), *aff'd on recon.*, -- BLR --, BRB No. 05-0335 BLA (Mar. 15, 2007)(*en banc*). Moreover, the regulations do not limit the number of separate CT scans that may be admitted into the record, *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-59 (2004)(*en banc*), but a party can proffer only one reading of each separate scan. *Webber*, 23 BLR at 1-134-135. *Id*. Thus, we vacate the administrative law judge's exclusion of Dr. Wiot's CT scan interpretations.[4] *Webber*, 23 BLR at 1-134-135; *Dempsey*, 23 BLR at 1-59. In addition, we vacate the administrative law judge's finding that the existence of clinical pneumoconiosis was established under Section 718.202(a)(4) and his finding that the weight of the medical evidence, like and unlike, is sufficient to establish the existence of clinical pneumoconiosis, Decision and Order at 7, as the administrative law judge based his findings upon an incomplete record.[5]

[4] Employer also challenges the validity of the Board's holding in *Henley v. Cowin & Company, Inc.*, BRB No. 05-0788 BLA (May 30, 2006)(unpublished), that medical evidence appearing in treatment records is not rebuttable. Employer's Brief at 10-15. In light of our holding that the administrative law judge erred in characterizing the CT scan readings as rebuttal evidence, we need not address this aspect of employer's argument as it is moot. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5] Because the administrative law judge, as the trier-of-fact, has not considered the relevancy of the CT scan interpretations of Dr. Wiot, we decline to accept the Director's argument that any error in excluding these interpretations is harmless as these readings are not categorized to establish the presence or absence of pneumoconiosis, Director's Letter Brief at 3. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

This case is, therefore, remanded to the administrative law judge for reconsideration of the admission of the CT scan evidence proffered by employer. On remand, the administrative law judge must initially consider whether the party proffering the CT scan evidence has established its medical acceptability under Section 718.107. 20 C.F.R. §718.107; *see Webber*, 23 BLR at 1-134-135; *Dempsey*, 23 BLR at 1-59. The administrative must then resolve the conflict in the CT scan evidence and determine whether it supports a finding of pneumoconiosis. The administrative law judge must also reconsider his finding that the weight of the evidence relevant to the existence of pneumoconiosis, when considered together, satisfies claimant's burden of proof under Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

We will now address employer's arguments regarding the merits of the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). In considering the evidence under this subsection, the administrative law judge found that the medical opinions addressing whether claimant suffers from legal pneumoconiosis were split. The administrative law judge found that Dr. Cohen opined that claimant has an obstructive lung disease resulting from his coal dust exposure and also that the miner does not suffer from asthma. Decision and Order at 5, 7; Claimant's Exhibit 1. The administrative law judge further found that Dr. Rasmussen opined that claimant's pulmonary condition was due to his cigarette smoking, coal dust exposure and asthma. Decision and Order at 4, 5, 7; Director's Exhibit 9; Claimant's Exhibit 6; Employer's Exhibit 3. With regard to the contrary evidence, the administrative law judge determined that Drs. Zaldivar and Castle both opined that claimant's pulmonary condition was due entirely to asthma and has no connection to his coal mine employment. Decision and Order at 4-6, 7; Director's Exhibit 10; Employer's Exhibits 4, 10, 11. After setting forth Dr. Cohen's professional credentials, including his extensive clinical experience, the administrative law judge found that Dr. Cohen's opinion is well-reasoned and based on a thorough analysis of the miner's medical history and the medical literature. Based on Dr. Cohen's superior credentials, the administrative law judge found the evidence sufficient to establish the existence of legal pneumoconiosis. Decision and Order at 8.

Employer asserts that the administrative law judge erred in failing to adequately discuss his crediting of the medical opinions of Drs. Cohen and Rasmussen, that claimant's pulmonary condition was due to his coal mine employment, and his discrediting of the contrary opinions of Drs. Zaldivar and Castle, that claimant's pulmonary condition was due solely to asthma. Employer further contends that the administrative law judge erred in relying only on Dr. Cohen's credentials in according his opinion determinative weight, without adequately discussing the contrary evidence. There is merit to these contentions.

The administrative law judge, in weighing the conflicting evidence, did not adequately discuss the weight he accorded to each of the medical opinions. Rather, he set forth the conclusions of each of the physicians, as well as their professional credentials, and summarily found that the opinion of Dr. Cohen, that claimant suffers from pneumoconiosis, is well-reasoned and entitled to determinative weight. Decision and Order at 7-8. While it is permissible for the administrative law judge to accord greater weight to a physician based on superior professional credentials, he must first determine the relative credibility of the conflicting evidence and provide a detailed explanation of his findings. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because the administrative law judge has provided an insufficient rationale for his findings of fact, his Decision and Order does not comport with the requirements of the Administrative Procedure Act (APA), 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), 30 U.S.C. §932(a). *See Webber*, 23 BLR at 1-138; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We vacate, therefore, his finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and remand this case for the administrative law judge to reweigh the conflicting medical opinions and fully articulate the rationale and underlying support for his credibility determinations.

In light of our decision to vacate the administrative law judge's findings under Section 718.202(a)(4), we also vacate the administrative law judge's finding that this evidence was sufficient to establish that claimant's totally disabling impairment was caused by pneumoconiosis pursuant to Section 718.204(c). The administrative law judge should also reconsider this issue if he determines that claimant has established the existence of pneumoconiosis on remand.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge 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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BETTY JEAN HALL
Administrative Appeals Judge