BRB No. 08-0161 BLA

J.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RONNIE ISON TRUCKING COMPANY	)	
	)	
and	)	DATE ISSUED: 10/30/2008
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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/Carrier (employer) appeals the Decision and Order (06-BLA-5663) of Administrative Law Judge Kenneth A. Krantz awarding 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). This case involves a subsequent claim filed on May 13, 2005.[1] After crediting claimant with at least twenty-two years of coal mine employment,[2] the administrative law judge found that the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered the merits of claimant's 2005 claim. In his consideration of all of the evidence of record, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was 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 Dr. Caffrey's January 18, 2007 biopsy report in its entirety and in excluding a portion of Dr. Broudy's November 8, 2006 report. Employer also argues that the administrative law judge erred in finding that the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, noting his agreement

[1] Claimant initially filed a claim for benefits on September 3, 2002. In a Proposed Decision and Order dated March 26, 2004, the district director denied benefits because he found that the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1. There is no indication that claimant took any further action in regard to his 2002 claim.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, 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*).

with employer's contention that the administrative law judge erred in excluding evidence from the record. The Director, however, contends that the administrative law judge's error was harmless.

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Evidentiary Limitations

Employer contends that the administrative law judge erred in excluding Dr. Caffrey's January 18, 2007 biopsy report. Dr. Caffrey reviewed five lung tissue slides from a biopsy conducted on April 1, 2005 and contained in claimant's treatment records.[3] In his report, Dr. Caffrey stated that, based upon a review of the biopsy slides, he did not "identify any necessary changes to make a diagnosis of coal workers' pneumoconiosis . . . or any other occupational pneumoconiosis." Employer's Exhibit 9 (excluded). Employer submitted Dr. Caffrey's biopsy review as its affirmative-case biopsy evidence.

Based upon his finding that 20 C.F.R. §725.414 did not permit a party to submit rebuttal evidence in response to treatment records, the administrative law judge excluded Dr. Caffrey's January 18, 2007 biopsy report. Decision and Order at 2-3 (*citing Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006) (unpub.)).

Employer and the Director contend that the administrative law judge erred in excluding Dr. Caffrey's biopsy report as improper rebuttal evidence. We agree. Contrary to the administrative law judge's characterization of this evidence as rebuttal evidence, employer was entitled to submit Dr. Caffrey's biopsy report as affirmative biopsy evidence pursuant to 20 C.F.R. §725.414(a)(3)(i). *See J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, BLR , slip op. at 14-15, BRB Nos. 07-0812 BLA/A (July 30, 2008) (published). Consequently, the administrative law judge erred in excluding Dr. Caffrey's January 18, 2007 biopsy report.

[3] Dr. Caffrey also reviewed five additional pathology slides from May 4, 2006 that he characterized as representing "washings from the right middle lobe and brushings from [the] right mainstem." Employer's Exhibit 9 (excluded).

We also agree with employer and the Director that the administrative law judge erred in excluding a portion of Dr. Broudy's November 8, 2006 supplemental report,[4] submitted by employer as an affirmative medical report. Again, based upon his finding that 20 C.F.R. §725.414 does not permit a party to submit rebuttal evidence in response to treatment records, the administrative law judge excluded that portion of Dr. Broudy's November 8, 2006 report that reviewed evidence contained in claimant's treatment records. Decision and Order at 2. The revised regulations do not contain any explicit provision for the rebuttal of treatment records. However, as the Director accurately notes, the revised regulations do not prevent a party from having one or both of its affirmative-case physicians review the written treatment records when preparing their medical reports or when offering deposition testimony. Director's Brief at 2; *see* 20 C.F.R. §725.414(a)(1) (providing that a physician's medical report may be based upon an examination of the miner "and/or" a review of the available admissible evidence). The administrative law judge, therefore, erred in excluding portions of Dr. Broudy's November 8, 2006 report.

Although the Director agrees with employer that the administrative law judge erred in excluding Dr. Caffrey's January 18, 2007 biopsy report and portions of Dr. Broudy's November 8, 2006 report, the Director contends that these errors were harmless. We acknowledge that the administrative law judge's evidentiary errors could ultimately prove to be harmless under the facts of this case. However, as discussed below, because this case must be remanded to the administrative law judge for reconsideration of whether the new medical opinion evidence establishes the existence of pneumoconiosis, we instruct the administrative law judge, on remand, to reconsider the admissibility of Dr. Caffrey's January 18, 2007 biopsy report and Dr. Broudy's

---

[4] Dr. Broudy's November 8, 2006 report encompassed the doctor's review of pulmonary function studies dated March 12, 2003, October 15, 2003, and December 3, 2003, and the doctor's review of Dr. Alam's January 22, 2003 medical report. Employer's Exhibit 4. Dr. Broudy interpreted the pulmonary function studies as showing evidence of severe obstructive airways disease. *Id.* Dr. Broudy further opined that:

> [I]t appears that [claimant] has severe obstructive airways disease from cigarette smoking. He has disabling impairment to the point where he would not be able to do his job as an underground coal miner. The results would qualify for disability according to the Federal Criteria for disability in coal workers. There is no evidence that he had any respiratory impairment or respiratory disease arising from his occupation as a coal worker.

Employer's Exhibit 4.

November 8, 2006 medical report. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Section 725.309

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish that he suffered from pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he suffers from pneumoconiosis to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Employer argues that the administrative law judge erred in finding that the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5] 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),[6] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In considering whether the new medical opinion evidence established the existence of pneumoconiosis, the administrative law judge considered the opinions of Drs. Alam, Rasmussen, Broudy, and Dahhan. The administrative law judge noted that Dr. Alam, claimant's treating physician for "at least three years," had treated claimant during hospitalizations for breathing problems and had performed three bronchoscopic examinations of claimant's lungs. Decision and Order at 9. The administrative law judge stated that:

> Although I found the bronchoscopy reports, standing alone, insufficient to establish pneumoconiosis under subsection 718.202(a)(2), I find that Dr. Alam's treatment records as a whole are sufficient to establish the presence

[5] The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). Decision and Order at 4-6. Because no party challenges these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] "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).

> of pneumoconiosis. The treatment records support a more complete consideration of [c]laimant's status over a period of time, including numerous physical examinations of [c]laimant's lungs, three bronchoscopic examinations of [c]laimant's lungs and treatment both in the office and during hospitalizations. Therefore, I find Dr. Alam's statements in the treatment records that [c]laimant has coal workers' pneumoconiosis sufficient to establish the presence of pneumoconiosis.

Decision and Order at 9.

The administrative law judge found that Dr. Alam's opinion was supported by Dr. Rasmussen's opinion. Decision and Order at 9. The administrative law judge found that Dr. Rasmussen's opinion, that claimant's chronic obstructive pulmonary disease was attributable in significant part to his coal dust exposure, was well reasoned and supported by the evidence. *Id.*

The administrative law judge further found that the opinions of Drs. Broudy and Dahhan, that claimant's chronic obstructive pulmonary disease was due to cigarette smoking and not coal dust exposure, did not "negate" the opinions of Drs. Alam and Dr. Rasmussen, that claimant's pulmonary impairment was due to a combination of coal dust exposure and cigarette smoking. Decision and Order at 10. The administrative law judge explained that:

> Since [c]laimant's exposure to both causative agents is long and since Dr. Alam's opinion is well reasoned and well supported by the opinion of Dr. Rasmussen, I find these opinions sufficient to establish the presence of legal pneumoconiosis. I further find that they are not outweighed by the contrary reports of Drs. Broudy and Dahhan for the reasons stated above. Therefore, I find Claimant has established the presence of pneumoconiosis under the provisions of Section 718.202(a)(4).

Decision and Order at 10.

Employer argues that the administrative law judge erred in not explaining the basis for his finding that Dr. Alam's diagnosis of pneumoconiosis was well reasoned. The administrative law judge found that Dr. Alam's statements in his treatment records that claimant suffered from "coal workers' pneumoconiosis [were] sufficient to establish the presence of pneumoconiosis." Decision and Order at 9. This statement suggests that the administrative law judge found that Dr. Alam's opinion supported a finding of clinical pneumoconiosis. The administrative law judge, however, failed to address Dr. Alam's basis for diagnosing clinical pneumoconiosis or explain what documentation in the

treatment records supported the doctor's diagnosis.[7] Consequently, on remand, the administrative law judge should address and explain whether Dr. Alam's diagnosis of coal workers' pneumoconiosis, *i.e.*, clinical pneumoconiosis, is sufficiently reasoned in light of "other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-627-29 (6th Cir. 1999); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge also found that Dr. Alam's opinion supported a finding of "legal" pneumoconiosis. Decision and Order at 10. Although Dr. Alam diagnosed several pulmonary diseases other than coal workers' pneumoconiosis,[8] the administrative law judge did not identify which of these diseases, if any, the doctor attributed to claimant's coal dust exposure. Consequently, the administrative law judge's analysis does not comport with the Administrative Procedure Act, which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On remand, the administrative law judge should identify which diagnoses, if any, rendered by Dr. Alam support a finding of legal pneumoconiosis and address whether these diagnoses are sufficiently reasoned.[9]

---

[7] The administrative law judge also failed to address the significance of the fact that Drs. Rasmussen, Broudy, and Dahhan each opined that claimant did not suffer from clinical pneumoconiosis. Director's Exhibit 12; Employer's Exhibits 1, 8. Further, the administrative law judge had found that the bronchoscopy biopsies conducted by Dr. Alam did not establish coal workers' pneumoconiosis. Decision and Order at 5-6.

[8] The record contains Dr. Alam's treatment notes from March 12, 2003 through March 13, 2006. Dr Alam's diagnoses in these records include coal workers' pneumoconiosis, severe chronic obstructive pulmonary disease, and bronchitis. Employer's Exhibit 7.

[9] An administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Employer also contends that the administrative law judge erred in not addressing the significance of the fact that Drs. Alam and Rasmussen relied upon inaccurate coal mine employment histories. An administrative law judge may properly accord less weight to a medical opinion that is based upon an inaccurate coal mine employment history. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988) (administrative law judge permissibly found physician's opinion "unreasoned" inasmuch as it was based on erroneous coal mine employment history); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984).

In this case, the administrative law judge noted that employer stipulated that claimant worked for twenty-two years in coal mine employment. Decision and Order at 3. The administrative law judge found that claimant's Social Security Administration Earnings Statement supported employer's stipulation. *Id.* Consequently, the administrative law judge found that claimant established "at least [twenty-two] years of coal mine employment." *Id.*

Employer contends that claimant worked for seven years in underground coal mine employment, and for an additional fourteen or fifteen years as a coal truck driver. Employer's Brief at 8. Employer's characterization of claimant's coal mine employment is consistent with its stipulation to twenty-two years of coal mine employment. Employer, however, notes that Dr. Alam relied upon the fact that claimant worked for twenty-seven years in underground mining, and that Dr. Rasmussen relied upon a thirty-seven year coal mine employment history. Director's Exhibit 12; Claimant's Exhibit 1. Employer also notes that claimant, during the hearing, acknowledged that the employment histories that he provided to Drs. Alam and Rasmussen could not have been correct. *See* Hearing Transcript at 37-38.

In his decision, the administrative law judge addressed the coal mine employment history relied upon by Dr. Rasmussen, stating that:

> While Dr. Rasmussen's history of coal dust exposure does not specifically match the stipulation in this case, I note that [c]laimant testified that he began coal mine employment working with his father. That coal mine employment was not documented and, therefore, not included in [e]mployer's stipulation. I found [c]laimant's testimony credible, however. Under such circumstances, I do not find Dr. Rasmussen's opinion less credible since he considers a coal mine dust exposure history that is at odds with the stipulation made by [e]mployer.

Decision and Order at 9.[10]

The administrative law judge has a duty to make a specific, complete finding on the length of a miner's coal mine employment, *see Boyd v. Director, OWCP*, 11 BLR 1-39 (1988), which must be based on a reasonable method of computation and be supported by substantial evidence. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 n.1 (1988) (*en banc*). Because Drs. Alam and Rasmussen relied upon coal mine employment histories greater that that stipulated to by employer, the administrative law judge should have addressed the specific length of claimant's coal mine employment, and not merely noted that claimant was entitled to credit for "*at least*" twenty-two years of coal mine employment and some unspecified amount of additional coal mine employment for the time that he worked with his father. Consequently, we instruct the administrative law judge, on remand, to make a length of coal mine employment finding consistent with the holdings in *Boyd* and *Dawson*.

As the administrative law judge's length of coal mine employment findings on remand may affect his analysis regarding the reliability of the opinions of Drs. Alam and Rasmussen, we vacate the administrative law judge's finding that the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Dawson*, 11 BLR at 1-61.

On remand, when considering whether the new medical opinion evidence is sufficient to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

In light of our decision to vacate the administrative law judge's finding that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309. On remand, should the administrative law judge find that the new medical opinion evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to reconsider claimant's 2005 claim on the merits, based on a weighing of all of

[10] Contrary to employer's specific contention, the administrative law judge did not "ignore the fact" that Dr. Rasmussen relied upon an inaccurate coal mine employment history. Employer's Brief at 7. The administrative law judge, however, did not quantify the additional time to which claimant was entitled for his coal mine employment working with his father.

the evidence of record, including the evidence that was submitted in connection with claimant's 2002 claim. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge