BRB No. 06-0199 BLA

CLYDE WARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/26/2006
	)	
SOUTHERN OHIO COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY INCORPORATED	)	
	)	
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 on Remand – Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (02-BLA-5443) of Administrative Law Judge Joseph E. Kane 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).[1] The instant claim is governed by the regulations that took effect on January 19, 2001, as it was filed on May 9, 2001.[2] Director's Exhibit 2. Initially, the administrative law judge awarded benefits. After excluding the newly submitted opinions of Drs. Bellotte and Zaldivar because he found they were based on prior claim evidence, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge based his finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b),[3] an element of entitlement previously adjudicated against him, on the newly submitted opinions of Drs. Gaziano and Rasmussen. Considering the merits of the instant subsequent claim, the administrative law judge found that claimant established that he has pneumoconiosis arising out of his coal mine employment and is totally disabled by it pursuant to 20 C.F.R.

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[1] Claimant filed his first claim on March 11, 1981, and it was denied by the district director on June 23, 1981 because claimant did not establish that his pneumoconiosis, which the district director found, arose out of his coal mine employment or that he was totally disabled due to pneumoconiosis. Director's Exhibit 24 of Director's Exhibit 1. Claimant filed a second claim on April 22, 1994. Director's Exhibit 1 of Director's Exhibit 1. In his 1997 decision, Administrative Law Judge Rudolf L. Jansen denied benefits after finding that claimant did not establish total disability. 1997 Decision and Order at 10-11. After assuming, *arguendo*, that total disability was established, Judge Jansen found the evidence insufficient to establish total disability due to pneumoconiosis. 1997 Decision and Order at 11. In 1998, the Board affirmed Judge Jansen's denial of benefits on the 1994 claim, upholding his determination that the medical evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Ward v. Southern Ohio Coal Co.*, BRB No. 98-0482 BLA (December 18, 1998)(unpub.).

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

§§718.202(a)(1), 718.203(b), and 718.204(b), (c).

Upon employer's appeal, the Board held that the administrative law judge improperly excluded the newly submitted reports of Drs. Bellotte and Zaldivar, and remanded the case for consideration of all "relevant, admissible evidence." *Ward v. Southern Ohio Coal Co.*, BRB No. 04-0519 BLA (February 28, 2005)(unpub.). The Board also vacated the administrative law judge's findings at Section 718.202(a)(1), and remanded the case for consideration of the x-ray evidence, if reached on remand, consistent with the principles set forth by the United States Court of Appeals for the Sixth Circuit in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).[4] *Id*.

On remand, the administrative law judge awarded benefits, after again excluding the newly submitted reports of Drs. Bellotte and Zaldivar on the ground that they were based on prior claim evidence, in contravention of the Board's holding. He therefore determined that claimant established a change in an applicable condition of entitlement at Section 725.309(d) based on the remaining newly submitted opinions of Drs. Gaziano and Rasmussen. The administrative law judge again found that claimant established that he has pneumoconiosis, based on the readings of the most recent newly submitted x-rays, and that claimant's pneumoconiosis arose out of his coal mine employment and totally disables him pursuant to Sections 718.202(a)(1), 718.203(b), and 718.204(b), (c).

In the instant appeal, employer challenges the administrative law judge's exclusion of the newly submitted reports of Drs. Bellotte and Zaldivar, as well as the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1).[5] Claimant responds in

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[4] The Board further upheld the validity of the revised regulations at 20 C.F.R. §§718.104(d), 718.201(c), 718.204(a), 725.414, and 725.701 in response to employer's challenges that they were invalid. *Ward v. Southern Ohio Coal Co.*, BRB No. 04-0519 BLA (February 28, 2005)(unpub.). The Board rejected employer's challenge to the administrative law judge's crediting of the reports of Drs. Gaziano and Rasmussen at 20 C.F.R. §§718.204(b)(2)(iv) and 725.309(d). *Id*.

[5] Employer notes its disagreement with the administrative law judge's: 1) crediting of the opinions of Drs. Gaziano and Rasmussen in determining that claimant has a totally disabling pulmonary impairment due to pneumoconiosis; 2) exclusion of Dr. Wiot's chest x-ray readings from claimant's prior claim; and 3) application of the revised regulations to the adjudication of the instant subsequent claim. Emp. Br. at 2 n. 2. However, employer, citing *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984) does not fully brief these issues because the Board previously affirmed the administrative law judge's prior findings on these issues. *Id*. We decline to address the above three issues as they are inadequately briefed, and as the Board's prior holdings

support of the administrative law judge's award of benefits on remand. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the Board's prior holding that the administrative law judge improperly excluded the newly submitted opinions of Drs. Bellotte and Zaldivar because they are based on prior claim evidence.

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).

Employer first argues that the administrative law judge again erred on remand by excluding the newly submitted opinions of Drs. Bellotte and Zaldivar in determining whether claimant established a change in an applicable condition of entitlement at Section 725.309(d). The Director agrees with employer. The Director posits that the only limitation imposed on the opinions and testimony of doctors is that they be based on admissible evidence, citing 20 C.F.R. §§725.414(a)(1) and 725.457(d).[6] The Director asserts that the newly submitted opinions of Drs. Bellotte and Zaldivar are admissible as they are based on admissible prior claim evidence, citing 20 C.F.R. §725.309(d)(1).[7]

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constitute the law of the case. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

[6] 20 C.F.R. §725.414(a)(1) provides in pertinent part that, "A medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1). 20 C.F.R. §725.457(d) provides that:

> (d) A physician whose testimony is permitted under this section may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence relevant to the miner's condition that is not admissible."

20 C.F.R §725.457(d).

[7] Section 725.309(d)(1) states:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

20 C.F.R. §725.309(d)(1). In *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*),

We agree with the position taken by employer and the Director. Moreover, the administrative law judge's exclusion on remand of the newly submitted opinions of Drs. Bellotte and Zaldivar is in direct contravention of the Board's prior decision that held that the administrative law judge improperly excluded these opinions because they are based on prior claim evidence. Consequently, we again hold that the administrative law judge improperly excluded the newly submitted opinions of Drs. Bellotte and Zaldivar. We, therefore, reverse the administrative law judge's decision to exclude the newly submitted opinions of Drs. Bellotte and Zaldivar, and hereby admit them into the record. We remand this case to the administrative law judge to consider the newly submitted opinions of Drs. Bellotte and Zaldivar, along with the newly submitted opinions of Drs. Gaziano and Rasmussen, to determine if claimant has established a change in an applicable condition of entitlement at 20 C.F.R. §§718.204 and 725.309(d).[8]

Employer next argues that the administrative law judge again erred on remand by giving greater weight to the positive May 2003 x-ray over the negative July 2001 x-ray in his consideration of the x-ray evidence on the merits at Section 718.202(a)(1). Such error, employer contends, contravenes the Board's directive to the administrative law judge in its previous decision to weigh the x-ray evidence consistent with the principles set forth by the United States Court of Appeals for the Sixth Circuit in *Woodward*, *supra*. Claimant asserts, in his response brief, that collateral estoppel precludes relitigation of the issue of whether claimant has pneumoconiosis by x-ray since Judge Jansen already made such a finding in his 1997 decision in claimant's previously denied 1994 claim.

In *Woodward*, the Sixth Circuit disapproved of the administrative law judge's reliance on the most recent x-rays of record, to the exclusion of the remaining earlier x-rays, where the most recent negative x-rays did not show a worsening in the claimant's condition, and were not reconciled with the earlier positive x-rays. The court in *Woodward* held that the administrative law judge misapplied the "later evidence" rule where pneumoconiosis is a progressive disease and the most recent negative x-rays do not show the expected deterioration in claimant's condition, but rather an improvement. Contrary to employer's contention, the administrative law judge did not misapply the "later evidence" rule in crediting the May 2003 x-ray, which he found to be positive, over the July 2001 x-ray, which he found to be negative, where the more recent May 2003 x-ray suggests a progression in the

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the Board, citing Section 725.309(d)(1), recognized that prior federal black lung claim evidence constitutes an exception to the evidentiary limitations at 20 C.F.R. §725.414. *Dempsey*, 23 BLR at 1-61.

[8] The fact that the newly submitted opinions of Drs. Bellotte and Zaldivar are based, in part, on prior claim evidence is relevant to the weight the administrative law judge may accord their opinions in determining whether a change in an applicable condition of entitlement is established.

worsening of claimant's condition.[9] *See Woodward, supra*. Consequently, we affirm the administrative law judge's finding of pneumoconiosis by x-ray at Section 718.202(a)(1), on the merits.[10]

[9] The administrative law judge found the July 2001 x-ray negative for pneumoconiosis because he credited the negative reading of that x-ray by the Board-certified radiologist and B reader, Dr. Wiot, over the positive reading of the B reader, Dr. Gaziano. 2005 Decision and Order on Remand at 20; Director's Exhibit 14; Employer's Exhibit 13. The administrative law judge found the May 2003 x-ray positive for pneumoconiosis because he credited the two positive readings by the Board-certified radiologists and B readers, Drs. Miller and Patel, over the sole negative reading by Dr. Spitz, also a Board-certified radiologist and B reader. 2005 Decision and Order on Remand at 20; Employer's Exhibit 23; Claimant's Exhibits 2, 3.

[10] Based on our affirmance of the administrative law judge's weighing of the x-ray evidence at 20 C.F.R. §718.202(a)(1), we need not address claimant's argument that collateral estoppel precludes the administrative law judge from reconsideration of whether claimant established the existence of pneumoconiosis by x-ray at Section 718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed in part and reversed in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge