BRB No. 07-0959 BLA

A.D.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REGENT ALLIED CARBON ENERGY	)	DATE ISSUED: 09/29/2008
	)	
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 - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2006-BLA-05911) of Administrative Law Judge Daniel F. Solomon 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). The administrative law judge accepted the parties' stipulation to thirty-five years of coal mine employment, as supported by the record, and adjudicated this claim for benefits, filed on July 25, 2005, as an initial claim under 20 C.F.R. Part 718. Decision and Order at 2-3. The administrative law judge found that the weight of the evidence was sufficient to establish the existence of

pneumoconiosis pursuant to 20 C.F.R. §718.202(a),[1] and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge failed to consider relevant evidence, or to properly evaluate the medical evidence, and therefore erred in finding the existence of pneumoconiosis and disability causation established pursuant to Sections 718.202(a)(4) and 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief unless specifically requested to do so.[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.[3] 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, 363 (1965).

In support of its appeal, employer first contends that the administrative law judge failed to consider Dr. Westerfield's supplemental medical report of April 23, 2007, noting: "Dr. Westerfield's 4/23/07 report was prepared, with leave from the administrative law judge, in response to the exhibits filed by the claimant at the hearing." Employer's Brief at 6. Asserting that the report constitutes evidence relevant to the issues of the existence of pneumoconiosis and disability causation, employer requests that the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c) be vacated and the case remanded to the administrative law judge for further consideration. *See* Employer's Brief at 6, 8-10, 12. Claimant submits that the administrative law judge's failure to consider Dr. Westerfield's report of April 23, 2007, "would not change

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[1] Specifically, the administrative law judged found that the existence of "legal pneumoconiosis" was established; "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). *See* Decision and Order at 14.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. Decision and Order at 2, 9; Director's Exhibits 4, 5; *see Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989)(*en banc*).

the overall decision of this case. The supplemental report does not provide new rationale that was not previously proffered by Dr. Westerfield." Claimant's Brief at 12-13.

The formal hearing transcript reflects employer's objection that it had not received several of claimant's exhibits,[4] as well as its objections to the administrative law judge's admission of claimant's exhibits, and the administrative law judge's determination to allow employer to respond thereto. Hearing Transcript at 17, 18, 20-21. Advising that employer would be filing a "follow up" report from Dr. Westerfield in response to claimant's exhibits, employer requested that Dr. Westerfield's supplemental medical report of February 19, 2007 be considered as rebuttal or rehabilitative evidence. Hearing Transcript at 36-37. Accordingly, at the conclusion of the hearing, the record was left open for sixty days to allow employer to respond to Claimant's Exhibits 1-4 and 6. Additionally, counsel were directed to file briefs on the issue of whether Dr. Westerfield's supplemental report of February 19, 2007 complied with the evidentiary limitations, and if so, in what evidentiary category the evidence should be considered. Hearing Transcript at 30-33, 36-40; *see* 20 C.F.R. §§725.414, 725.457.

On post–hearing brief, employer requested that the submissions from Dr. Westerfield be considered as a single medical report, inclusive of the two previously submitted reports,[5] together with the newly offered report dated April 23, 2007. Designating the April 23, 2007 medical report as "Employer's Exhibit 4," employer stated that the report "was prepared after reviewing several pieces of documentary evidence submitted by the claimant as exhibits…these included (Claimant's Exhibits 1, 2, 3, 4 and 6)." Employer's Post-Hearing Brief at 7. Claimant, on post-hearing brief, contended that Dr. Westerfield's supplemental reports of February 19, 2007 and April 23, 2007 should be disallowed under the evidentiary limitations at Section 725.414. Claimant's Post-Hearing Brief at 2-4.

Subsequently, in his Decision and Order, the administrative law judge designated Dr. Westerfield's supplemental report of February 19, 2007 as "EX3 (Rehabilitative Evidence)." *See* Decision and Order at 6, 10, 13; Employer's Exhibit 3. In his analysis

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[4] These exhibits were: Claimant's Exhibit 1, January 10, 2007 pulmonary function study; Claimant's Exhibit 2, Jenkins Hospital emergency room and treatment notes; Claimant's Exhibit 3, Dr. Warsy's treatment records; Claimant's Exhibit 4, Pikeville treatment records; Claimant's Exhibit 6, Dr. Rasmussen's February 1, 2007 medical report and x-ray of the same date. *See* Hearing Transcript at 16-20.

[5] Employer's evidence at hearing included two medical reports from Dr. Westerfield, that of October 10, 2006, and a supplemental report of February 19, 2007, Hearing Transcript at 36-37, designated as Employer's Exhibits 1 and 3. *See* Decision and Order at 5-6.

of the evidence, the administrative law judge made no mention of Dr. Westerfield's medical report of April 23, 2007, submitted and identified by employer post-hearing as "Employer's Exhibit 4," and referenced by both counsel in post-hearing briefs, although the report is present in the record file bearing a date stamp of May 15, 2007.

Based on our review of the record and the Decision and Order in this case, it is unclear whether Dr. Westerfield's report of April 23, 2007 was ever designated as an exhibit and admitted into the record. Notably, the administrative law judge specified: "[T]he employer also submits two medical reports prepared by Dr. Westerfield. The second is provided as rehabilitative evidence in response to hospital treatment notes submitted by claimant." Decision and Order at 13. The administrative law judge's summaries of Dr. Westerfield's evidence do not indicate whether the report of April 23, 2007 was admitted and perhaps inadvertently identified and considered under an incorrect exhibit number. *See* Decision and Order at 5-6, 10. The administrative law judge correctly identified Employer's Exhibits 1 and 3 as Dr. Westerfield's reports, without mention of a third report by Dr. Westerfield or any additional item of evidence identified as Employer's Exhibit 4. *See* Decision and Order at 5-6.

We reject claimant's argument that, because Dr. Westerfield's medical opinion set forth in the April 23, 2007 report was the same as that expressed in his earlier two reports, the administrative law judge's apparent failure to consider the report is immaterial. Even if the administrative law judge were to find that Dr. Westerfield's ultimate opinion did not change, the April 23, 2007 report is based on a review of virtually all of the claimant's medical evidence offered at hearing, including the most recent objective testing of record, and provides the physician's rationale for his conclusions. Both the comprehensive nature of Dr. Westerfield's April 23, 2007 medical report and the recency of the objective testing underlying his opinion are proper factors for consideration and assignment of probative value by the finder-of-fact. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Moreover, while an administrative law judge is allowed considerable leeway in procedural matters such as pre-hearing and admissibility rulings, *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004), the Board must strictly construe the integrity of the formal record on appeal. Accordingly, because the administrative law judge's duty to resolve evidentiary conflicts obliges him to not only consider the medical opinions provided by physicians, but to examine the underlying documentation and rationale supporting a relevant opinion, it cannot be said that the administrative law judge's omission here is harmless. Rather, "uncertainty is not proof, and claimant must prove entitlement." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 768, 21 BLR 2-587, 2-610 (4th Cir. 1999).

While the administrative law judge properly exercised his discretion in allowing the development of post-hearing evidence, his decision-making function further requires

him to identify and admit or exclude the resulting evidence. *See Dempsey*, 23 BLR 1-47. Moreover, identification and analysis of the evidence and consequent explanation of findings and conclusions is required for the Board's review, as the administrative law judge must review all relevant evidence of record. *See* Administrative Procedure Act (APA), 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Because the administrative law judge's Decision and Order does not encompass a discussion of all of the evidence, his resolution of the issues of the existence of pneumoconiosis and disability causation fails to satisfy the requirements of the APA. Accordingly, we vacate the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(c), and remand this case to the administrative law judge for an evidentiary ruling regarding the admissibility into evidence and designation of Dr. Westerfield's post-hearing report of April 23, 2007 pursuant to Section 725.414, followed by analysis and reconsideration of the entirety of the evidence of record in adjudicating the issues of the existence of pneumoconiosis and disability causation. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[6]

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[6] In view of our disposition herein, we need not address employer's additional arguments regarding the administrative law judge's weighing of the other medical opinions of record. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge