BRB No. 07-0980 BLA

K.P.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN COAL COMPANY	)	DATE ISSUED: 09/25/2008
	)	
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (05-BLA-5263) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a miner's 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 the miner with twenty-one years, one month, and one day of qualifying coal mine employment, and adjudicated this claim, filed on May 27, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated the responsible operator herein, and that the evidence was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

On appeal, employer challenges its designation as responsible operator, as well as the administrative law judge's findings that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and disability causation. Claimant has not filed a brief in this case. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that employer is the responsible operator.[1] Employer has replied in support of its position.

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.[2] 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 contends that the administrative law judge erred in finding it to be the properly designated responsible operator herein, and asserts that the administrative law judge failed to provide a rational explanation that comports with 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), for his analysis of the relevant evidence. Employer specifically argues that the administrative law judge erred in finding that claimant's last employer, Ken's Coal Company (Ken's), was not insured for federal black lung claims, and in finding that Ken's was therefore financially incapable of assuming liability for the claim. *See* 20 C.F.R. §725.494(e). Upon review of the

[1] Because no party challenges the administrative law judge's findings regarding the length of claimant's coal mine employment or that claimant is totally disabled 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, 1-711 (1983).

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's findings on the responsible operator issue cannot be affirmed.

The district director initially identified three potentially liable operators,[3] the most recent being Ken's. Decision and Order at 6; Director's Exhibit 35. The regulations provide, in pertinent part, that a potentially liable operator must be capable of assuming its liability for the payment of benefits, and such capability will be assumed if (1) the operator has an insurance policy that covers the claim, (2) the operator qualifies as a self-insurer, or (3) the operator possesses sufficient assets to secure the payment of benefits. *See* 20 C.F.R. §725.494(e)(1)-(3). The Director correctly maintains that once employer has been designated the responsible operator, employer bears the burden to show that a later employer qualifies as a potentially liable operator based on its possession of sufficient assets. Director's Brief at 5. We note, however, that the district director bears the initial burden to determine that employer does not have insurance or a self-insurance arrangement covering a claim.[4]

The record reflects that Ken's was insured by Employer's Insurance of Wausau (Wausau) from August 21, 1996 through August 21, 1997. While the record does not contain a copy of the insurance policy, claimant testified that the insurance coverage was workers' compensation insurance, while Wausau, as a potentially liable insurer, never indicated that Ken's was uninsured for black lung claims, but argued only that claimant was not covered under Ken's policy. Director's Exhibits 10, 32, 36, 44 at 13-14, 45. A memorandum written by the district director, based on a conversation with the miner, states that the "miner contends he . . . did not have federal black lung insurance," and

[3] Three employers were initially designated as potentially liable operators. The record reflects that claimant worked for H&D Coal & Trucking from 1975-1979; for Eastern Coal Company from 1979-1993; and for Ken's Coal Company (also known as Kenes Coal Company) from 1994-1996. Director's Exhibits 3, 10, 45. H&D Coal & Trucking and Ken's Coal Company were ultimately dismissed. Director's Exhibits 52, 53.

[4] The applicable regulation provides that: "In any case. . .in which the operator finally designated as responsible pursuant to §725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation. . . .[i]f the reasons include the most recent employer's failure to meet the conditions of §725.494(e), the record shall also contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of §725.494(e)(1) or (e)(2)." 20 C.F.R. §725.495(d).

another memorandum indicates that "Ken's is not insured for last coal mine employment date of 1996," and that "claimant is the owner of the company so it cannot be identified as the responsible operator." Director's Exhibit 10. The district director later stated in his Proposed Decision and Order that "[claimant] did not carry insurance for himself and the record confirms was [sic] black lung insurance exists to cover his employment." *See* 20 C.F.R. §725.495(d). Without an analysis or reference to the actual insurance policy, the district director appears to have credited claimant's assertion that no black lung insurance existed, and the administrative law judge, in like manner, credited claimant's testimony and the district director's findings without discussing the relevant conflicting evidence. Director's Exhibit 10; Decision and Order at 7.

The administrative law judge determined that Ken's was claimant's most recent employer, and that when the company last operated, it was insured by Wausau. Decision and Order at 6, 7; Director's Exhibits 33, 45. Relying on claimant's testimony, as the owner of Ken's, that the insurance coverage included workers' compensation but not black lung because "he didn't know about it," the administrative law judge found that "Ken's was not insured for federal black lung claims." Decision and Order at 7; Director's Exhibit 45. In view of the foregoing, however, we vacate the administrative law judge's finding that Ken's does not meet the requisite financial qualifications to assume payment of benefits, and the finding that employer is the properly designated responsible operator, and remand this case for the administrative law judge to reassess the evidence of record in determining whether the district director has met his initial burden of establishing that Ken's was not financially capable of assuming liability for the payment of benefits. *See* 20 C.F.R. §§725.494(e), 725.495(d).

After further consideration, if the administrative law judge determines that the Director has properly discharged his duty in designating employer as the responsible operator pursuant to Sections 725.494(e) and 725.495(d), then employer bears the burden pursuant to Section 725.495(c) of proving that a more recent employer possesses sufficient assets to secure the payment of benefits.

Turning to the merits of the case, employer challenges the administrative law judge's finding that the x-ray evidence and medical opinion evidence are sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4). Specifically, employer contends that the administrative law judge merely conducted a headcount of the x-ray evidence and erred in considering x-ray interpretations that either failed to meet the requirements of 20 C.F.R. §718.102(b) or exceeded the evidentiary limitations at 20 C.F.R. §725.414(a)(2)(i). Employer further objects to the administrative law judge's crediting of the medical opinions of record, and contends that the administrative law judge failed to perform a proper weighing of the evidence pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Some of employer's arguments have merit.

Initially, employer contends that the administrative law judge erred in considering Dr. Forehand's interpretation of a September 9, 2003 x-ray at Section 718.202(a)(1), and in crediting the interpretation as positive for pneumoconiosis. We agree. Although the interpretation was properly admitted into the record as part of claimant's treatment records, it does not meet the classification requirements of Section 718.102(b), and thus cannot constitute evidence of the presence or absence of pneumoconiosis.[5] *See Webber v. Peabody Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (Boggs, J., concurring), *aff'd on recon*. 24 BLR 1-1 (2007)(*en banc*). Employer also contends that claimant exceeded the evidentiary limitations on x-ray evidence pursuant to Section 725.414(a)(2)(i), by submitting three affirmative case x-ray interpretations by Drs. Alexander, Pathak, and Robinette, and employer asserts that the administrative law judge must exclude either the interpretation by Dr. Alexander or the interpretation by Dr. Pathak from the record. Claimant's Exhibits 1, 2, 5, 6. While we agree that claimant may not designate more than two affirmative case x-ray interpretations, we reject employer's argument that one of claimant's x-ray interpretations must be excluded, as claimant has not designated any rebuttal or rehabilitative evidence pursuant to Section 718.414(a)(2)(ii)-(iii), and the administrative law judge has broad discretion in procedural matters. *See generally Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). Accordingly, we vacate the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1), and instruct the administrative law judge, on remand, to conform the evidence to the limitations thereon at Section 725.414 and the evidentiary standards at Section 718.102(b), and to reevaluate the x-ray evidence of record in determining whether it is sufficient to meet claimant's burden at Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Because we are remanding this case for further consideration, we will specifically address employer's contention that the administrative law judge erred in considering Dr. Hippensteel's interpretation of the March 17, 2004 x-ray as positive for pneumoconiosis at Section 718.202(a)(1). We find no merit to this contention. The administrative law judge noted that Dr. Hippensteel found parenchymal abnormalities consistent with pneumoconiosis with a profusion of 1/2, but also indicated that the abnormality was "not suggestive of coal workers' pneumoconiosis." The administrative law judge correctly determined that the doctor's comments should properly be considered at Section 718.203(b) and not at Section 718.202(a)(1), as the doctor's comments called into question the etiology of the pneumoconiosis observed, rather than its existence. *See*

[5] Section 718.102(b) provides that, "A chest x-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconiosis (ILO-U/C 1971), or subsequent revisions thereof." 20 C.F.R. §718.102(b).

Cranor v. Peabody Coal Co., 22 BLR 1-1 (1999)(*en banc on recon.*); Decision and Order at 11-13; Director's Exhibit 9A. As discussed *infra*, however, we agree with employer's argument that the administrative law judge's consideration of Dr. Hippensteel's medical opinion and deposition testimony at Section 718.203(b) was flawed.

Next, at Section 718.202(a)(4), employer contends that the administrative law judge erroneously weighed the medical opinion evidence and failed to properly weigh all the relevant evidence together. After finding simple pneumoconiosis established based on the preponderance of the radiographic evidence, the administrative law judge credited the opinions of Drs. Forehand, Robinette, and Hippensteel, as being consistent with the radiographic evidence and the administrative law judge's finding of clinical pneumoconiosis, over the opinion of Dr. Fino, who diagnosed no clinical or legal pneumoconiosis. Decision and Order at 21. As we have vacated the administrative law judge's findings at Section 718.202(a)(1), however, we must also vacate his findings at Section 718.202(a)(4) for a reassessment of the medical opinions on remand. Additionally, we find merit in employer's specific arguments that the administrative law judge failed to explain the weight he assigned to the CT scan evidence, mechanically credited Dr. Forehand's opinion based on his status as claimant's treating physician, and improperly discounted the opinion of Dr. Fino as contrary to the objective evidence of record. While the administrative law judge summarized the CT scan evidence, Decision and Order at 14, he failed to include this evidence in his analysis or indicate the weight to which it was entitled. Similarly, after listing the factors to be considered in evaluating a treating physician's opinion pursuant to 20 C.F.R. §718.104(d), the administrative law judge credited Dr. Forehand's opinion as reasoned and consistent with the x-ray evidence and, without further discussion, stated that "Dr. Forehand is also [claimant's] treating physician." Decision and Order at 21. If, on remand, the administrative law judge finds that Dr. Forehand's opinion is entitled to enhanced weight, he must provide an explanation referencing the relevant factors relied upon at Section 718.104(d).

With respect to Dr. Fino's opinion, that claimant did not have clinical or legal pneumoconiosis, the administrative law judge found that it was based on "the absence of positive biopsy or chest x-ray evidence," and thus, was entitled to diminished probative value "due to inaccurate documentation." Decision and Order at 21. The record reflects, however, that Dr. Fino's diagnosis of idiopathic pulmonary fibrosis unrelated to coal mine employment, as supported by Dr. Hippensteel's opinion that claimant's x-ray abnormalities and pulmonary impairment were unrelated to coal dust exposure, was based on his examination of claimant, recorded histories, his objective testing of claimant, and his review of medical records and reports, including claimant's CT scans. Employer's Exhibits 5, 9. Consequently, on remand, the administrative law judge must reassess Dr. Fino's opinion, along with the remaining relevant evidence at Section 718.202(a)(4), provide a rationale for his credibility determinations that comports with the APA, and then weigh all probative evidence together at Section 718.202(a)(1)-(4) to

determine whether claimant has established the existence of pneumoconiosis by a preponderance of all the evidence. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174.

Employer next challenges the administrative law judge's finding of disease causality at Section 718.203(b), arguing that the administrative law judge provided an invalid reason for discounting Dr. Hippensteel's opinion and failed to address Dr. Fino's opinion. As we have vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a), we also vacate the administrative law judge's findings at Section 718.203(b), and remand for a reevaluation of the evidence thereunder, if reached. Additionally, we find merit in some of employer's specific arguments at Section 718.203(b).

In finding that employer failed to rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment, the administrative law judge determined that Dr. Hippensteel opined that the shape of the opacities seen on the March 17, 2006 x-ray were not suggestive of coal workers' pneumoconiosis. The administrative law judge concluded that Dr. Hippensteel's opinion was equivocal because the physician admitted that, while uncommon, irregularly shaped opacities can occur with coal workers' pneumoconiosis. Decision and Order at 22. Contrary to the administrative law judge's finding, however, Dr. Hippensteel's report and deposition testimony unequivocally ruled out coal dust exposure as the etiology of claimant's pneumoconiosis, and detailed the underlying documentation supporting his conclusion. Director's Exhibit 9A, Employer's Exhibit 8. As it appears that the administrative law judge selectively analyzed Dr. Hippensteel's opinion and failed to address Dr. Fino's corroborative opinion, he is instructed to reassess and weigh all relevant evidence on remand.

Lastly, on the issue of disability causation at Section 718.204(c), employer argues that the administrative law judge erred in relying on Dr. Robinette's opinion, as it was based on tests not admitted into evidence, and erred in crediting it over the opinions of Drs. Hippensteel and Fino. Decision and Order at 25-26; Claimant's Exhibit 5. Because the administrative law judge must reevaluate whether the evidence at Section 718.202(a) establishes the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). Contrary to employer's contention, however, we note that when a report is based, in whole or in part, on evidence not admitted into the record, an administrative law judge may exclude that report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the opinion is entitled. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006).

Accordingly, the administrative law judge's Decision and Order – Award of 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.

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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