BRB No. 07-1012 BLA

L.R.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 09/22/2008
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

L.R.P., Bluefield, West Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (2007-BLA-5327) of Administrative Law Judge Larry W. Price 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).[1] The administrative law judge accepted the parties' stipulation that claimant worked thirty-four years in coal mine employment, but he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's finding that he does not have pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter, indicating that he will not file a substantive response to claimant's appeal unless specifically requested to do so by the Board. However, the Director asserts that employer exceeded the evidentiary limitations by submitting more than two affirmative medical reports. The Director requests that if the Board remands this case for any reason, the administrative law judge "be instructed that one of employer's three medical opinions must be excluded from the record." Director's Brief at 1 n.1.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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, 363 (1965).

Initially, we will address the Director's assertion that employer submitted evidence in excess of the evidentiary limitations pursuant to 20 C.F.R. §725.414(a). On its evidence summary form, employer designated, in support of its affirmative case, a medical report from Dr. Zaldivar dated September 5, 2005, based on his examination of claimant on August 10, 2005, along with a medical report by Dr. Crisalli dated June 20, 2006, based on his review of the medical record. ALJ Exhibit 2; Director's Exhibit 14; Employer's Exhibit 3. Employer also designated, as a supplemental report, Dr. Zaldivar's June 14, 2006 report, which was based on Dr. Zaldivar's second examination

[1] Claimant filed his claim for benefits on April 1, 2005. Director's Exhibit 2. The district director awarded benefits, and pursuant to employer's request, a hearing was held on December 7, 2006. The administrative law judge issued his Decision and Order – Denying Benefits on August 16, 2007, which is the subject of this appeal.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

of claimant on June 14, 2006, along with his review of additional evidence. ALJ Exhibit 2; Employer's Exhibit 4. In reviewing Dr. Zaldivar's June 14, 2006 report, the administrative law judge stated:

> I find that the second examination exceeds the evidentiary limitations. Each party may submit two initial physician's opinions. In addition, supplemental reports may be admitted. A supplemental report is comprised of the physician's opinions in light of the rebuttal evidence . . . 20 C.F.R. §725.414(a)(3)(i) and (ii) (2001). Dr. Zaldivar's second report was based upon pulmonary function tests, arterial blood gas tests, an x-ray, a physical examination and additional rebuttal evidence offered by [claimant]. The pulmonary function test, blood gas studies, and the x-ray were all admitted into the record independently of his report. I do not find the actual physical examination to be necessary for Dr. Zaldivar to offer his opinion in light of further rebuttal evidence. Therefore, in my analysis, I will redact any comment pertaining specifically to [the] June 14, 2006 physical examination [of claimant].

Decision and Order – Denying Benefits (Decision and Order) at 7.

Employer does not challenge the administrative law judge's finding that Dr. Zaldivar's opinion, insofar as it was based on his "actual physical examination" conducted on June 14, 2006, is inadmissible. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm that finding. *Id*. Thus, the question before us is whether the administrative law judge acted properly in choosing not to exclude all of Dr. Zaldivar's June 14, 2006 report from the record. We conclude that the administrative law judge acted within his discretion in his treatment of Dr. Zaldivar's opinion.

The amended regulations do not address the appropriate treatment of a medical report that includes a physician's review of inadmissible evidence. In this case, the administrative law judge was presented with the issue of whether Dr. Zaldivar's entire June 14, 2006 opinion was tainted by his reference to inadmissible physical examination findings. In *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), the Board held that an administrative law judge should not *automatically* exclude a medical opinion without first ascertaining what portions, if any, are tainted by the doctor's review of inadmissible evidence. *Harris*, 23 BLR at 1-108. If the administrative law judge finds that the opinion is tainted, he is not required to exclude the report or testimony in its entirety.[3] Rather, the administrative law judge has options. *Id.* He may redact the objectionable content, ask

[3] Exclusion of evidence is disfavored. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting).

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 physician's opinion is entitled. *Id*.

Based on our review of Dr. Zaldivar's June 14, 2006 report,[4] we conclude that the administrative law judge acted within his discretion in finding that while Dr. Zaldivar's physical examination findings were inadmissible, the remainder of Dr. Zaldivar's opinion, excluding his reference to the physical examination, qualified as a rehabilitative report or supplemental report pursuant to Section 725.414(a)(3)(ii).[5] Decision and Order at 7. Furthermore, because *Harris* gives the administrative law judge broad discretion in the resolution of evidentiary matters, we find no error in the administrative law judge's decision to redact only those portions of Drs. Zaldivar's June 14, 2006 report that referenced his inadmissible physical examination of claimant. *See Harris*, 23 BLR at 1-108; *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). We therefore affirm the administrative law judge's evidentiary ruling. *Harris*, 23 BLR at 1-108.

We now proceed to the merits of the claim. In order to be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

---

[4] Dr. Zaldivar discussed his examination findings in the first portion of his June 14, 2006 report, and then outlined records provided by employer, which consisted of three x-ray interpretations, Dr. Rasmussen's June 29, 2005 examination report, and medical records from Bluefield Regional Hospital. Employer's Exhibit 4. Dr. Zaldivar commented on Dr. Rasmussen's findings and then stated that: "after reviewing the information [sent by employer] and having re-examined clamant, my opinion remains the same as previously given," which is that claimant "does not have coal workers' pneumoconiosis or any dust disease of the lung." *Id*.

[5] The regulation at 20 C.F.R. §725.414(a) provides 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) (emphasis added); *see also* 64 Fed. Reg. 54995 (Oct. 8, 1999) (recognizing that a physician who prepares a medical report may address medical reports prepared by other physicians that are in the record and in conformance with the limitations).

The regulation at Section 718.202(a) provides four methods by which a claimant may establish the existence of pneumoconiosis: 1) chest x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4), The United States Court of Appeals for the Fourth Circuit has held that all relevant evidence is to be considered together, rather than merely within discrete subsections of Section 718.202(a)(1)-(4), in determining whether a claimant has met his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Under Section 718.202(a)(1), the administrative law judge considered six readings of five x-rays dated June 29, 2005, August 10, 2005, June 14, 2006, August 28, 2006 and August 29, 2006.[6] As noted by the administrative law judge, the June 29, 2005 x-ray was read as positive by Dr. Rasmussen, a B reader, and as negative by Dr. Scatarige, a Board-certified radiologist and B reader. Director's Exhibits 13, 14. The August 10, 2005 and June 14, 2006 x-rays were each read only once, by Dr. Wheeler, a Board-certified radiologist and B-reader, as negative for pneumoconiosis. Director's Exhibit 14; Employer's Exhibit 8. An August 28, 2006 x-ray was read as positive for pneumoconiosis by Dr. Robinette, a B reader. Claimant's Exhibit 1. Lastly, in rebuttal of Dr. Robinette's positive reading, employer submitted a negative reading by Dr. Scatarige, of a film identified as dated August 29, 2006.[7] Employer's Exhibit 11.

In weighing the conflicting x-ray evidence, the administrative law judge properly accorded controlling weight to the four negative readings by physicians who were dually qualified Board-certified radiologists and B readers, over the two positive readings by the

[6] The administrative law judge excluded a positive reading by Dr. Patel of an x-ray dated September 29, 1999, noting that employer did not have the opportunity to rebut Dr. Patel's reading as the original film had been destroyed. This was proper. The regulations provide that an x-ray report is admissible only if "[t]he original film on which the [x]ray report is based . . . is [made] available to the Office [of Workers' Compensation Programs] or other parties." 20 C.F.R. §718.102(d).

[7] The administrative law judge noted that while there appears to be a typographical error as to the date of the x-ray that was read by Dr. Scatarige, "there is no circumstantial proof in the record to establish whether or not [the interpretations by Drs. Robinette and Scatarige] are indeed of the same x-ray," Decision and Order at 14 n.17. Notwithstanding, the administrative law judge noted that even if Dr. Scatarige's negative reading was excluded from consideration, he would still find the x-ray evidence insufficient to establish the existence of pneumoconiosis, as there would remain three negative readings by dually qualified radiologists compared to two positive readings by B-readers. *Id*.

physicians who were B readers.[8] Decision and Order at 14. Because the administrative law judge properly performed both a quantitative and qualitative analysis of the x-ray evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), as it is supported by substantial evidence. *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 14.

Because there is no biopsy evidence of record, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Decision and Order at 14. Additionally, because claimant is not eligible for any of the regulatory presumptions at 20 C.F.R. §§718.304, 718.305, 718.306, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). *Id*.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of four physicians regarding whether claimant has either clinical or legal pneumoconiosis.[9] The administrative law judge correctly noted that only two physicians, Drs. Yadav and Rasmussen, diagnosed clinical pneumoconiosis.[10] The administrative

---

[8] A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

[9] The administrative law judge noted that the record also includes a treatment note by Dr. Vasudevan, but that the doctor did not diagnose clinical or legal pneumoconiosis. Decision and Order at 15 n.19; Employer's Exhibit 2.

[10] Pursuant to 20 C.F.R. §718.201(a)(1):

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(1).

law judge properly gave Dr. Yadav's opinion little weight at Section 718.202(a)(4) because the administrative law judge found that Dr. Yadav "substantially relied on evidence that was not of record," namely a positive x-ray reading, in reaching his diagnosis of clinical pneumoconiosis. *See Harris*, 23 BLR at 1-108; Decision and Order at 15; Employer's Exhibit 1.

With respect to Dr. Rasmussen, the administrative law judge noted that he diagnosed clinical pneumoconiosis based on a positive x-ray and claimant's history of coal dust exposure. However, since the administrative law judge found Dr. Rasmussen's positive reading of the June 29, 2005 x-ray to be less credible, in view of a contrary negative reading of that same x-ray by a more qualified radiologist, we affirm his decision to accord Dr. Rasmussen's diagnosis of clinical pneumoconiosis less weight. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 15; Director's Exhibit 13.

In contrast, the administrative law judge permissibly credited the opinions of Drs. Zaldivar and Crisalli, that claimant does not have clinical pneumoconiosis, since he found their opinions to be reasoned and documented, and better supported by the weight of the negative x-ray evidence and the negative CT scan evidence. *See Clark*, 12 BLR at 1-151; Decision and Order at 15; Director's Exhibit 14; Employer's Exhibit 3. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4).

As to the issue of legal pneumoconiosis,[11] the administrative law judge weighed the opinion of Dr. Rasmussen, that the miner had emphysema due, in part, to coal dust exposure, against the contrary opinions of Drs. Zaldivar and Crisalli, that the miner's emphysema was due entirely to smoking. The administrative law judge determined that the opinions of Drs. Zaldivar and Crisalli were well-documented and well-reasoned.[12] Decision and Order at 17. Conversely, the administrative law judge found that some of Dr. Rasmussen's statements were too general in nature, while other conclusions reached

[11] 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).

[12] The administrative law judge noted that Dr. Crisalli reviewed a CT scan that was not of record. However, because Dr. Crisalli did not specifically refer to the CT scan in rendering his opinion, the administrative law judge permissibly found that "Dr. Crisalli's reliance on this CT scan does not diminish the credibility of his opinion." Decision and Order at 11 n.14; *see Harris*, 23 BLR at 1-108.

by Dr. Rasmussen, "although more specific to [claimant's] case are not based on the objective evidence of record." *Id*. The administrative law judge specifically explained:

> All three physicians agreed that [claimant] displayed impairment in blood gas transfer without the presence of a significant pulmonary obstruction. Dr. Rasmussen opined that such a pattern is indicative of damage caused by coal dust. He testified that "fibrosis in the lung tissue prevents airway and alveolar collapse that would occur with emphysema alone and that . . . is what's felt to be responsible for the frequent finding of impaired oxygen transfer either absent or in excess of airway obstruction." I find this statement to be equivocal and lacking support from the objective medical evidence in this case. I do not find the observation that *some authorities believe or feel* that fibrosis may be the cause of a similar impairment to be strong enough to carry [claimant's] burden of proof.

Decision and Order at 16-17 (emphasis in the original).

We affirm the administrative law judge's decision to assign less weight to Dr. Rasmussen's opinion because he found that Dr. Rasmussen's rationale for attributing claimant's emphysema to coal dust exposure was based on general statements in the medical literature, as opposed to specific objective evidence presented in the record. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc* on recon.); *Clark*, 12 BLR at 1-151. The administrative law judge correctly noted that there was no evidence of fibrosis in the record "to corroborate Dr. Rasmussen's theory that fibrosis is the cause of [claimant's] specific pattern of impairment." Decision and Order at 17 n.21.

Additionally, the administrative law judge properly found that, while Drs. Rasmussen, Zaldivar and Crisalli referenced medical literature for their opposing viewpoints, as to the etiology of claimant's emphysema, none of the specific journal articles cited by the doctors was of record. Decision and Order at 17. As such, the administrative law judge permissibly considered the qualifications of the physicians, and their experience with regard to pneumoconiosis, in resolving the credibility to be accorded the scientific explanations they provided. *Id*.

In weighing the qualifications of the physicians, the administrative law judge properly considered that Drs. Zaldivar and Crisalli were Board-certified in pulmonary medicine, while Dr. Rasmussen was Board-certified in internal medicine but not pulmonary diseases. *Id*. Considering the reasoning and documentation underlying the medical opinions, the administrative law judge properly exercised his discretion in finding that claimant failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *See 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, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-151; Decision and Order at 17.

Furthermore, the administrative law judge reasonably found that claimant failed to establish the existence of either clinical or legal pneumoconiosis by a preponderance of the evidence. *Compton*, 211 F.3d at 211, 22 BLR at 2-175. Thus, we affirm his finding that claimant failed to satisfy his burden of proof to establish the existence of pneumoconiosis at Section 718.202(a).

Claimant bears the burden of proof and, thus, the risk of non-persuasion if his evidence is insufficient to establish an element of entitlement. *See Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Insofar as claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

JUDITH S. BOGGS
Administrative Appeals Judge