BRB No. 06-0837 BLA

FRED RAINES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TALL TIMBER COAL COMPANY	)	
	)	
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS, INCORPORATED	)	DATE ISSUED: 08/28/2007
	)	
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 – Award of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Martin E. Hall (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

Employer appeals the Decision and Order on Remand – Award of Benefits (04-BLA-5227) of Administrative Law Judge Joseph E. Kane 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). This case is before the Board for the second time with respect to this subsequent claim.[1] In the original Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, credited claimant with twelve years of qualifying coal mine employment, and found that because claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), claimant established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Addressing the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total disability due to pneumoconiosis at §718.204(c). Accordingly, benefits were awarded as of October 1, 2001, the month in which the claim was filed.

Employer appealed and the Board affirmed, as unchallenged, the administrative law judge's determination that claimant established a change in an applicable condition of entitlement under Section 725.309, based on a finding of total respiratory disability. With respect to the evidentiary limitations set forth in 20 C.F.R. §725.414, the Board held that the administrative law judge permissibly admitted two supplemental opinions of Dr. Gaziano, dated December 10, 2002 and January 8, 2003, into the record. However, the Board held that the administrative law judge failed to identify what x-ray readings constituted affirmative and rebuttal evidence proffered by the parties in accordance with Section 725.414 and that his exclusion of Dr. Wiot's rebuttal x-ray readings was problematic. Consequently, the Board vacated the administrative law judge's finding pursuant to Section 718.202(a)(1) and instructed him to further explain his evidentiary rulings with respect to the x-ray evidence and, contingent on his determinations on remand, reconsider the admissibility of all or portions of the deposition testimony of Dr. Dahhan and the report and deposition testimony of Dr. Rosenberg. Lastly, the Board

[1] Claimant filed his first application for benefits on January 17, 1989; this claim was finally denied by Administrative Law Judge Samuel J. Smith because claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a), 718.203(b), but failed to establish total respiratory disability at 20 C.F.R. §718.204(c) (2000). Director's Exhibit 1. Claimant appealed and the Board affirmed the denial. *Raines v. Tall Timber Coal Co.*, BRB No. 92-0331 BLA (Nov. 27, 1992) (unpub.); Director's Exhibit 1. Claimant's second application, filed on September 22, 2000, was withdrawn at claimant's request, and as such, is considered never to have been filed. S*ee* 20 C.F.R. §725.306; Director's Exhibit 1. Claimant filed a third application on October 24, 2001, which is pending on appeal. Director's Exhibit 2.

held that the administrative law judge erred in according preclusive effect to the existence of pneumoconiosis determination that was made in claimant's 1989 claim. Hence, the Board instructed the administrative law judge to review all of the relevant evidence of record to determine whether claimant established the existence of pneumoconiosis under Section 718.202(a) and, if reached, disability causation under Section 718.204(c). *Raines v. Tall Timber Coal Co.*, BRB No. 05-0516 BLA (Feb. 16, 2006) (unpub.).

On remand, the administrative law judge identified the affirmative case and rebuttal x-ray evidence proffered by the parties, and excluded Dr. Wiot's readings of x-ray films dated September 13, 2002 and September 17, 2002, finding that these interpretations exceeded the evidentiary limitations at Section 725.414 because the films were contained in Dr. Hussain's treatment records, and were not proffered by claimant as part of his affirmative case. The administrative law judge then found that claimant established the existence of pneumoconiosis arising out of coal mine employment under Sections 718.202(a)(1) and 718.203, and total disability due to pneumoconiosis under Section 718.204(c). Accordingly, benefits were awarded as of October 1, 2001, the month in which the claim was filed.

Employer appeals, arguing that the administrative law judge failed to adhere to the remand instructions of the Board regarding his evidentiary rulings. Employer also challenges the administrative law judge's weighing of the conflicting medical evidence on the issues of the existence of pneumoconiosis and disability causation at Sections 718.202(a) and 718.204(c). Claimant has filed a response brief, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response letter, arguing that the administrative law judge's exclusion of Dr. Wiot's interpretations of the September 13, 2002 and September 17, 2002 x-rays from the record was proper. The Director takes no position regarding the remaining issues raised on appeal.

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 contends that the administrative law judge erred on remand by failing to discuss and clarify which x-ray reports were admitted into evidence in accordance with the Board's specific instructions. Employer argues specifically that the administrative

[2] Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

law judge failed to discuss two x-ray interpretations rendered by Dr. Wiot of films dated September 13, 2002 and September 17, 2002, which employer submitted as rebuttal evidence pursuant to Section 725.414(a)(3)(ii). Therefore, employer urges the Board to remand the case for the administrative law judge to address Dr. Wiot's rereadings. *See* Employer's Exhibit 2. Employer's arguments lack merit.

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414, 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function studies, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). The regulations further provide that, "notwithstanding the limitations" of Section 725.414(a)(2) and (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or a medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1); *see Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-73-74 (2004); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

In the Decision and Order on Remand, the administrative law judge determined that, in support of their affirmative cases, claimant proffered readings rendered by Dr. Baker and Dr. Miller of a film dated November 2, 2002, Director's Exhibit 23; Claimant's Exhibit 4, and employer proffered the reading of Dr. Rosenberg of a film dated March 13, 2002 and the reading of Dr. Dahhan of a film dated January 7, 2002, Employer's Exhibit 1; Director's Exhibit 17. Based on his determination that rebuttal evidence could only be submitted with respect to the aforementioned films, the administrative law judge properly admitted claimant's rebuttal evidence, consisting of Dr. Miller's readings of the January 7, 2002 and March 13, 2003 films, and employer's rebuttal evidence, consisting of Dr. Wiot's reading of the November 2, 2002 x-ray, into the record. The administrative law judge excluded all remaining x-ray interpretations proffered as rebuttal evidence by both parties because these readings did not respond to the opposing party's initially offered x-rays. 20 C.F.R. §§725.414(a)(2)(ii), (a)(3)(ii), (a)(4); Decision and Order on Remand at 2 n.1 [unpaginated]. As the administrative law judge found that the x-ray films dated September 13, 2002 and September 17, 2002 were

contained in treatment records[3] and were not read for the presence of pneumoconiosis, he permissibly excluded any rereadings of these films proffered by the parties as the regulations do not provide for rebuttal of treatment records.[4]

Employer additionally argues that, notwithstanding the Board's explicit remand instruction, the administrative law judge failed to adequately review the evidence of record in its entirety, particularly the medical evidence from the prior January 1989 claim, when he addressed the merits of entitlement, as he was required to do. Hence, employer asserts that the administrative law judge's mere reference to the previously submitted medical evidence was cursory and his resultant review of the evidence on the merits of entitlement was inadequate and unexplained. Employer's arguments have merit.

After finding that claimant affirmatively established the threshold requirement for further review of subsequent claims, *i.e.*, that one of the applicable conditions of entitlement had changed since the prior denial became final, the administrative law judge

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[3] A review of the record reveals that the original readings of these films are contained in the treatment records of Dr. Hussain: Dr. Chirico read the September 13, 2002 film and did not address the presence of pneumoconiosis and Dr. Blake read the September 17, 2002 film and, likewise, did not address the existence of pneumoconiosis. Director's Exhibit 21. In rebuttal, employer proffered the rereadings of Dr. Wiot, who opined that these x-rays were unreadable due to overexposure. Employer's Exhibit 2.

[4] Employer argues that because the administrative law judge erred in failing to address the admissibility of Dr. Wiot's x-ray interpretations and to clarify the x-ray evidence of record on remand, this error was significant because Dr. Wiot's interpretations, considered in conjunction with the negative readings of Drs. Dahhan and Rosenberg, establish that the x-ray evidence was negative for pneumoconiosis. Likewise, employer avers that the administrative law judge's failure to consider Dr. Wiot's readings may have affected his determination that the opinions of Drs. Dahhan and Rosenberg were entitled to less weight. As discussed previously, the administrative law judge not only clearly delineated which x-rays were contained in the evidentiary record as he listed the x-ray readings on remand, Decision and Order on Remand at 2-3 [unpaginated], but also adequately addressed the admissibility of Dr. Wiot's interpretations concerning the September 2002 films. Furthermore, we cannot ascertain, nor has employer specifically asserted, how Dr. Wiot's opinion that the September 13, 2002 and September 17, 2002 films were each unreadable due to overexposure would impact the administrative law judge's ultimate determination that the preponderance of the x-ray evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Accordingly, employer's contention is rejected.

was required to consider all of the evidence of record *de novo*, old and new, to determine whether claimant established all requisite elements of entitlement. Pursuant to Section 718.202(a)(1), the administrative law judge found that the weight of the newly submitted x-ray evidence established the existence of pneumoconiosis; however, the administrative law judge failed to weigh the old evidence *de novo*. Rather, the administrative law judge stated, "when this newly submitted evidence is compared with the old evidence contained in the 1989 claim which already established pneumoconiosis, it is clear that Claimant proves pneumoconiosis under both the new and old evidence." Decision and Order on Remand at 4-5 [unpaginated]. We note that the prior finding of pneumoconiosis from claimant's January 1989 claim, however, was based on the adjudicator's application of the "true doubt" rule, which is no longer valid. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Further, a review of the record demonstrates that the administrative law judge failed to list Dr. Gaziano's positive reading of a film dated June 6, 2002, which was admitted into the record, in his summary of the x-ray evidence and failed to consider it under his Section 718.202(a)(1) analysis. Director's Exhibit 10. As Dr. Gaziano's interpretation was submitted by the Director as part of his complete pulmonary evaluation of claimant, it should have been considered along with rebuttal evidence submitted by the parties, if any.[5] 20 C.F.R. §§725.406, 725.414.

Because the administrative law judge's Decision and Order on Remand does not encompass a discussion of all of the evidence, we vacate the administrative law judge's findings at Section 718.202(a)(1) and remand the case for a complete analysis, including his weighing of the entirety of the evidence on the merits. *See Director, OWCP v. Congleton*, 743 F.2d 428, 429-230, 7 BLR 2-12, 2-15 (6th Cir. 1984); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). If the administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a), he must reconsider his finding on disability causation pursuant to Section 718.204(c) since that finding is directly affected by his finding relevant to the existence of pneumoconiosis.[6]

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[5] A review of the record reveals that the x-ray film dated June 6, 2002 that was initially interpreted by Dr. Gaziano, was reread by Drs. Miller, Wheeler, Wiot, and Scott. Director's Exhibits 22; Claimant's Exhibit 7; Employer's Exhibit 1, 2. In addition, Dr. Barrett interpreted the June 6, 2002 for film quality only. Director's Exhibit 10.

[6] Employer also argues that the administrative law judge, when analyzing the medical opinion evidence with respect to disability causation, failed to comply with the Board's directive not to automatically exclude the medical opinions of Drs. Dahhan and

Accordingly, the Decision and Order on Remand – Award of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings 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

Rosenberg without first ascertaining what portions of the opinions were tainted by the review of inadmissible evidence. *See Raines*, BRB No. 05-0516 BLA, *slip op*. at 7. Employer avers that the Board instructed the administrative law judge to reexamine his exclusion of the opinions of Drs. Dahhan and Rosenberg on remand, and in so doing, employer asserts that the administrative law judge correctly found that Dr. Rosenberg's opinion was based on admissible evidence, but incorrectly found that Dr. Dahhan's opinion was based on inadmissible evidence due to Dr. Dahhan's consideration of evidence contained in claimant's withdrawn claim. We reject employer's contention because, in accordance with the Board's remand instructions, the administrative law judge addressed whether the opinions of Drs. Dahhan and Rosenberg were tainted, admitted both opinions into the record in their entirety, but found them entitled to diminished weight because they did not diagnose pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); Decision and Order on Remand at 5-6 [unpaginated]. The administrative law judge must reassess both opinions on remand, however, after readjudicating the issue of the existence of pneumoconiosis.