BRB No. 12-0278 BLA

ERMAL ADAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANADA COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/28/2013
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 Awarding Benefits (2006-BLA-06039) of Administrative Law Judge Theresa C. Timlin (the administrative law judge) rendered on a miner's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant filed his subsequent claim on August 23, 2002,[1] and the district director issued a Proposed Decision and Order awarding benefits on December 2, 2003. Director's Exhibits 2, 24. At employer's request, the case was forwarded to the Office of Administrative Law Judges (the OALJ) for a formal hearing, which was held on June 29, 2005, before Administrative Law Judge William Colwell. Subsequent to the hearing, claimant's representative was disqualified from appearing in a representative capacity before the OALJ. Consequently, by Order dated March 27, 2006, Judge Colwell remanded the case to the district director to allow claimant the opportunity to retain new representation and for further development of the evidentiary record. Judge Colwell determined that the lack of activity on the part of claimant's former representative prevented the parties from adequately developing the medical record. Director's Exhibit 34 at 227. Following submission of additional evidence by both parties, the case was again transferred to the OALJ for a formal hearing. Director's Exhibit 36. However, prior to the hearing, Administrative Law Judge Larry S. Merck noted that Dr. Hussain diagnosed emphysema but did not clearly identify its specific cause. Specifically, Judge Merck noted that the doctor diagnosed emphysema and pneumoconiosis due to tobacco abuse and coal dust

[1] Claimant filed an initial claim for benefits on April 9, 1987, which was denied by Administrative Law Judge Bernard J. Gilday, Jr. in a Decision and Order issued on March 7, 1989, based on his determination that claimant failed to establish a totally disabling respiratory impairment. Director's Exhibit A at 391, 685. Judge Gilday's denial of benefits was affirmed by the Board in a Decision and Order issued July 17, 1991, *Adams v. Canada Coal Co.*, BRB No. 89-1295 BLA (July 17, 1991)(unpub.), and the United States Court of Appeals for the Sixth Circuit by Decision and Order issued August 4, 1992, *Adams v. Canada Coal Co*., No. 91-3706 (Aug. 4, 1992, 6th Cir.) (unpub.). Director's Exhibit A at 340, 350. Claimant filed a second claim on November 24, 1993, which was denied by Administrative Law Judge Michael P. Lesniak in a Decision and Order issued on April 29, 1996, based on the determination that claimant failed to establish a totally disabling respiratory impairment. Director's Exhibit A at 6, 829. By Decision and Order dated October 18, 1996, the Board affirmed Judge Lesniak's denial of benefits. *Adams v. Canada Coal Co*., BRB No. 96-1011 BLA (Oct. 18, 1996) (unpub.); Director's Exhibit A at 1. No further action was taken until claimant filed his current claim.

exposure, but did not clearly identify the specific cause of claimant's emphysema. Director's Exhibit 39 at 463, 467. Because Dr. Hussain did not adequately address the elements of legal pneumoconiosis, i.e., whether claimant's emphysema arose out of, or was related to, coal dust exposure, and disability causation, Judge Merck found that Dr. Hussain's report did not constitute a complete pulmonary evaluation sufficient to satisfy the burden of the Director, Office of Workers' Compensation Programs (the Director) under 20 C.F.R. §725.406. *Id.* In an Order to Remand dated December 28, 2009, Judge Merck remanded the case to the district director with instructions to provide claimant with a complete pulmonary evaluation. *Id*. Claimant was evaluated by Dr. Rasmussen, at the request of the district director, in fulfillment of the duty of the Department of Labor (DOL) to provide claimant with a complete pulmonary evaluation under Section 725.406. Director's Exhibit 39 at 28. The case was then returned to the OALJ, and assigned to the administrative law judge. In a Decision and Order issued on January 23, 2012, the administrative law judge credited claimant with thirty years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, based on her finding that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Reviewing the claim on the merits, the administrative law judge determined that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits, commencing as of November 2002.

On appeal, employer contends that claimant should not have received a new pulmonary evaluation by Dr. Rasmussen, as Dr. Hussain's opinion was adequate to fulfill the DOL's obligation pursuant to Section 725.406. Employer requests that the case be remanded to the administrative law judge for consideration of the record, based on the original DOL evaluation, and without reference to Dr. Rasmussen's report and testing. Employer further contends that the administrative law judge erred in admitting the report of Dr. Rasmussen, arguing that the admission is in violation of the evidentiary limitations set forth at 20 C.F.R. §725.414, and the report must be excluded. With regard to the merits, employer contends that, because Dr. Rasmussen's report should have been excluded, the administrative law judge erred in his weighing of the medical opinion evidence of record. Employer otherwise contends that the administrative law judge erred in his weighing of the conflicting evidence of record; particularly in discrediting the opinions of Drs. Jarboe and Broudy. In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. Employer, in a reply brief to claimant's brief, reiterates its arguments that the administrative law judge erred in weighing the medical evidence of record.

The Director, in a response brief limited to the procedural issues, urges the Board to reject employer's contention that Judge Merck erred in ordering a new complete pulmonary evaluation. The Director further contends that the administrative law judge properly admitted the report of Dr. Rasmussen and that if she made any error, it was in also admitting the report of Dr. Hussain. The Director, however, argues that any error in admitting Dr. Hussain's report is harmless because the administrative law judge did not credit Dr. Hussain's opinion in finding that the evidence established the existence of legal pneumoconiosis and disability causation. Employer, in a specific reply brief to the Director's response, argues that the administrative law judge's use of Dr. Rasmussen's report is not harmless and that Dr. Hussain's report was the properly admitted DOL-sponsored evaluation. Employer also reiterates its argument that Judge Merck erred in remanding the case for a second pulmonary evaluation, as Dr. Hussain's evaluation satisfied the requirements of Section 725.406. Employer contends that the issue of whether an opinion is credible is separate from whether it addresses the necessary elements of entitlement.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc*., 380 U.S. 359 (1965).

Complete Pulmonary Evaluation

Initially, we address employer's contentions that Dr. Hussain's opinion was adequate to fulfill the DOL's obligation to provide claimant with a complete pulmonary evaluation pursuant to Section 725.406 and, therefore, that claimant should not have received a new pulmonary evaluation by Dr. Rasmussen. The initial DOL-sponsored pulmonary evaluation was performed by Dr. Hussain on November 13, 2002. Director's Exhibit 9. Dr. Hussain recorded a coal mine employment history of thirty years, and obtained a chest x-ray, a pulmonary function study, and a blood gas study. *Id*. Dr. Hussain read the x-ray as negative for simple pneumoconiosis, but positive for emphysema. *Id*. Dr. Hussain then diagnosed emphysema and pneumoconiosis due to tobacco abuse and coal dust exposure. *Id*. Dr. Hussain further opined that claimant was totally disabled, stating that claimant suffers from a severe impairment. *Id*. When asked to identify the extent to which pneumoconiosis contributed to the impairment, he wrote,

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit A at 683, 827.

"emphysema – 80%, pneumoconiosis – 20%." *Id.*

Judge Merck found that Dr. Hussain's opinion did not constitute a complete pulmonary evaluation because the doctor did not clearly address the cause of claimant's emphysema and, therefore, he found that Dr. Hussain's opinion is insufficient to determine the issue of legal pneumoconiosis. December 28, 2009 Order of Remand at 5. Judge Merck further noted that, because Dr. Hussain did not adequately explain his finding regarding the cause of claimant's emphysema, and, thus, whether it constitutes a finding of legal pneumoconiosis, Dr. Hussain's disability causation finding is unclear because if, "[c]laimant's emphysema does not constitute legal pneumoconiosis, it is unclear whether the 20% of [c]laimant's impairment due to pneumoconiosis has a material adverse effect on his pulmonary condition or whether it is a substantial contributing cause of his disability" pursuant to 20 C.F.R. §718.204(c)(1). *Id.* Judge Merck concluded that it was necessary to remand the case to the district director for a new pulmonary evaluation.[3]

On remand to the district director, claimant was sent to Dr. Rasmussen for a new DOL-sponsored evaluation, which was conducted on March 30, 2010. Director's Exhibit 39 at 28. Dr. Rasmussen concluded that claimant had both clinical and legal pneumoconiosis, and is totally disabled due, at least in part, to his coal dust exposure, stating that coal mine dust exposure and cigarette smoking are significant co-contributors to claimant's total disability.[4] *Id.* The case was returned to the OALJ and was assigned to the administrative law judge, who issued a Decision and Order Awarding Benefits on January 23, 2012, which is the subject of this appeal.

Employer asserts that Dr. Hussain's November 2002 opinion satisfies the DOL's obligation to provide claimant with a complete pulmonary evaluation, and that Judge Merck erred in remanding the case in order for claimant to receive a new pulmonary evaluation from a different physician. Employer's Brief in Support of Petition for

[3] Administrative Law Judge Larry S. Merck also noted that Dr. Hussain's Department of Labor sponsored pulmonary evaluation was administered in November 2002 and was over seven years old and, therefore, "the objective medical evidence recorded by Dr. Hussain no longer provides an accurate reflection of [c]laimant's current condition." December 28, 2009 Order of Remand at 5.

[4] In response to Dr. Rasmussen's evaluation, employer obtained a new evaluation of claimant by Dr. Broudy on September 30, 2010. Employer's Exhibit 22. Employer also submitted Dr. Jarboe's consultative opinions, which are based on his review of the medical evidence of record, including the report and testing associated with Dr. Rasmussen's opinion. Employer's Exhibits 11, 13, 15, 16, 21.

Review (Employer's Brief) at 13-17. Employer maintains that Dr. Rasmussen's report should, therefore, be stricken from the record. We disagree.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984). The United States Court of Appeals for the Sixth Circuit has recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, [the] DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. §923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) *specifically links each conclusion in his or her medical opinion to those medical tests.* Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, 24 BLR 2-199, 221 (6th Cir. 2009) (emphasis added). The court held in *Greene* that, while the physician who performed the DOL-sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given that the physician's report addressed all of the elements of entitlement, "even if lacking in persuasive detail." *Greene*, 575 F.3d at 642, 24 BLR at 2-221.

Employer maintains that because Dr. Hussain addressed all of the requisite elements of entitlement, his opinion satisfies the Director's obligation at Section 725.406, and the requirements of *Greene*. However, based on Judge Merck's rational determination that Dr. Hussain did not provide a complete pulmonary evaluation on the issues of legal pneumoconiosis and disability causation, because the doctor did not adequately discuss the cause of claimant's emphysema and whether it constituted a finding of legal pneumoconiosis, we affirm his finding that claimant did not receive a complete pulmonary evaluation. *See Greene*, 575 F.3d at 642, 24 BLR at 2-221; *R.G.B.*

[*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-146 (2009)(en banc). Thus, we reject employer's argument that the case must be remanded to the administrative law judge with instructions that she strike Dr. Rasmussen's report from the record and consider the record based on Dr. Hussain's original DOL evaluation, without reference to Dr. Rasmussen's report and testing.

Evidentiary Limitations

Employer further contends that the administrative law judge erred in admitting the report of Dr. Rasmussen and the accompanying objective testing, because the Director did not designate Dr. Rasmussen's report on its Evidence Summary Form. Specifically, employer contends that Dr. Hussain's report, originally designated by the Director as claimant's DOL-sponsored pulmonary evaluation was properly admitted and, therefore, the admission of Dr. Rasmussen's report and its accompanying objective testing into the record violates the evidentiary limitations regulations pursuant to 20 C.F.R. §725.414. *See* Employer's Brief at 18-21.

The Director, in response, urges the Board to reject employer's contention that the administrative law judge erred in admitting Dr. Rasmussen's report into the record in violation of Section 725.414. The Director contends that the administrative law judge properly admitted Dr. Rasmussen's report as the DOL-sponsored pulmonary evaluation, but that she erred in also admitting Dr. Hussain's report pursuant to Section 725.414. However, the Director argues that the administrative law judge's error in failing to exclude Dr. Hussain's report is harmless, because the administrative law judge did not credit Dr. Hussain's opinion regarding the issues of pneumoconiosis and disability causation, the only elements challenged in this appeal. Director's Response Brief at 11-12.

Based on the facts of this case, we reject employer's contention that the administrative law judge erred in admitting Dr. Rasmussen's report, and the associated objective testing, into the record as the DOL-sponsored pulmonary evaluation pursuant to Sections 725.406 and 725.414. In light of our holding that Judge Merck permissibly remanded the case for the district director to provide claimant with a complete pulmonary evaluation, which was performed by Dr. Rasmussen on March 30, 2010, the administrative law judge properly considered Dr. Rasmussen's report to be the properly admitted DOL-sponsored evaluation. *See* discussion, *supra*.

Employer, in challenging the admission of Dr. Rasmussen's report into the record, argues that, because the Director designated the report of Dr. Hussain on his Evidence Summary Form, as his DOL-sponsored evaluation pursuant to Section 725.406, the Director is bound by that designation and Dr. Rasmussen's report constitutes excessive evidence in violation of Section 725.414. However, the administrative law judge ruled,

at the formal hearing, that the Director's designation on the Evidence Summary Form is not dispositive because the Director was not participating in the case and, therefore, that the Director was not required to submit an Evidence Summary Form. Hearing Transcript at 12-15. Rather, the administrative law judge found that because the case was specifically remanded in 2009 for the district director to provide claimant with a new pulmonary evaluation under Section 725.406, and Dr. Rasmussen's report and objective testing were submitted to satisfy Judge Merck's Order, i.e., the properly submitted DOL evidence. *Id*. Moreover, the administrative law judge noted that both claimant and employer developed evidence in rebuttal to Dr. Rasmussen's report and, therefore, that neither party would be prejudiced by its designation as the Director's Section 725.406 complete pulmonary evaluation. *Id*. The administrative law judge, therefore, overruled employer's objection to the admission of Dr. Rasmussen's report pursuant to Section 725.414. *Id*. at 15.

Because the administrative law judge is given broad discretion in resolving procedural matters, including evidentiary issues, *see Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986), a party seeking to overturn an administrative law judge's evidentiary ruling must prove that the administrative law judge's action represented an abuse of his or her discretion. 20 C.F.R. §725.455(c); *see Clark*, 12 BLR at 1-153. We conclude that, on the facts presented in this case, employer has not demonstrated that the administrative law judge's admission of Dr. Rasmussen's report into the record was an abuse of her discretion. 20 C.F.R. §725.455. Rather, based on Judge Merck's 2009 Order of Remand, instructing the district director to provide claimant with a new pulmonary evaluation, the administrative law judge rationally found that Dr. Rasmussen's report, obtained in satisfaction of that Order, is the evidence that satisfies the DOL's obligation, and is the report admissible under Sections 725.406 and 725.414. Consequently, we reject employer's contention that the administrative law judge erred in accepting Dr. Rasmussen's report into the record.

However, because the Director is permitted to submit only one DOL-sponsored evaluation, the administrative law judge erred in also admitting the 2002 report of Dr. Hussain and the accompanying objective studies, as neither claimant, nor employer, designated it as a part of the affirmative case of either party. *See* 20 C.F.R. §§725.406, 725.414. The Director contends that, while the administrative law judge erred in admitting Dr. Hussain's report, such error is harmless because the administrative law judge did not credit Dr. Hussain's opinion on the elements of pneumoconiosis and disability causation, the only two elements challenged by employer on appeal. Director's Response Brief at 12. We cannot agree. While the Director is correct in stating that the administrative law judge did not credit Dr. Hussain's opinion in weighing the evidence pursuant to Sections 718.202(a) and 718.204(c), she did include the objective studies from Dr. Hussain's evaluation in her weighing of the x-ray evidence pursuant to 20

C.F.R. §718.202(a)(1), as well as the pulmonary function study and blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii), and she also relied exclusively on Dr. Hussain's opinion in determining the date from which benefits commence. Consequently, because the administrative law judge considered and relied upon evidence that was not properly admitted into the record, we vacate the administrative law judge's award of benefits and remand the case to the administrative law judge for reconsideration.

In light of the foregoing, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and 718.204. On remand, the administrative law judge must reconsider the merits of entitlement in this case, based only on that evidence properly before her. Additionally, if reached, the administrative law judge must reconsider the evidence with regard to the date from which benefits commence.

Accordingly, the administrative law judge's Decision and Order Awarding 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