BRB No. 13-0177 BLA

RONALD McCRAE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY FOUR MINING COMPANY	)	DATE ISSUED: 01/31/2014
	)	
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 on Modification - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Margaret M. Scully (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Sarah M. Hurley (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification - Awarding Benefits (2010-BLA-5028) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (2012)(the Act). This case, involving a miner's claim filed on November 21, 2003, is before the Board for the second time.[1]

In the initial decision, Administrative Law Judge Richard A. Morgan credited claimant with 19.99 years of coal mine employment pursuant to the parties' stipulation. Judge Morgan found that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202. Accordingly, Judge Morgan denied benefits.

Upon claimant's *pro se* appeal, the Board affirmed Judge Morgan's finding that pneumoconiosis was not established under 20 C.F.R. §718.202(a)(1)-(3), but vacated the his finding that legal pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4). Because Judge Morgan relied on his weighing of the medical opinions at 20 C.F.R. §718.202(a)(4) to conclude that pneumoconiosis was not a contributing cause of claimant's disabling respiratory impairment, the Board also vacated his findings at 20 C.F.R. §718.204(c), and remanded the case for further consideration. *McCrae v. Eighty-Four Mining Co*., BRB No. 06-0862 BLA (Aug. 30, 2007)(unpub.).

On remand, Judge Morgan again found that claimant failed to meet his burden of establishing pneumoconiosis pursuant to 20 C.F.R. §718.202, and denied benefits.

Upon claimant's request for modification, Director's Exhibit 96, the case was assigned to Judge Lesniak (the administrative law judge), whose Decision and Order, issued on December 14, 2012, is the subject of this appeal. At the hearing, employer submitted the medical reports of Drs. Fino, Pickerill, and Renn, and the deposition of Dr. Oesterling, who had provided a biopsy report. After the hearing, and upon further review of the record, the administrative law judge issued an Order on August 13, 2012, in which he determined that Dr. Oesterling's deposition exceeded the evidentiary limitations. The administrative law judge allowed employer twenty days to show good cause for the admission of the deposition or risk exclusion of the evidence from the record. Employer responded, arguing that good cause existed because Dr. Oesterling's deposition further enhanced and clarified the doctor's biopsy report.

In his Decision and Order on Modification dated December 14, 2012, the administrative law judge determined that employer failed to establish good cause for admitting Dr. Oesterling's deposition into the record. The administrative law judge also

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 3.

found that the evidence was sufficient to establish clinical pneumoconiosis at 20 C.F.R. §718.202, a change in condition at 20 C.F.R. §725.310, and disability causation at 20 C.F.R. §718.204(c). The administrative law judge further found that granting modification would render justice under the Act. Accordingly, the administrative law judge granted modification and awarded benefits.

On appeal, employer challenges the administrative law judge's evidentiary ruling, and contends that the administrative law judge erred in finding that the evidence established clinical pneumoconiosis pursuant to Section 718.202(a), and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's evidentiary argument. Employer has filed a reply 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).

Turning first to the evidentiary issue raised in this appeal, employer contends that the administrative law judge erred in finding that Dr. Oesterling's deposition testimony exceeded the evidentiary limitations set forth at 20 C.F.R. §§725.414, 725.457(c)(2). Alternatively, employer contends that the administrative law judge erred in finding that good cause for its admission was not established, because "Dr. Oesterling's testimony was rehabilitative evidence specifically allowed by Section 725.414." Employer also argues that the administrative law judge erred in rendering his evidentiary ruling in his Decision and Order, thus depriving employer of the opportunity to re-designate its evidence or offer other rehabilitative evidence by Dr. Oesterling. Employer's Brief at 23-28; Reply Brief at 2-5. Employer's arguments are without merit.

The regulations governing the development of evidence provide that a physician who has prepared a "medical report" may testify with respect to a claim. If a party has submitted fewer than two medical reports as part of its affirmative case, a physician who did not prepare a medical report may testify in lieu of such a medical report, and the testimony will be considered a medical report for the purposes of the evidentiary

[2] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as claimant was last employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 4-6.

limitations. 20 C.F.R. §§725.414(c),[3] 725.457(c)(2).[4] In a modification proceeding, a party is entitled to submit no more than one additional medical report in support of its affirmative case. 20 C.F.R. §725.310(b).

In this case, the administrative law judge properly found, and employer does not dispute, that Dr. Oesterling prepared a biopsy report, not a medical report. Decision and Order on Modification at 14; Employer's Brief at 24. Therefore, Dr. Oesterling's deposition testimony is considered a medical report for the purposes of the evidentiary limitations at Section 725.457(c)(2). Decision and Order on Modification at 15. Because employer had already submitted affirmative medical reports from Drs. Fino and Pickerill in its initial claim, and then submitted Dr. Renn's medical report on modification, the administrative law judge notified employer that Dr. Oesterling's deposition testimony exceeded the evidentiary limitations on medical reports, and would be excluded unless employer demonstrated that good cause existed for its admission. Decision and Order on Modification at 15, n.27; 20 C.F.R. §§725.414(a)(3)(i), 725.310. Noting that employer could have provided rehabilitative evidence in a form that did not run afoul of the evidentiary limitations, the administrative law judge acted within his discretion in rejecting employer's assertion that Dr. Oesterling's deposition testimony established good cause because it enhanced and clarified the doctor's biopsy report and/or constituted rehabilitative evidence. Decision and Order on Modification at 16; *see Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 n.18, 23 BLR 2-430, 2-461 (4th Cir. 2007); 64 Fed. Reg. 79993 (Dec. 20, 2000). As an administrative law judge is granted broad discretion in resolving procedural issues, we discern no abuse of discretion in his exclusion of Dr. Oesterling's deposition from the record. *See Consolidation Coal Co. v.*

[3] Section 725.414(c) provides, in pertinent part, that a physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this section. 20 C.F.R. §725.414(c).

[4] Section 725.457(c)(2) provides, in pertinent part, that in the case of a physician offering testimony relevant to the physical condition of the miner, such physician must have prepared a medical report. Alternatively, in the absence of a showing of good cause, a physician may offer testimony relevant to the physical condition of the miner only to the extent that the party offering the physician's testimony has submitted fewer medical reports than permitted by §725.414. Such physician's opinion shall be considered a medical report subject to the limitations of §725.414. 20 C.F.R. §725.457(c)(2).

Williams, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). We also discern no violation of employer's due process rights, as the administrative law judge provided employer with the opportunity to establish good cause or otherwise remedy the situation by re-designating its evidence or submitting a supplemental biopsy report prior to issuing his decision, consistent with the Board's holding in *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008). Accordingly, we affirm the administrative law judge's evidentiary ruling. *See Clark*, 12 BLR at 1-153.

Turning to the merits of entitlement, employer challenges the administrative law judge's findings that the x-ray evidence is in equipoise, and that the biopsy and medical opinion evidence is sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Specifically, employer contends that, in weighing the x-ray evidence, the administrative law judge erroneously failed to address Dr. Pickerill's reading of the November 7, 2005 film.[5] Employer also argues that, in finding the biopsy evidence positive for clinical pneumoconiosis, the administrative law judge failed to explain why he concluded that Dr. Green's qualifications were superior to those of Dr. Oesterling. Lastly, employer maintains that the administrative law judge "failed to address why he discredited the reports of Drs. Pickerill, Renn, and Fino." Employer's Brief at 28-30.

In weighing the x-ray evidence at Section 718.202(a)(1), the administrative law judge considered fourteen interpretations of seven x-rays and the qualifications of the readers, and acknowledged the superior credentials of the physicians who possessed dual qualifications as Board-certified radiologists and B readers.[6] The administrative law judge determined that the x-ray dated February 2, 2004 was negative for pneumoconiosis, as it was interpreted as negative by two dually qualified physicians, Drs. Thomeier and

[5] In its brief, employer initially argued that the administrative law judge excluded Dr. Abrahams's interpretation of the November 7, 2005 film, but later stated in its reply brief that Dr. Abrahams's reading had not been offered and that Dr. Pickerill's reading should have been considered. Reply Brief at 6. Employer designated Dr. Pickerill's interpretation on its evidence summary form. Director's Exhibit 70.

[6] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The term "B reader" refers to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. A dually-qualified physician is one who is both a Board-certified radiologist and a B reader. *See* 42 C.F.R. §37.51.

Hayes, and as positive by only one dually qualified physician, Dr. Gohel. The administrative law judge determined that the August 31, 2004 x-ray was positive, as it was interpreted as positive by dually qualified Dr. Gohel, and as negative by B reader Dr. Fino. The administrative law judge determined that the January 25, 2005 x-ray was negative, as it was interpreted as negative by dually qualified Dr. Hayes, and as positive by B reader Dr. Cohen. The administrative law judge determined that the x-ray dated September 14, 2005 was inconclusive for pneumoconiosis, as dually qualified Dr. Hayes interpreted it as negative and dually qualified Dr. Gohel interpreted it as positive. The administrative law judge found that the November 7, 2005 x-ray was positive, as it was interpreted as positive by Dr. Gohel without contradiction. Lastly, the administrative law judge determined that the November 17, 2009 and December 16, 2010 x-rays were inconclusive for pneumoconiosis, as they were both interpreted as negative by dually qualified Dr. Meyer and as positive by dually qualified Dr. Smith. Considering all of the above, the administrative law judge found the x-ray evidence overall to be in equipoise, "as there are an equal number of positive and negative x-rays, and the other interpretations are inconclusive." Decision and Order on Modification at 19.

A review of the record reveals that Dr. Pickerill's negative interpretation of the November 7, 2005 x-ray was properly admitted into the record as part of employer's evidence on modification. Director's Exhibit 70. Thus, employer correctly argues that the administrative law judge erred in failing to consider this evidence. However, as the administrative law judge permissibly credited the interpretations by dually qualified physicians over those by physicians with only B reader certification, the administrative law judge's failure to address B reader Dr. Pickerill's negative interpretation constitutes harmless error, since dually qualified Dr. Gohel interpreted the x-ray as positive. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, we affirm the administrative law judge's conclusion at Section 718.202(a)(1), that the x-ray evidence overall is in equipoise. Decision and Order on Modification at 19; *see* 20 C.F.R. 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

In evaluating the biopsy evidence at Section 718.202(a)(2), the administrative law judge considered the report of Dr. Oesterling,[7] who found no evidence of clinical

[7] Dr. Oesterling provided a microscopic description of claimant's 2007 biopsy, and found: 1) no true clinical or legal [coal workers' pneumoconiosis]; 2) changes due to coal dust inhalation purely those of a mild anthracotic pigmentation of the subpleura; 3) no interstitial change related to coal dust; 4) evidence of a cigarette induced respiratory bronchiolitis; 5) early panlobular pulmonary emphysema from tobacco smoke; 6) adenocarcinoma secondary to inhalation of tobacco smoke; and 7) if respiratory symptomatology is present it is due to emphysema and superimposed carcinoma, related to smoking not occupational exposure. Employer's Exhibit 1A.

pneumoconiosis, and the report of Dr. Green,[8] who diagnosed severe interstitial fibrosis associated with dust pigmentation, and noted micronodules consistent with simple micronodular coal workers' pneumoconiosis. Decision and Order on Modification at 20; Employer's Exhibit 1A; Claimant's Exhibit 2. While recognizing that Dr. Oesterling was Board-certified in clinical and anatomic pathology and in nuclear medicine, and that Dr. Green was Board-certified in anatomic pathology, the administrative law judge rationally concluded that Dr. Green possessed superior qualifications in the area of occupational diseases, as he has published extensively in this field, and he was the chief of pathology at the National Institute for Occupational Safety and Health (NIOSH), where he researched coal workers' pneumoconiosis. Decision and Order on Modification at 20, n.36. In view of Dr. Green's superior expertise in this area, the administrative law judge acted within his discretion in finding that Dr. Green's opinion was well-reasoned, persuasive and entitled to greater weight.[9] Decision and Order on Modification at 20; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). As his findings are supported by substantial evidence, we affirm the administrative law judge's conclusion that the weight of the biopsy evidence is positive for clinical pneumoconiosis at Section 718.202(a)(2).

At Section 718.202(a)(4), we reject employer's contention that the administrative law judge failed to explain why he discounted the medical opinions of Drs. Renn, Fino and Pickerill, that claimant does not have clinical pneumoconiosis. After finding clinical pneumoconiosis established by Dr. Green's biopsy report, the administrative law judge reviewed the conflicting medical opinions of record, and determined that, "considering their particular expertise in the area of black lung disease," the qualifications of Drs.

[8] Dr. Green reviewed the slides from the 2007 biopsy and diagnosed: 1) old granulomata; 2) severe panacinar emphysema; 3) severe interstitial fibrosis associated with dust pigmentation; 4) micronodules consistent with simple micronodular coal workers' pneumoconiosis; 5) severe vascular changes consistent with cor pulmonale; and 6) smokers' macrophages consistent with history of cigarette smoking. Claimant's Exhibit 2.

[9] Dr. Green additionally testified that he is a professor of pathology at the University of Calgary, teaching undergraduates and postgraduates and conducting research. From 1985-2005 he was chief of the autopsy service for the region, and now "is part of the team that does all the lung pathology consultations." His focus has been occupational lung diseases and asthma. Claimant's Exhibit 7 at 5-6, 11.

Green and Cohen[10] exceeded those of Drs. Renn, Fino and Pickerill. Decision and Order on Modification at 20. Noting that Dr. Green's opinion, that claimant suffers from the "interstitial fibrosis type" of pneumoconiosis, is bolstered by the opinion of Dr. Cohen, who explained that he and Dr. Green had co-authored an article addressing this kind of "pigmented interstitial fibrosis," the administrative law judge permissibly accorded "significant weight" to the opinions of Drs. Green and Cohen, based on the physicians' impressive qualifications and their review of the evidence as a whole, including the biopsy material. Decision and Order on Modification at 20-21; Claimant's Exhibit 7 at 20, Claimant's Exhibit 8 at 18. The administrative law judge noted that, contrary to his findings, Drs. Renn and Fino did not credit Dr. Green's pathological diagnosis of clinical pneumoconiosis,[11] and Dr. Pickerill did not review any of the newly submitted biopsy evidence.[12] Decision and Order on Modification at 21. Thus, the administrative law judge acted within his discretion in according little weight to the opinions of Drs. Renn, Fino and Pickerill, and finding clinical pneumoconiosis established pursuant to Section 718.202(a)(4). As substantial evidence supports his findings thereunder, they are affirmed, and we affirm the administrative law judge's conclusion that the weight of the evidence as a whole established the existence of clinical pneumoconiosis at Section 718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Employer next challenges the administrative law judge's finding of disability causation at Section 718.204(c), arguing that the administrative law judge erred in crediting the medical opinions of Drs. Green and Cohen over the contrary opinions of Drs. Renn, Fino and Pickerill. Noting that the administrative law judge did not find legal pneumoconiosis established, employer asserts that the opinions of Drs. Green and Cohen do not constitute evidence sufficient to support a finding of disability causation, as

[10] Dr. Cohen, who is Board-certified in internal medicine, pulmonary medicine, and critical care medicine, diagnosed interstitial pulmonary fibrosis significantly related to claimant's coal dust exposure. Claimant's Exhibit 8. The administrative law judge noted that "Dr. Cohen also has extensive professional experience consulting on [coal workers' pneumoconiosis] and has published and lectured widely on this topic. Decision and Order on Modification at 20, n.36; Director's Exhibit 61; Claimant's Exhibit 8 at 7.

[11] Neither Dr. Renn nor Dr. Fino found any evidence of clinical or legal pneumoconiosis. Employer's Exhibits 2, 3.

[12] Dr. Pickerill, who is Board-certified in internal medicine, pulmonary disease, and critical care medicine, diagnosed moderate COPD and emphysema attributable to smoking, but stated that he could not completely exclude the possibility that coal dust contributed to claimant's lung disease.

neither expert concluded that clinical pneumoconiosis alone is a substantially contributing cause of claimant's total respiratory disability pursuant Section 718.204(c).[13] Employer's arguments lack merit. The administrative law judge determined that Dr. Green found claimant's clinical pneumoconiosis to be a "major" cause of his pulmonary impairment, explaining in detail how the combination of claimant's lung fibrosis and emphysema had an adverse effect on lung function. Decision and Order on Modification at 24; Claimant's Exhibit 7 at 17, 64-65, 67. The administrative law judge further determined that Dr. Cohen agreed with Dr. Green's position, and "explained how the combination of the two processes caused [claimant's] low diffusion, which would test the ability of the lung to transfer gas." Decision and Order on Modification at 24; Claimant's Exhibit 8 at 22. As the administrative law judge found clinical pneumoconiosis established, he permissibly accorded significant weight to the opinions of Drs. Green and Cohen, and discounted the contrary opinions of Drs. Renn, Fino and Pickerill on the ground that they did not diagnose pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *Scott v. Mason Coal Company*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002). As substantial evidence supports the administrative law judge's weighing of the evidence, we affirm his finding that claimant established disability causation at Section 718.204(c), and a basis for modification at Section 725.310. Consequently, we affirm the administrative law judge's award of benefits.

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[13] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in [Section] 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) [h]as a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) [m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order on Modification – Awarding Benefits is affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge