

BRB No. 04-0455 BLA

JERRY DAVIDSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WHITAKER COAL CORPORATION)	DATE ISSUED: 10/31/2005
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER on
Party-in-Interest)	RECONSIDERATION

Appeal of Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration and Suggestion for Rehearing *En Banc* requesting that the Board reconsider its February 17, 2005 Decision and Order issued in the above captioned case, which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In that decision the Board held, in part, that the administrative law judge erred by failing to impose the evidentiary limitations set forth at 20 C.F.R. §725.414, although claimant

did not specifically object at the hearing to employer's submission of excessive evidence. *Davidson v. Whitaker Coal Corporation*, BRB No. 04-0455 BLA (Feb. 17, 2005) (unpub.). The Board also vacated the administrative law judge's denial of benefits, and remanded the case for further consideration of the medical evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id.*

Employer seeks reconsideration, arguing that claimant waived his challenge to the Section 725.414 evidentiary limitations because claimant did not specifically object at the hearing to the admission of employer's evidence, including Dr. Barrett's interpretation of the March 24, 2001 x-ray and Dr. Fino's report. Employer argues that the Board erred in holding that Dr. Barrett's x-ray reading and Dr. Fino's report exceeds the evidentiary limitations. Employer further requests that the Board instruct the administrative law judge on remand to address whether claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308.

On February 17, 2005, the Board requested that the Director, Office of Workers' Compensation Programs (the Director), file a brief addressing employer's argument that the evidentiary limitations are subject to waiver by the parties. The Director filed his brief in response to the Board's Order on June 6, 2005. The Director maintains that the evidentiary limitations are mandatory and cannot be waived. The Director, however, suggests that the issue is moot in this case because claimant properly raised below objections to employer's evidence as being in violation of the evidentiary limitations. Director's Brief at 2, n. 1. Claimant has not filed a brief.

We agree with the Director that, while claimant did not lodge a specific objection at the hearing to employer's evidence proffered in excess of the regulations, the record establishes that claimant did raise the issue of the evidentiary limitations in his post-hearing brief, page 3, and challenged employer's evidence as potentially exceeding the limitations of Section 725.414, while the case was pending before the district director. Director's Exhibit 29. We consider the statements by claimant below to be sufficient to serve as an objection to employer's evidence as having been proffered in excess of the evidentiary limitations and, therefore, direct the administrative law judge to properly consider on remand whether employer's evidence was admitted in compliance with the evidentiary limitations at 20 C.F.R. §725.414.¹

¹ We decline to address employer's general argument that the evidentiary limitations are not mandatory. Employer's Brief in Support of Motion for Reconsideration at 4-8.

Employer argues that the Board erred in ruling that Dr. Barrett's x-ray interpretation constitutes evidence which must count against employer's evidentiary submissions. We disagree. We note that at Director's Exhibit 37, the district director specifically advised employer's counsel that Dr. Barrett's reading was obtained in error and excluded from the record. The district director, however, noted that employer had the right to submit this reading to the administrative law judge and request that it be admitted into the record as employer's evidence. Director's Exhibit 37. Employer subsequently proffered Dr. Barrett's reading as Employer's Exhibit 1. Employer's argument on reconsideration is that Dr. Barrett's reading does not count against it at Section 725.414(a)(3)(i) since the reading was originally obtained by the district director in conjunction with 20 C.F.R. §725.406, the miner's complete pulmonary evaluation, and *must* be made a part of the record pursuant to 20 C.F.R. §725.421(b)(4). *See* 20 C.F.R. §§725.406, 725.414(a)(3)(i), 725.421(b)(4); Employer's Brief In Support of Motion for Reconsideration at 10. Contrary to employer's assertion, however, the March 24, 2001 x-ray did not originate from an examination sponsored by the Department of Labor. Claimant first submitted Dr. Baker's March 24, 2001 report and x-ray reading, which originated as an examination taken in conjunction with his state workers' compensation claim. The district director subsequently, and erroneously, had Dr. Baker's x-ray reread by Dr. Barrett. The district director erred in having the x-ray reread since there was already an identified responsible operator of record, and the Black Lung Disability Trust Fund was not going to be liable for benefits. In this case, employer cannot rely on 20 C.F.R. §725.406 to require admission of Dr. Barrett's reading, as the reading was not developed in conjunction with claimant's complete pulmonary evaluation. Because Dr. Barrett's x-ray reading was proffered as an employer's exhibit, the administrative law judge must consider on remand whether it was admitted in excess of the evidentiary limitations.

Notwithstanding, with respect to Dr. Fino's report, we agree with employer that our prior decision requires clarification. Employer argues that Dr. Fino's report was not admitted in excess of the evidentiary limitations because it constitutes rebuttal evidence and not one of its two permissible, affirmative medical reports. Contrary to employer's argument, the Board did not previously consider Dr. Fino's report as rebuttal evidence because it does not satisfy the definition of rebuttal evidence. Section 725.414(a)(3)(ii) provides that the responsible operator is entitled to submit, in rebuttal to claimant's case, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy report. *See* 20 C.F.R. §725.414(a)(3)(ii). Under this provision, rebuttal evidence does not include a consultative opinion, which reviews the entire medical record. Thus, we reject employer's assertion that it could proffer Dr. Fino's entire consultative medical report as rebuttal evidence. On remand, if employer wishes to have Dr. Fino's consultative report admitted into the record in its entirety, employer must demonstrate to the administrative law judge that good cause exists for its admission. *See* 20 C.F.R. §725.414(d). The Board notes, however, that Dr.

Fino's invalidation of a pulmonary function study or arterial blood gas study submitted by claimant in support of his affirmative case may constitute rebuttal evidence, and be properly considered by the administrative law judge.

Employer also argues that the Board erred in surmising in its Decision and Order that, using the administrative law judge's initial analysis, the record would contain two positive and one negative x-ray.² On further reflection, we agree that the Board's analysis was in error as it borderlines fact-finding, which is within the purview of the administrative law judge. We therefore clarify our instruction to the administrative law judge on remand and direct him to consider at 20 C.F.R. §718.202(a) whether Dr. Rosenberg was a B-reader. We further instruct the administrative law judge to reweigh the x-ray evidence relevant to whether claimant established the existence of pneumoconiosis.

Lastly, we agree with employer that the administrative law judge erred by not addressing whether claimant's subsequent claim was timely filed.³ The record reveals that employer raised the timeliness issue several times before the district director and also specifically requested that it be included as a contested issue when the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 22, 25, 32, 36. Because employer raised the timeliness issue below, and the issue has not previously been addressed by the administrative law judge, we instruct the administrative law judge on remand to consider whether claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308 and the decision of the United States Court of Appeals for the Sixth Circuit in *Consolidation Coal Co. v. Kirk*, 264 F. 3d 602, 22 BLR 2-288 (6th Cir. 2001).

² We retract the following sentence contained in the February 17, 2005 Decision and Order, page two, which reads: "Under the administrative law judge's initial analysis, taking into account the qualifications of the physicians, the x-ray evidence is not equally balanced as there would be two positive and only one negative x-ray for pneumoconiosis." *Davidson v. Whitaker Coal Corporation*, BRB No. 04-0455 BLA (Feb. 17, 2005) (unpub.).

³ Employer raised the timeliness issue before the Board in footnote 1 of its Response Brief. In the event of a remand, employer asked the Board to have the administrative law judge to consider whether claimant's subsequent claim was timely filed.

Accordingly, we grant employer's Motion for Reconsideration, deny employer's request for *En Banc* review, and modify our prior Decision and Order of February 17, 2005. We vacate the administrative law judge's Decision and Order – Denial of Benefits and remand this case for further consideration consistent with our original decision and the modifications contained herein.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge