

BRB No. 04-0812 BLA

JAMES E. HARRIS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
OLD BEN COAL COMPANY)	
)	
Employer-Petitioner)	DATE ISSUED: 06/29/2007
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	DECISION AND ORDER ON
)	RECONSIDERATION <i>EN</i>
Party-in-Interest)	<i>BANC</i>

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Michelle Gerdano and Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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, McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer and claimant have filed timely motions for reconsideration of the Board's Decision and Order in *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). 30 U.S.C. §921(b)(5); 20 C.F.R. §802.407. In *Harris*, the Board held that the administrative law judge acted within his discretion in according less weight to the opinions of Drs. Renn and Repsher

because they relied, in part, upon x-ray readings in excess of the limitations set forth in 20 C.F.R. §725.414. The Board also held that digital x-rays should be considered at 20 C.F.R. §718.107 rather than 20 C.F.R. §718.202(a)(1). With respect to the administrative law judge's consideration of the CT scan evidence, the Board cited its newly published decision in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(Boggs, J., concurring)(*aff'd on recon. en banc*, BLR , BRB No. 05-0535 BLA, Mar. 15, 2007), and instructed the administrative law judge to order the parties to select and designate, as affirmative or rebuttal evidence, one reading of each CT scan. On the merits of entitlement, the Board vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.304 and remanded the case to the administrative law judge for reconsideration.

Claimant challenges the Board's decision to vacate the administrative law judge's findings under Sections 718.202(a)(1), (a)(4), and 718.304. Claimant has also raised allegations of error regarding the Board's treatment of the digital x-ray issue and the Board's holding in *Webber*. Employer argues that the Board erred in holding that the administrative law judge acted within his discretion in according less weight to the opinions of Drs. Renn and Repsher because they relied, in part, upon x-ray readings in excess of the limitations set forth in Section 725.414. Employer maintains that the Board's resolution of this issue conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Durbin*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999). With respect to the issue of the digital x-ray, employer maintains that the Board erred in holding that administrative law judges should determine on a case-by-case basis whether digital x-rays represent a medically acceptable technology pursuant to Section 718.107. Finally, employer contends that the Board's holding in *Webber* is incorrect. The Director, Office of Workers' Compensation Programs (the Director), has responded to both motions and urges the Board to reject the contentions that the parties have raised regarding the administrative law judge's treatment of the opinions in which Drs. Renn and Repsher referred to the excess x-ray readings, the consideration of digital x-rays under Section 718.107, and the Board's holding in *Webber*.

We will first address claimant's arguments regarding the Board's decision to vacate the administrative law judge's findings on the merits under Sections 718.202(a)(1), (a)(4), and 718.304. Claimant alleges that the Board erred in vacating the administrative law judge's determination that Dr. Wiot's x-ray readings were not necessarily inconsistent with the positive x-ray readings for pneumoconiosis, in instructing the administrative law judge to reconsider the medical reports of Drs. Tuteur, Sanjabi, and Houser pursuant to Section 718.202(a)(4) on remand, and holding that the administrative law judge did not properly weigh the CT scan evidence under Sections 718.202(a)(4) and 718.304.

We decline to alter our prior holdings. For the most part, claimant's assertions merely represent contentions previously raised and rejected by the Board. There has been no intervening case law that would affect our previous disposition of claimant's contentions. In addition, contrary to claimant's suggestion, the Board did not indicate that the administrative law judge could not determine on remand that the reports of Drs. Tuteur, Sanjabi, and Houser support Dr. Cohen's diagnosis of pneumoconiosis pursuant to Section 718.202(a)(4). We merely stated that the administrative law judge must fully consider all aspects of these reports and set forth his findings in detail. Therefore, we adhere to our previous decision to vacate the administrative law judge's findings under Sections 718.202(a)(1), (a)(4) and 718.304 and remand the case to the administrative law judge for reconsideration.

We will now consider the arguments that the parties have raised regarding the Board's holding that readings of digital x-rays should be addressed at Section 718.107, rather than Section 718.202(a)(1). Claimant asserts that the Board erred in addressing this issue, as the parties did not raise it. Claimant also maintains that if it was properly raised, the Board should have held that readings of digital x-rays are to be weighed under Section 718.202(a)(1), particularly in this case where the digital x-ray was recorded on film. Employer contends that the Board erred in holding that, pursuant to Section 718.107, an administrative law judge must determine, on a case-by-case basis, whether a digital x-ray is medically acceptable and relevant to the merits of entitlement. According to employer, the acceptance of digital film technology is not in dispute.

We find no merit in claimant's and employer's allegations of error. On appeal, employer raised the issue of whether the administrative law judge acted properly in according little weight to Dr. Wiot's negative reading of a digital x-ray based upon Dr. Ahmed's statement that the x-ray could not be interpreted, as it was a digital x-ray. In order to assess whether the administrative law judge's action was rational and in accordance with law, the Board had to ascertain which regulation applied to the interpretation of digital x-rays and whether the administrative law judge's analysis was in compliance with that regulation. Accordingly, the Board did not err in addressing this issue.

The Board also did not err in holding that readings of digital x-rays should be addressed under Section 718.107 and that an administrative law judge must consider whether the readings of the digital x-ray that a party seeks to admit are "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits" pursuant to Section 718.107(b). Sections 718.102, 718.202(a)(1), and Appendix A contain numerous explicit references to "film" and set forth technical standards that apply only to x-rays recorded on film. Digital x-rays also do not fall within Section 718.101(b), which provides that evidence meets the applicable quality standards if it is in "substantial compliance" with those standards. 20 C.F.R. §718.101(b). In addition, because the plain

language of Section 718.107 establishes that it was promulgated to allow for the use of new technologies, digital x-rays constitute “other medical evidence” pursuant to Section 718.107(a).

Claimant’s assertion that because the digital x-ray in this case was printed on film, it is governed by Section 718.202(a)(1) and the accompanying quality standards, is also without merit. The salient point is that the x-ray image was recorded digitally, a method that is not addressed in Sections 718.102, 718.202(a)(1) or Appendix A to Part 718. Thus, the Board did not err in holding that digital x-rays must be addressed under Section 718.107, which was specifically designed to accommodate the development of new technology.

In addition, employer’s argument that the acceptance of digital x-ray technology is not in dispute is unpersuasive in light of the fact that the National Institute of Occupational Safety and Health has not approved the use of digital x-rays to diagnose pneumoconiosis, as quality standards applicable to this technology have not yet been developed by the International Labor Organization. In addition, when this case was before the administrative law judge, employer put forth no evidence regarding the extent to which digital x-rays are viewed as reliable diagnostic tools. Employer now refers to uncontradicted testimony in which Drs. Wiot and Parker attest to the broad acceptance of digital radiology, but the Board is not empowered to weigh this evidence, which is not in the record. The administrative law judge has the sole authority to render findings of fact and, therefore, must address this issue on remand based upon his consideration of any evidence submitted by employer, claimant, and the Director. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

With respect to the administrative law judge’s application of the evidentiary limitations in this case, employer argues that the Board erred in holding that the administrative law judge acted within his discretion in according less weight to the opinions of Drs. Renn and Repsher on the ground that they relied upon x-rays in excess of the evidentiary limitations set forth in Section 725.414. Employer maintains that the Board should have applied the holding of the Seventh Circuit court in *Durbin* and the requirements of Federal Rule of Evidence (FRE) 703, 20 C.F.R. §725.455(b), and 29 C.F.R. §18.703. Employer further alleges that the discretion accorded to the administrative law judge in resolving procedural issues does not include the authority to sanction a party for failure to comply with the evidentiary limitations.

In *Durbin*, the court held that, consistent with FRE 703, a medical opinion can be fully credited, even if the physician refers to items that are not in the record, “provided that they are the sort of thing on which a responsible expert draws in formulating a professional opinion.” 165 F.3d 1126, 1128, 21 BLR 2-538, 2-543. In that case, Dr. Fino

had referred to Dr. Naeye's review of an autopsy report, which was not in the record, in rendering an opinion as to the cause of a miner's totally disabling respiratory impairment. The rules and regulations to which employer refers mirror the court's holding in *Durbin*.¹

Employer has advanced no compelling argument for altering the Board's determination that the adoption of the evidentiary limitations set forth in Section 725.414 materially altered the context within which the Seventh Circuit decided *Durbin*, and rendered inapplicable rules that provide for the routine consideration of evidence that has not been admitted into the record. The Department of Labor explicitly adopted the evidentiary limitations for the purpose of promoting fairness and administrative efficiency by restricting the amount of evidence that the parties may submit. Requiring an administrative law judge to fully credit an expert opinion based upon inadmissible evidence could allow the parties to evade the limitations set forth in the new regulations, by submitting medical reports in which the physicians have reviewed evidence in excess of the evidentiary limitations.

In addition, contrary to employer's allegation, the Board has not created a rule that requires the administrative law judge to resolve this issue in a particular way, nor has the Board conferred upon the administrative law judge a power that he did not previously possess. The Board simply noted the traditional principle that resolving procedural and evidentiary issues falls within the broad discretion of the administrative law judge and held that, in this case, the administrative law judge did not abuse his discretion in light of the purpose and the text of the evidentiary limitations at Section 725.414. Therefore, we decline to alter our holding that the Seventh Circuit's decision in *Durbin* and the external evidentiary rules cited by employer are not controlling with respect to the issue of whether the administrative law judge acted properly in according little weight to the opinions of Drs. Renn and Repsher pursuant to Section 718.202(a)(4).

Finally, we reject any allegations of error regarding the Board's decision in *Webber* concerning the admission of CT scan results pursuant to Sections 718.107 and 725.414. In *Webber*, the Board addressed arguments identical to those raised by claimant

¹ Federal Rule of Evidence 703 provides that the data relied upon by an expert in forming an opinion need not be admissible if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" FED. R. EVID. 703. In 29 C.F.R. §18.703, which is part of the rules of practice and procedure regarding the conduct of hearings, the same rule regarding the testimony of experts is set forth. 29 C.F.R. §18.703. Pursuant to 20 C.F.R. §725.455(b), an administrative law judge is not bound by statutory rules of evidence. 20 C.F.R. §725.455(b).

and employer on reconsideration in this case. The Board recently reaffirmed its holding in *Webber*, that Section 718.107 permits the parties to submit one reading of each CT scan undergone by claimant in support of a party's affirmative case and that the reading need not be the original or first reading. *Webber v. Peabody Coal Co.*, BLR , BRB No. 05-0335 BLA (Mar. 15, 2007)(Decision and Order on Reconsideration *En Banc*).

Accordingly, we deny the motions for reconsideration submitted by claimant and employer and affirm the Board's Decision and Order of January 27, 2006. 20 C.F.R. §802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, J., concurring and dissenting:

I concur in the majority's disposition of the arguments regarding the Board's affirmance of the administrative law judge's decision to accord less weight to the opinions of Drs. Renn and Repsher pursuant to 20 C.F.R. §§725.414(a)(2)(i), (a)(3)(i),

and 718.202(a)(4) and regarding the Board's application of *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(Boggs, J., concurring), *aff'd on recon en banc*, BLR , BRB No. 05-0535 BLA, Mar. 15, 2007). I continue to dissent, however, from the majority's decision to instruct the administrative law judge to reconsider the digital x-ray evidence on remand pursuant to 20 C.F.R. §718.107. Although I agree that readings of digital x-rays should be addressed under Section 718.107, rather than 20 C.F.R. §718.202(a)(1), I would hold that employer waived consideration of Dr. Wiot's reading of the digital x-ray dated February 19, 2002 on remand. Employer failed to avail itself of the opportunity to argue before the administrative law judge that Section 718.107 applied to such evidence and, therefore, it is not now entitled to consideration of Dr. Wiot's reading. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369 (7th Cir. 1996).

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge