BRB No. 13-0302 BLA

BOBBY R. COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARIS MEADOWS COAL COMPANY	)	DATE ISSUED: 04/29/2014
	)	
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 Granting Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2011-BLA-5059) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) 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).

By Order issued on May 21, 2012, the administrative law judge addressed employer's objection at the hearing[1] to the admission into evidence of Claimant's Exhibit

[1] The parties agreed to a telephonic hearing. Decision and Order at 2.

4 as treatment records. Employer argued that Claimant's Exhibit 4 contained Dr. Forehand's pulmonary evaluation of claimant at pages 2-4, which employer maintained was a medical report that exceeded the evidentiary limitations. The administrative law judge held that the entirety of Claimant's Exhibit 4 was admissible as treatment records, and that employer was not permitted to have its expert, Dr. Fino, review this evidence on the ground that parties are not entitled to submit evidence in rebuttal of treatment records. The administrative law judge additionally declined to allow employer to submit evidence in rebuttal of Claimant's Exhibits 1-3, and held that digital x-rays were admissible only as "other medical evidence" pursuant to 20 C.F.R. §718.107.

In his Decision and Order issued on March 12, 2013, the administrative law judge credited claimant with 8.73 years of coal mine employment,[2] and adjudicated this miner's claim, filed on September 15, 2009, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of both legal pneumoconiosis and clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(c), as well as total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's decision on both procedural and substantive grounds. On procedural grounds, employer asserts that Dr. Forehand's pulmonary evaluation of claimant, with supporting documentation, constitutes a third medical report submitted in excess of the evidentiary limitations at 20 C.F.R. §725.414 and, as such, should have been excluded from the record. Alternatively, if the administrative law judge properly admitted this evidence into the record as "treatment records," employer maintains that the administrative law judge erred in failing to allow employer's expert the opportunity to review these records. Employer additionally asserts that the administrative law judge abused his discretion in excluding from consideration the digital x-rays submitted by employer. On the merits, employer challenges the administrative law judge's analysis in finding the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a), 718.203(c), and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of

[2] Claimant is unable to invoke the presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he did not establish fifteen years of coal mine employment. 30 U.S.C. §921(c)(4).

Workers' Compensation Programs, has declined to file a response brief. Employer has filed a reply brief in support of its position.[3]

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.[4] 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 issues, we reject employer's contention that the administrative law judge erred in excluding the digital x-ray interpretations from consideration. Contrary to employer's argument, the administrative law judge accurately noted that digital x-rays are "properly considered under 20 C.F.R. §718.107, where the administrative law judge must determine, on a case-by-case basis … whether the proponent of the x-ray evidence has established that it is medically acceptable and relevant to entitlement." Decision and Order at 29, *citing Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006)(en banc)(Boggs, J., concurring). As the record before the administrative law judge contained no evidence addressing whether the digital x-rays were medically acceptable, we discern no abuse of his discretion in excluding the digital x-rays from consideration. 20 C.F.R. §718.107(b).

Employer next contends that the administrative law judge erred in finding that Dr. Forehand's pulmonary evaluation of claimant was properly admitted as "treatment records" pursuant to Section 725.414(a)(4),[5] rather than as a third medical report submitted in excess of the evidentiary limitations. In this regard, employer argues that

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[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 8.73 years of coal mine employment, that employer is the responsible operator, and that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 20.

[5] Section 725.414(a)(4) provides that "notwithstanding the limitations" of Section 725.414(a)(2) and (a)(3), "any record of a miner's . . . medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4).

Dr. Forehand is a physician "frequently used by claimant's counsel" who is located approximately three hundred miles from claimant's home, and that his evaluation meets the definition of a medical report at Section 725.414(a)(1).[6] Alternatively, employer contends that, in the event that Dr. Forehand qualifies as a treating physician pursuant to Section 725.414(a)(4), the administrative law judge erred in failing to allow Dr. Fino the opportunity to review his treatment records. Employer's Brief at 16-21.

In determining that Claimant's Exhibit 4 was properly admitted into evidence as "treatment records," the administrative law judge noted that there was no indication that claimant was sent by his attorney to see Dr. Forehand, nor was there any correspondence between the doctor and claimant's counsel. Order at 3. The administrative law judge noted that Dr. Forehand referred to claimant as a new patient, examined claimant in a follow-up appointment one week later, completed paperwork to be compensated for the treatment, and scheduled a future appointment for claimant in three months. The administrative law judge concluded, therefore, that Dr. Forehand's evaluation was created in the course of claimant's medical treatment, and overruled employer's objection to the admission into evidence of Claimant's Exhibit 4. Citing *J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78 (2008), the administrative law judge further determined that employer was not entitled to submit rebuttal evidence to treatment or hospitalization records and, accordingly, denied employer's request for Dr. Fino to review Dr. Forehand's evaluation. Order at 4-5.

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 Claimant's Exhibit 4 into evidence as "treatment records" was an abuse of his discretion. 20 C.F.R. §§725.414(a)(4), 725.455. Consequently, we affirm the administrative law judge's evidentiary ruling in this regard. We find merit, however, to employer's contention that Dr. Fino should have been permitted to review Dr. Forehand's treatment records. While the administrative law judge is correct that the regulations do not provide for direct rebuttal of clinical tests contained in treatment records, the regulations do not prevent a

[6] Section 725.414(a)(1) provides that "a medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition . . . [and] may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1).

party from having one or both of its affirmative-case physicians review and evaluate all available admissible evidence, including treatment records, when preparing medical reports or offering deposition testimony. *Stowers*, 24 BLR at 1-86; *see* 20 C.F.R. §§725.414(a), 725.457(d), 725.458. Thus, due process requires that we vacate the administrative law judge's determination that employer's medical expert was not entitled to review Dr. Forehand's treatment records, and remand this case for the administrative law judge to allow Dr. Fino to review the records and submit a supplemental report. As consideration of this supplemental report may affect the administrative law judge's weighing of the evidence on the issues of pneumoconiosis and disability causation, we must also vacate the administrative law judge's findings at Sections 718.202, 718.203(c) and 718.204(c), for readjudication of these issues on remand.

Nonetheless, in the interest of judicial efficiency, we will address employer's contention that the administrative law judge erred in his analysis of the evidence relevant to the issues of clinical and legal pneumoconiosis at 20 C.F.R. §§718.202(a), 718.203, and disability causation pursuant to 20 C.F.R. §718.204(c). Employer maintains that the administrative law judge failed to weigh all relevant evidence in finding clinical pneumoconiosis arising out of coal mine employment established, and gave disparate treatment to the conflicting medical opinions in finding legal pneumoconiosis and disability causation established. Employer also asserts that the treatment records of Drs. Forehand and Hinson do not support a finding of legal pneumoconiosis; that the administrative law judge erred in crediting the opinions of Drs. Al-Khasawneh and Gallai without critically examining the bases for their conclusions; and that the administrative law judge's analysis fails to comport with the requirements of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer's Brief at 28-54; Reply Brief at 7-18. Some of employer's arguments have merit.

In concluding that claimant established clinical pneumoconiosis, the administrative law judge determined that a December 17, 2009 x-ray was positive for clinical pneumoconiosis, because two dually-qualified physicians[7] interpreted it as positive, while one dually-qualified physician interpreted it as negative, and all of the physicians possessed "substantial" or "impressive" credentials. Decision and Order at

[7] 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 terms "A reader" and "B reader" refer 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.

28; Director's Exhibits 12, 17; Claimant's Exhibit 1. The administrative law judge determined that the March 18, 2010 and August 16, 2011 x-rays were in equipoise, as one dually-qualified physician interpreted each x-ray as positive, and one dually-qualified physician interpreted each x-ray as negative. Decision and Order at 28; Director's Exhibits 15, 16; Claimant's Exhibit 2; Employer's Exhibit 5. With one positive x-ray and two x-rays in equipoise, the administrative law judge determined that the x-ray evidence established clinical pneumoconiosis. Finding that Drs. Al-Khasawneh, Gallai and Fino based their analysis regarding clinical pneumoconiosis "almost solely [on] reading one or more x-rays, whereas "the x-ray evidence has been independently weighed above," the administrative law judge found the medical opinion evidence to be of little value. Decision and Order at 31. On the issue of legal pneumoconiosis, the administrative law judge determined that claimant had a smoking history of 48.3 pack-years, and credited Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis as well-reasoned and well-documented. In so finding, the administrative law judge determined that the doctor did not rely upon an exaggerated coal mine employment history, but relied on qualifying pulmonary function study and arterial blood gas study results, and a smoking history of 46 pack-years, "similar" to the 48.3 pack-year history found by the administrative law judge. Decision and Order at 22, 32, 36. The administrative law judge also credited Dr. Gallai's diagnosis of legal pneumoconiosis "despite some flaws in analysis," specifically, the doctor's reliance on a "substantially different" smoking history of 35 pack-years. Decision and Order at 32, 36. The administrative law judge determined that Dr. Gallai performed a physical examination; obtained a pulmonary function study, an arterial blood gas study and an EKG; reviewed claimant's symptoms; and explained that "the dramatic decrease in [claimant's] pulmonary function over 17 months … would be more consistent with his coal dust exposure rather than his obstructive lung disease principally from cigarette smoking." Claimant's Exhibit 2 at 4; Decision and Order at 33, 36. Reviewing the treatment records, the administrative law judge determined that they are "consistent with a finding of legal pneumoconiosis," as Dr. Forehand "noted the presence of obstructive lung disease," and Dr. Hinson "repeatedly tied claimant's chronic obstructive pulmonary disease (COPD) to his history of coal dust exposure." Decision and Order at 38. Weighing the x-ray and medical opinion evidence together, the administrative law judge found both clinical and legal pneumoconiosis established. On the issue of disability causation, the administrative law judge credited the opinion of Dr. Al-Khasawneh, that claimant's clinical and legal pneumoconiosis substantially contributed to claimant's disabling respiratory impairment, and the opinion of Dr. Gallai, that claimant is totally disabled due to clinical pneumoconiosis. Decision and Order at 43.

We agree with employer that some of the administrative law judge's findings are flawed. On the issue of clinical pneumoconiosis, while the administrative law judge permissibly determined that the December 17, 2009 x-ray was positive and that the March 18, 2010 and August 16, 2011 x-rays were in equipoise, he failed to weigh the x-rays and CT scans contained in the treatment records with this evidence. Claimant's

Exhibit 4; Employer's Exhibit 1. Further, while the administrative law judge summarized Dr. Fino's analysis of the CT scan findings, Decision and Order at 31, he failed to weigh Dr. Fino's opinion, that they were inconsistent with pneumoconiosis, with all evidence relevant to the issue of clinical pneumoconiosis. Employer's Exhibit 4. On the issue of legal pneumoconiosis, the administrative law judge stated that Dr. Al-Khasawneh did not rely upon an exaggerated coal mine employment history. However, Dr. Al-Khasawneh did not specify the length of coal mine employment that he relied upon, but merely listed claimant's last four years with employer and referred to his review of Form CM-911a, dated July 3, 2009. Director's Exhibits 12, 15. Employer correctly notes that Form CM-911a lists four coal mine employers but does not reflect any dates of employment, Director's Exhibit 3, whereas Form CM-911, also dated July 3, 2009, lists a total of fourteen years of coal mine employment, Director's Exhibit 2. Thus, the administrative law judge's statement, that Dr. Al-Khasawneh did not rely upon an exaggerated coal mine employment history, is not supported by the record. Moreover, we agree with employer's argument that the administrative law judge failed to explain why Dr. Gallai's reliance on a reduced smoking history of 35 years did not affect the credibility of his opinion, that claimant's rapid deterioration of pulmonary function was more consistent with disease than smoking, when claimant's 8.73 years of coal mine employment ended in 1986 and his 48.3 pack-years of smoking ended in 2010. Claimant's Exhibit 2. Further, in finding that the medical opinions in the treatment records supported a finding of legal pneumoconiosis, the administrative law judge did not address whether Dr. Hinson's reliance on a coal mine employment history of twelve years affected the credibility of his opinion. Employer's Exhibit 1. Additionally, we note that Dr. Forehand's diagnosis of obstructive lung disease cannot support a finding of legal pneumoconiosis, as the doctor did not relate his finding to coal dust exposure. 20 C.F.R. §718.201(a)(2); Claimant's Exhibit 4. In view of the foregoing, on remand, the administrative law judge is instructed to reassess all evidence of record relevant to the issues of clinical and legal pneumoconiosis arising out of coal mine employment and disability causation; to subject all of the medical opinions to the same scrutiny; and to provide a thorough analysis and explanation for his credibility determinations. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 165 (1989); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181, 1-189. In weighing the medical opinions, the administrative law judge must specifically address to what extent Dr. Hinson's reliance on an inflated coal mine employment history, Dr. Al-Khasawneh's lack of a complete coal mine employment history, and Dr. Gallai's reliance on a reduced smoking history affects the credibility of their opinions.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and this case is remanded 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