BRB No. 03-0808 BLA

MATTHEW J. CHUPLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/30/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Rita Roppolo (Howard Radzely, Solicitor of Labor; Donald S. Shire, 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 and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5231) of Administrative Law Judge Janice K. Bullard denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] After crediting claimant with six years of coal mine employment,

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). Because this case was filed after January 19, 2001, all citations to the regulations refer to the amended regulations.

the administrative law judge found that the evidence was insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Although the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant further contends that the administrative law judge erred in finding that the evidence was insufficient to establish that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Claimant also challenges the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, wherein he argues that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis. The Director also requests that the Board instruct the administrative law judge, on remand, to review her finding regarding the length of claimant's coal mine employment.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Claimant contends that the administrative law judge erred in her consideration of the x-ray evidence. The record includes interpretations of two x-rays taken on September 20, 2001 and September 13, 2002. While Dr. Benjamin, a Board-certified radiologist, interpreted claimant's September 20, 2001 x-ray as negative for pneumoconiosis, Director's Exhibit 13, Dr. Cappiello, a B reader and Board-certified radiologist, interpreted this x-ray as positive for the disease.[3] Claimant's Exhibit 1. While Dr.

[2] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Dr. Navani, a B reader and Board-certified radiologist, interpreted claimant's September 20, 2001 x-ray for quality only, assigning the film a quality of 2. Director's Exhibit 12.

Navani, a B reader and Board-certified radiologist, interpreted claimant's September 13, 2002 x-ray as negative for pneumoconiosis, Director's Exhibit 31, two similarly qualified physicians, Drs. Smith and Ahmed, interpreted this x-ray as positive for the disease. Claimant's Exhibits 11, 21.

In her consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge stated that:

> The first X-ray of Claimant's chest was taken on September 20, 2001. It was interpreted on October 14, 2001, as completely negative by Dr. James K. Benjamin, M.D. (DX-13) and on January 20, 2001 by Dr. Shiv Navani (DX-12). Both of these physicians are Board certified radiologists/B-readers. DX-27, 28. Another BCR/BR found that the X-ray is positive for the presence of pneumoconiosis. CX-1; CX-2. The second X-ray was taken on September 13, 2002. It was interpreted as positive by two BCR/BRs, and as completely negative by another.
>
> I note that although all reading physicians of record are BCR/BRs, Dr. Navani's curriculum vitae lists many publications in the field of radiology. DX-27. Similarly, Dr. Ahmed has authored learned treatises in this field. CX-6. I find that overall, the physicians of record have the same credentials, and their qualifications cannot be the basis for giving weight to one reading over another. Overall, there are three positive readings and three negative readings. The earlier X-ray was found negative twice, and the later X-ray was found positive twice. I consider this evidence to be in equipoise. Therefore, I find that the X-ray evidence does not, by itself, support a finding that Claimant has pneumoconiosis.

Decision and Order at 5-6.

Claimant contends that the administrative law judge mischaracterized the x-ray evidence. We agree. Contrary to the administrative law judge's characterization, the record does not reveal that Dr. Benjamin, who read the September 20, 2001 x-ray as negative, is a B reader as well as a Board-certified radiologist. Moreover, the administrative law judge erred in stating that Dr. Navani rendered a negative interpretation of claimant's September 20, 2001 x-ray. Dr. Navani read this x-ray for quality purposes only. In light of these errors, we vacate the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and remand the case to the administrative law judge for further consideration. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Claimant further contends that the administrative law judge erred in excluding Dr. Thomas Miller's positive interpretation of claimant's September 13, 2002 x-ray from the record.[4] The administrative law judge found that Dr. Thomas Miller's x-ray interpretation was not admissible because it exceeded the evidentiary limitations of 20 C.F.R. §725.414.[5]

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406."[6] 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

At the hearing, claimant offered for submission into the record Claimant's Exhibits 11 and 21, interpretations of a September 13, 2002 x-ray rendered by Drs. Smith

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[4] The excluded x-ray evidence includes interpretations from Dr. Thomas Miller, Excluded Claimant's Exhibits 3, 19, 25, and Dr. Michael Miller. Excluded Director's Exhibit 14.

[5] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

[6] Pursuant to 20 C.F.R. §725.406, the Director provides a complete pulmonary evaluation of the miner, the results of which are "not . . . counted as evidence submitted by the miner under §725.414." 20 C.F.R. §725.406(b).

and Ahmed. Transcript at 7-8. Because claimant was limited to two interpretations of this x-ray, claimant withdrew Claimant's Exhibits 19 and 20, additional interpretations of this x-ray rendered by Drs. Thomas Miller and Cappiello. *Id.* at 8. The Director sought an extension of time in which to submit rebuttal evidence, a rereading of claimant's September 13, 2002 x-ray. *Id.* at 9-10. The administrative law judge also provided claimant with an additional fifteen days in which to submit rehabilitative evidence, if necessary. *Id.* at 10-12.

After the hearing, the Director, on March 11, 2003, submitted Dr. Navani's negative interpretation of claimant's September 13, 2002 x-ray. In response, on March 17, 2003, claimant submitted, as his rehabilitative evidence, Dr. Thomas Miller's positive interpretation of claimant's September 13, 2002 x-ray. In his post-hearing brief, the Director objected to claimant's submission of Dr. Thomas Miller's x-ray interpretation as rehabilitative evidence. The Director asserted that claimant was limited to the submission of "an additional statement from the physician who originally interpreted the x-ray." In his post-hearing brief, claimant argued that the Director's objection to his submission of Dr. Thomas Miller's x-ray interpretation was untimely. Claimant further requested an opportunity to submit a response from Dr. Smith if the administrative law judge ruled that Dr. Thomas Miller's x-ray interpretation was not admissible. In her Decision and Order, the administrative law judge excluded Dr. Miller's interpretation of claimant's September 13, 2002 x-ray, ruling that it did not constitute permissible "rehabilitative" evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). Decision and Order at 2.

We reject claimant's contention that that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid. In a recent decision, the Board rejected the argument that Section 725.414 conflicts with Section 923(b) of the Act. 30 U.S.C. §923(b); s*ee Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (*en banc*) (published). The Board also rejected the argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the Administrative Procedure Act (APA). *See Dempsey*, *supra*.

Claimant next notes that the administrative law judge, at the hearing, agreed that Dr. Thomas Miller's interpretation of claimant's September 13, 2002 x-ray could serve as rehabilitative evidence. At the hearing, the administrative law judge implied that claimant could use an x-ray reading rendered by Dr. Thomas Miller as rehabilitative evidence. For example, the administrative law judge admitted Dr. Thomas Miller's curriculum vitae into evidence "in case [claimant] want[ed] to use him for rehabilitative evidence." Transcript at 15. Claimant asserts that he relied upon the administrative law judge's statements in submitting Dr. Thomas Miller's x-ray interpretation as rehabilitative evidence.

We agree with the Director that the administrative law judge properly excluded Dr. Thomas Miller's positive interpretation of claimant's September 13, 2002 x-ray because it exceeds the evidentiary limitations set forth at 20 C.F.R. §725.414. In response to the Director's submission of Dr. Navani's x-ray interpretation, claimant was limited to the submission of "an additional statement from the physician who originally interpreted the chest [x]-ray…." 20 C.F.R. §725.414(a)(2)(ii). However, the Director notes that he has no objection to the administrative law judge, on remand, providing claimant with an opportunity to submit a statement from Dr. Smith, the physician who originally interpreted claimant's September 13, 2002 x-ray. In light of the administrative law judge's statements during the hearing that inadvertently led claimant to believe that he could submit Dr. Thomas Miller's interpretation of claimant's September 13, 2002 x-ray as rehabilitative evidence, and the fact that the Director has no objection, we instruct the administrative law judge, on remand, to provide claimant with an opportunity to submit a statement from Dr. Smith regarding his interpretation of the September 13, 2002 x-ray.

Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The record contains two medical reports. In a report dated October 16, 2001, Dr. Cali diagnosed asthma. Director's Exhibit 10. Dr. Kraynak prepared a report dated October 3, 2002, wherein he indicated that claimant had been under his care since September 13, 2002. Claimant's Exhibit 13. Dr. Kraynak stated that:

> Based upon [claimant's] history of having worked in the anthracite coal industry approximately eight years, the complaints with which he has presented, my physical examination, and the diagnostic studies performed, it is my opinion that he is totally and permanently disabled, secondary to Coal Workers' Pneumoconiosis. He is unable to lift, carry, climb steps or walk for any period of time. He must be able to sit, stand and lay at his leisure, secondary to his severe respiratory impairment.

Claimant's Exhibit 13.

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that Dr. Cali's opinion was better reasoned and supported by the objective record. Decision and Order at 8. The administrative law judge also credited Dr. Cali's opinion over that of Dr. Kraynak based upon Dr. Cali's superior qualifications. *Id.* The administrative law judge, therefore, found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 718.202(a)(4). *Id.*

Claimant argues that the administrative law judge erred in her consideration of Dr. Cali's opinion.[7] Claimant contends that the administrative law judge failed to consider that Dr. Cali based his opinion on evidence not admitted into the record; specifically, Dr. Michael Miller's negative interpretation of claimant's September 20, 2001 x-ray. As claimant notes, Dr. Michael Miller's interpretation of claimant's September 20, 2001 x-ray was not admitted into the record.

The Director accurately notes that Dr. Cali did not specifically identify the x-ray interpretation upon which he relied in rendering his opinion. *See* Director's Exhibit 10. However, on his x-ray report, Dr. Michael Miller indicated that his interpretation of claimant's September 20, 2001 x-ray was ordered by Dr. Cali. *See* Excluded Director's Exhibit 14. Thus, it was reasonable for the administrative law judge to find that Dr. Cali relied upon Dr. Michael Miller's interpretation of claimant's September 20, 2001 x-ray. *See* Decision and Order at 7. Thus, Dr. Cali's failure to diagnose coal workers' pneumoconiosis could have been based in part upon the fact that Dr. Michael Miller interpreted claimant's September 20, 2001 x-ray as revealing "no active disease." *Id.*

Section 725.414 provides that any x-ray referenced in a medical report must be admissible. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). However, as the Board recently noted, the regulations "do not specify what is to be done with a medical report or testimony that references an inadmissible x-ray." *See Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (*en banc*) (published).[8] Consequently, we

[7] Although Dr. Cali diagnosed asthma, he did not address the etiology of this disease. Director's Exhibit 10. Consequently, Dr. Cali's opinion of asthma is insufficient to support a finding of "legal" pneumoconiosis. However, because Dr. Cali did not diagnose "clinical" pneumoconiosis, his opinion arguably supports an inference that claimant does not suffer from this form of pneumoconiosis, thereby calling into question Dr. Kraynak's diagnosis of coal workers' pneumoconiosis.

[8] In *Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (*en banc*) (published), the Board addressed an employer's contention that the administrative law judge had erred in declining to consider a physician's opinion regarding the existence of pneumoconiosis because it was based upon an x-ray reading that was excluded pursuant to Section 725.414 (in *Dempsey*, the physician's own interpretation of a July 19, 2001 film). The administrative law judge had declined to consider the physician's opinion, that the miner did not have coal workers' pneumoconiosis, because the administrative law judge found that the opinion was "inextricably tied" to the excluded x-ray interpretation. *Id.* The Board noted that its review of the physician's opinion reflected that his opinion regarding the absence of coal workers' pneumoconiosis was closely linked to the excluded x-ray interpretation. *Id.* On these facts, the Board held that the administrative law judge did not abuse his discretion

vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and instruct the administrative law judge, on remand, to address the significance of Dr. Cali's reliance upon an inadmissible x-ray report.[9]

On remand, should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) or (a)(4), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Claimant also contends that the administrative law judge erred in finding that claimant failed to establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Because the administrative law judge credited claimant with only six years of coal mine employment, claimant has the burden of establishing, by competent evidence, that his pneumoconiosis arose out of his coal mine employment. In summarily concluding that claimant had not established this element of entitlement, *see* Decision and Order at 9, the administrative law judge failed to explain why Dr. Kraynak's opinion, that claimant's pneumoconiosis arose out of his coal mine employment, was insufficient to establish this element of entitlement. Consequently, the administrative law judge's analysis of the evidence does not comply with the requirements of the APA, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light*

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in declining to consider the physician's opinion regarding the existence of pneumoconiosis, when he found the opinion "inextricably tied" to an inadmissible x-ray reading. *Id.*

[9] The administrative law judge also failed to explain his basis for finding that Dr. Cali's opinion was "better reasoned and supported by the objective record." Decision and Order at 8. The administrative law judge erred to the extent that he based this finding upon the results of claimant's pulmonary function study. Pulmonary function and arterial blood gas studies are not generally considered to be diagnostic of the presence or absence of pneumoconiosis. *See generally Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984); *Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983); *see also Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984) (Pulmonary function studies and arterial blood gas studies, while relevant to the presence or absence of a respiratory impairment, are not determinative of causation.). Thus, the administrative law judge erred to the extent that he credited Dr. Cali's opinion because it was supported by claimant's pulmonary function study results.

Co., 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge finding pursuant to 20 C.F.R. §718.203(c).

Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In her consideration of whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis, the administrative law judge stated that:

> Dr. Cali attributed [claimant's] total disability to asthma, while Dr. Kraynak opined that the cause is coal workers' pneumoconiosis. I find both opinions troubling for lack of thoroughness. Dr. Kraynak's opinion is belied by a brief coal mine employment history that ended in 1952 at the latest. It fails to reconcile the nonspecific finding of wheezing as being caused by pneumoconiosis as opposed to asthma or any other condition. He does not address the fact that Claimant's pulmonary function studies improved after the application of bronchodilators. He further fails to rule out Claimant's ten-year smoking history as the etiology of his impairment or to address the smoking history at all. On the other hand, Dr. Cali's attribution of disability to asthma is supported by the findings on physical examination and objective medical test results. Consequently, given the evidence at hand and its shortcomings, I find that Dr. Cali's conclusion is more consistent with the totality of the evidence.
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> Accordingly, Claimant has not shown that his disability is caused by pneumoconiosis. I find that claimant has not established this element of entitlement.

Decision and Order at 9.

Claimant contends that the administrative law judge failed to provide an adequate explanation for rejecting Dr. Kraynak's opinion regarding the etiology of claimant's pulmonary disability. The Director also contends that the administrative law judge erred in his consideration of Dr. Kraynak's opinion pursuant to 20 C.F.R. §718.204(c), stating that:

> In her decision, the [administrative law judge] indicated her criticism of Dr. Kraynak's opinion in light of the fact that the pulmonary function study results improved after administration of bronchodilators and the fact that [c]laimant's coal mine work occurred years earlier. This is inappropriate. Without a doctor's opinion discussing the significance of

> improved study results or long-ceased coal mine work, a fact finder may not put her/himself in the place of a doctor and do the same.

Director's Brief at 5 n.1.

We agree with the Director. The interpretation of medical data is a medical determination and an administrative law judge may not substitute his opinion for that of a physician. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). We, therefore, vacate the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[10]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the 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

[10] We need not address the Director's argument regarding the administrative law judge's length of coal mine employment finding. In a response brief, a party is limited to raising arguments which either respond to arguments raised in petitioner's brief or support the decision below. 20 C.F.R. §802.212(b). The Director's argument regarding the length of claimant's coal mine employment neither responds to arguments raised in claimant's brief nor supports the administrative law judge's decision. Consequently, this argument is not properly before the Board. *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994); *Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993); *King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983).