BRB No. 06-0828 BLA

FREDDIE D. JARRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 08/27/2007
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 Remand of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Ranae Reed Patrick (Legal Clinic, Washington and Lee University), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; 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:

Employer appeals the Decision and Order on Remand (03-BLA-5265) of Administrative Law Judge Daniel L. Leland awarding 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). This case involves a miner's claim filed on September 11, 2001, and is before the Board for the second time. In the initial decision, the administrative law judge, after crediting claimant with thirty-four years of coal mine employment, found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated December 29, 2005, the Board rejected employer's arguments challenging the validity of the evidentiary limitations set forth at 20 C.F.R. §725.414. *Jarrell v. Consolidation Coal Co.*, BRB No. 05-0338 BLA (Dec. 29, 2005) (unpub.). The Board also affirmed the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[1] *Id.* However, the Board agreed with employer's contention that the administrative law judge did not adequately consider the CT scan evidence. *Id.* The Board also vacated the administrative law judge's findings that the medical opinion evidence established the existence of legal and clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* In light of its decision to vacate the administrative law judge's findings regarding the CT scan evidence and the medical opinion evidence, the Board also vacated the administrative law judge's Section 718.202(a) finding and instructed the administrative law judge to consider all of the relevant evidence pursuant to 20 C.F.R. §718.202(a) on remand. *Id.* The Board also vacated the administrative law judge's disability causation finding pursuant to 20 C.F.R. §718.204(c). *Id.*

On remand, the administrative law judge noted that the Board had affirmed his finding that the x-ray evidence established the existence of pneumoconiosis. Although the administrative law judge found that the CT scan evidence was negative for pneumoconiosis, he accorded the CT scan evidence diminished weight due to its less-than-optimal resolution. The administrative law judge also accorded diminished weight to the medical opinion evidence as a whole because each physician based his opinion upon an incomplete review of the x-ray evidence of record. Consequently, the administrative law judge found that the medical evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that claimant's total disability was due to legal

[1] The Board also affirmed the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). *Jarrell v. Consolidation Coal Co.*, BRB No. 05-0338 BLA (Dec. 29, 2005) (unpub.).

pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the validity of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer also argues that the administrative law judge erred in finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also contends that the administrative law judge erred in his consideration of the CT scan evidence. Employer further argues that the administrative law judge erred in finding that the medical evidence established the existence of clinical and legal pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that the Board's previous holding in this case, upholding the validity of the evidentiary limitations set forth at 20 C.F.R. §725.414, constitutes the law of the case.

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).

The Validity of the Evidentiary Limitations at 20 C.F.R. §725.414

Employer contends that the administrative law judge erred in limiting the number of exhibits that it could submit, pursuant to 20 C.F.R. §725.414. Employer argues that the newly promulgated regulations, which impose limitations on the evidence each party is permitted to submit, are arbitrary, capricious, and violate both Section 923(b) of the Act, 30 U.S.C. §923(b), and the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer also argues that the limits on evidence violate the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), because, in that case, the Fourth Circuit required that all relevant evidence be considered.

The Fourth Circuit and the Board have held that the regulation at 20 C.F.R. §725.414, placing limits on the evidence to be submitted by each party, is valid and does not contravene the Act or controlling precedent. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-154 (2006); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*). Consequently, we reject employer's contention that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid.

The Existence of Pneumoconiosis

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[2] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Clinical Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In its Decision and Order dated December 29, 2005, the Board rejected the same arguments and affirmed the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Jarrell*, slip op. at 3-6. The Board's previous holding on this issue constitutes the law of the case and governs our determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address employer's contentions of error in regard to the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer also contends that the administrative law judge erred in his consideration of the medical opinion evidence. In considering the medical opinion evidence, the administrative law judge properly found that Dr. Cohen's opinion that claimant "probably" suffers from clinical pneumoconiosis was too equivocal to support a finding of clinical pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order on Remand at 6; Claimant's Exhibit 14 at 88.

The administrative law judge next considered the remaining medical opinions of record. While Dr. Porterfield opined that claimant suffered from clinical pneumoconiosis, Drs. Koenig, Zaldivar, and Crisalli opined that claimant did not suffer from the disease. The administrative law judge found that the medical opinion evidence as a whole was entitled to diminished weight because none of the five physicians of record reviewed all of the x-ray evidence of record. Decision and Order on Remand at 7. An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). We, therefore, affirm the administrative law judge's determination that the medical opinion

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[2] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

evidence was entitled to diminished weight in regard to the issue of the existence of clinical pneumoconiosis.

Employer also argues that the administrative law judge erred in his consideration of the CT scan evidence. In his consideration of the CT scan evidence, the administrative law judge noted that all four interpretations of claimant's December 9, 2002 CT scan are negative for pneumoconiosis. Decision and Order on Remand at 4; Claimant's Exhibits 15, 16; Employer's Exhibits 12, 13. The administrative law judge further recognized that the "physician testimony universally establishes that CT scan evidence is relevant and useful as a diagnostic tool." Decision and Order on Remand at 5. However, the administrative law judge found that the CT scan evidence in this particular case was entitled to diminished weight because the scan itself was not of optimal resolution. *Id.* Although the administrative law judge reasonably concluded that the CT scan evidence was not of optimal resolution, he failed to address the relevant issue, *i.e.*, whether the CT scan evidence, while not of the highest resolution, was still nonetheless equivalent or superior to the x-ray evidence. Specifically, the administrative law judge did not address whether claimant's ten-millimeter CT scan was equivalent or superior to the x-ray evidence in revealing the presence of pneumoconiosis. Consequently, we vacate the administrative law judge's finding that the CT scan evidence is entitled to diminished weight and remand the case for further consideration.

The administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis and was not called into question by the contrary CT scan and medical opinion evidence. Considering all of the evidence together, the administrative law judge found that it established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). However, because we vacate the administrative law judge's findings regarding the CT scan evidence, we also vacate the administrative law judge's Section 718.202(a) finding of clinical pneumoconiosis and instruct the administrative law judge to again reconsider all of the relevant evidence pursuant to 20 C.F.R. §718.202(a) on remand.

The administrative law judge additionally found that the medical evidence established that claimant's total disability was due to "legal pneumoconiosis," in the form of chronic obstructive pulmonary disease due partly to coal mine dust exposure. 20 C.F.R. §718.204(c); Decision and Order on Remand at 16-17. Employer alleges error in regard to the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Legal Pneumoconiosis

Employer contends that the administrative law judge committed numerous errors in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although Drs. Koenig and Cohen opined that claimant suffered from chronic obstructive pulmonary disease attributable to his coal dust exposure,[3] Drs. Zaldivar and Crisalli opined that claimant did not suffer from any lung disease related to his coal dust exposure.[4] The administrative law judge found that the opinions of Drs. Koenig and Cohen were entitled to greater weight than those of Drs. Zaldivar and Crisalli on the issue of legal pneumoconiosis because Drs. Koenig and Cohen cited extensively to the medical literature in support of their conclusions and because Drs. Zaldivar and Crisalli did not refute the studies or the data underlying the studies with sufficient specificity. Decision and Order on Remand at 13-16.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Zaldivar and Crisalli. The administrative law judge noted that Drs. Zaldivar and Crisalli diagnosed asthma, in part based upon the fact that claimant's lung obstruction was reversible after the administration of a bronchodilator, a finding that the doctors found consistent with asthma, but not with a lung disease attributable to coal dust exposure. Decision and Order on Remand at 13. In discrediting the opinions of Drs. Zaldivar and Crisalli, the administrative law judge noted that Drs. Koenig and Cohen cited various studies in support of the position that an intermittent improvement in lung function after the administration of a bronchodilator is not definitive evidence of asthma, since such an improvement can also be seen in patients suffering from chronic obstructive pulmonary disease. *Id.*

The administrative law judge's analysis is deficient for many of the same reasons referenced in our previous Decision and Order. Although he noted that Drs. Koenig and Cohen cited various studies in support of their positions, the administrative law judge did not elaborate upon which studies or which findings in the studies cited by Drs. Koenig and Cohen support their respective conclusions. As we recognized in our previous

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[3] Dr. Koenig opined that claimant suffered from chronic obstructive pulmonary disease caused by coal dust exposure. Claimant's Exhibit 4. Dr. Cohen opined that claimant suffered from chronic obstructive pulmonary disease caused in part by coal dust exposure. Claimant's Exhibit 1.

[4] Dr. Zaldivar opined that claimant's pulmonary impairment was attributable to asthma and a component of emphysema due to smoking. Employer's Exhibit 4. Dr. Crisalli diagnosed both asthma and emphysema, neither of which he related to claimant's coal dust exposure. Director's Exhibit 25.

decision, because the administrative law judge did not state why the studies cited by Drs. Koenig and Cohen support their conclusions, it is difficult to determine whether this reason given by the administrative law judge for crediting the opinions of Drs. Koenig and Cohen is rational. *Jarrell*, slip op. at 12 (citing *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989) and *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984)). Therefore, we again instruct the administrative law judge to more fully explain his reasons for finding that the studies cited by Drs. Koenig and Cohen support their conclusions.

Moreover, although the administrative law judge acknowledged that Drs. Zaldivar and Crisalli disagreed with the content of the articles cited by Drs. Koenig and Cohen, and in some instances asserted that the studies were not germane to the instant case, *see* Decision and Order on Remand at 15, the administrative law judge failed to address the specific criticisms offered by Drs. Zaldivar and Crisalli. The administrative law judge instead summarily concluded that "Drs. Zaldivar and Crisalli's challenge to the medical literature failed to provide more than conclusory disagreement with the studies cited by Drs. Cohen and Koenig and failed to identify, proffer, or summarize literature in support of their contrary position." *Id.* The administrative law judge erred in not addressing the deposition testimony of Drs. Zaldivar and Crisalli questioning the validity of the studies cited by Drs. Koenig and Cohen.[5] *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591; *see* Employer's Exhibits 19 at 35-36, 55-56; Employer's Exhibit 21 at 43-46.

Employer also challenges the administrative law judge's conclusion that the "absence of evidence in the record pertaining to any personal or family history of asthma indicates that [c]laimant's condition is not asthma." Decision and Order on Remand at 14. During his deposition, Dr. Cohen explained that a remodeling of claimant's lungs due to an asthmatic condition was "a very unlikely diagnosis" because claimant was never diagnosed with asthma, was never treated for asthma, and developed symptoms

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[5] In a footnote, the administrative law judge stated:

> Dr. Crisalli correctly noted that a study from which Dr. Cohen drew the conclusion that asthma can be "fully" reversible states that obstructive lung disease is "often reversible." (EX 21 at 44; attachments to November 8, 2004 letter from Employer to the undersigned.) I have acknowledged that asthma needs to not be completely reversible in making my determinations.

Decision and Order on Remand at 15 n.2.

The administrative law judge, however, failed to address how this incorrect statement affected the credibility of Dr. Cohen's opinion.

only after more than twenty years of exposure to coal dust. Claimant's Exhibit 14 at 96. The administrative law judge, however, did not address the fact that Dr. Crisalli noted that an absence of asthma in claimant's family history would not preclude a finding that claimant suffers from the disease. *See* Employer's Exhibit 21 at 88. Dr. Crisalli also noted that claimant had not taken *any* respiratory medications at all for his lung disease, not just medications used to treat asthma. *Id.* On remand, the administrative law judge is instructed to consider the significance of Dr. Crisalli's statements. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Employer also argues that the administrative law judge erred in not focusing upon the relevant issue, *i.e.*, whether the evidence was sufficient to establish that claimant suffers from a lung disease attributable to his coal dust exposure. Employer accurately notes that the "fact that COPD may be included in the definition of [legal] pneumoconiosis when it arises out of coal mine employment does not automatically include all COPD under the umbrella of [legal] pneumoconiosis." Employer's Brief at 18. The administrative law judge failed to explain how the fact that some forms of chronic obstructive pulmonary disease may be reversible supports a finding that *claimant's* lung disease was attributable to his coal dust exposure.

The administrative law judge also failed to properly consider whether Dr. Cohen's opinion was sufficiently reasoned. In our previous decision, we stated:

> Employer points out that one of the studies relied upon by Dr. Cohen to support his finding that claimant suffers from legal pneumoconiosis showed a much greater loss of FEV1 capacity than claimant has shown on the pulmonary function studies. At his deposition, Dr. Cohen agreed with this statement made by employer's counsel, but responded that the studies do not take into account sensitive individuals such as claimant. Claimant's Exhibit 14 at 61. However, upon further cross-examination by employer's counsel, Dr. Cohen stated that he did not know what the level of claimant's coal dust exposure was during his employment or if claimant used any equipment to protect his breathing in the mines. *Id.* at 61-62. Knowledge of the level of claimant's coal dust exposure and whether he wore any breathing protection during employment may be critical factors in determining how sensitive a miner is to coal dust.

Jarrell, slip op. at 12 n.2.

On remand, the administrative law judge is instructed to address whether Dr. Cohen's opinion is sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Employer also accurately notes that the administrative law judge focuses upon Dr. Cohen's assessment and "never really explains why Dr. Koenig's opinion is credited." Employer's Brief at 30. On remand, the administrative law judge is instructed to address whether Dr. Koenig's opinion is sufficiently reasoned. *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

On remand, when reconsidering whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Because the administrative law judge must reevaluate whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand awarding 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