BRB No. 05-0245 BLA

EUGENE PAULUKONIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEAR RIDGE SHOPS, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 12/29/2005
	)	
LACKAWANNA CAUSALITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Maureen E. Herron (Cipriani & Werner), Scranton, Pennylvania, for employer.

Helen H. Cox (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-5755) of Administrative Law Judge Robert D. Kaplan rendered on a subsequent claim[1] 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). The administrative law judge noted the parties' stipulation to 37.4 years of coal mine employment. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. In considering this subsequent claim, the administrative law judge concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the sole element of entitlement previously adjudicated against claimant. The administrative law judge, therefore, determined that claimant failed to establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that claimant and the Director stipulated to 37.4 years of coal mine employment. Claimant also contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Claimant asserts error in the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant also alleges that the administrative law judge erred in allowing employer to submit evidence post-hearing. Claimant specifically asserts that (1) employer failed to submit the supplemental report by Dr. Levinson at least 20 days before the hearing as required by 20 C.F.R. §725.456(b)(2); (2) the administrative law judge failed to make a finding that good cause existed for the post-hearing admission of Dr. Levinson's report as late evidence pursuant to 20 C.F.R. §725.456(b)(3), and (3) Dr. Levinson's report dated August 30, 2004, is excess evidence and its submission by employer violates the evidentiary limitations pursuant to 20 C.F.R. §725.414(a). Thus, claimant contends that the evidence should be excluded from the record, or, in the alternative, requests that the Board reverse the decision below and remand the case for a proper evaluation of the evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge did not violate the evidentiary limitations

[1] Claimant filed his initial claim for benefits on June 28, 1973, which was denied by the district director on May 11, 1979, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant filed this subsequent claim for benefits on February 3, 2003. Director's Exhibit 3. The district director found that claimant was entitled to benefits in a Proposed Decision and Order dated October 29, 2003. Director's Exhibit 31. Employer requested a formal hearing on November 11, 2003. Director's Exhibit 32. A hearing was held before the administrative law judge on August 24, 2004.

under 20 C.F.R. §725.414 by admitting Dr. Levinson's supplemental report post-hearing. The Director, however, agrees with claimant's argument 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), and urges the Board to vacate the administrative law judge's findings at 20 C.F.R. §718.202(a) and to remand the case. Employer responds, urging affirmance of the denial of benefits.

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. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to respiratory or pulmonary impairment arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Initially, claimant argues that the administrative law judge erred in finding that claimant and the Director stipulated to 37.4 years of coal mine employment. Review of the hearing transcript indicates that employer was willing to stipulate to 37.4 years and that claimant agreed that he worked at least that long, but the "key record documents approximately 54." Hearing Transcript at 22. The administrative law judge did not make a specific finding of years of coal mine employment. This error is harmless as it is not prejudicial to either claimant or employer in that claimant was properly credited with over ten years of coal mine employment and any additional years of coal mine employment would not give him any advantage, based on the facts and issues in this case. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant next contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant specifically contends that the administrative law judge erred in finding that the newly submitted x-ray readings are insufficient to establish the existence of pneumoconiosis based on a "mechanical nose count" of the number of readings, and thus, failed to provide an adequate explanation for his findings pursuant to the Administrative Procedure Act (APA), 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 U.S.C. §932(a).

There are nine interpretations of three x-rays of record. The April 10, 2003 x-ray was read as positive by a dually qualified physician, namely Dr. Ahmed, and as negative by two dually qualified physicians, namely Drs. Sundheim and Wheeler. Director's Exhibit 17; Employer's Exhibit 1; Claimant's Exhibit 5. The administrative law judge rationally found the weight of the April 10, 2003 x-ray readings was negative for the presence of pneumoconiosis. *Staton v. Norfolk & Western Ry. Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995); *Adkins v. Director, OWCP*, 958 F.2d 49, 6 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

The x-ray dated January 21, 2004 was read as positive by two dually qualified physicians, namely Drs. Miller and Cappiello, and as negative by two dually qualified physicians, namely Drs. Wheeler and Scott. Employer's Exhibit 3; Claimant's Exhibits 7, 8. The administrative law judge rationally found that the January 21, 2004 x-ray was therefore neither positive nor negative for the presence of pneumoconiosis, as the contrary readings were rendered by four equally qualified physicians. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). The x-ray dated May 5, 2004 was read as positive by a dually qualified physician, namely Dr. Smith, and as negative by a dually qualified physician, namely Dr. Wheeler. The administrative law judge, again, rationally found that the May 5, 2004 x-ray was therefore neither positive nor negative for the presence of pneumoconiosis, as the contrary readings were rendered by equally qualified physicians. *Ondecko*, 512 U.S. at 269, 18 BLR at 2A-3. The administrative law judge thereby considered the qualitative and quantitative nature of the newly submitted x-ray evidence, and properly accorded greater weight to the preponderance of negative x-ray readings by physicians with superior qualifications. *Staton*, 65 F.2d at 55, 19 BLR at 2-271; *Adkins*, 958 F.2d at 49, 6 BLR at 2-61; *Edmiston*, 14 BLR at 1-65. Based on the foregoing, we hold that, contrary to claimant's argument, the administrative law judge provided an adequate explanation for his finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to the APA.

Claimant next contends that while the administrative law judge properly found the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[2] he erred in finding that the

[2] While asserting that the administrative law judge properly found the medical opinions sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), claimant specifically argues that the administrative law judge erred in finding that Dr. Kraynak was not claimant's treating physician and in failing to fully discuss Dr. Munir's opinion and in according it little weight. We find no merit in claimant's argument as the administrative law judge provided rational reasons for finding that Dr. Kraynak was not claimant's treating physician, and for according little weight to the medical opinion of Dr. Munir. *See* Decision and Order at 8.

relevant newly submitted evidence is nonetheless insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) overall. The administrative law judge specifically found:

> As noted, the X-ray evidence is negative for pneumoconiosis. However, the medical opinion evidence is positive for the presence of pneumoconiosis. Under the Act, Claimant carries the burden of establishing entitlement to benefits. Having considered all of the medical evidence together pursuant to [20 C.F.R.] §718.202(a), I find that Claimant has not met his burden of proof as the evidence regarding the presence of pneumoconiosis is in equipoise. Therefore, I find that Claimant has not established the presence of pneumoconiosis, pursuant to [20 C.F.R.] §718.202.

Decision and Order at 9. Claimant specifically argues that the administrative law judge's determination that the newly submitted evidence relevant to the existence of pneumoconiosis was in equipoise, is cursory, unexplained, unreasoned, and fails to comport with the requirements of the APA.

Claimant's contention has merit. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that a finding of pneumoconiosis at 20 C.F.R. §718.202(a) requires that all types of relevant evidence of record must be weighed together in determining whether claimant has met his burden of establishing the presence of pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-6 (3d Cir. 1986). Similarly, the Board has held that pursuant to 20 C.F.R. §718.202(a), the administrative law judge must consider and weigh all relevant evidence to ascertain whether or not claimant has established the presence of pneumoconiosis by a preponderance of the evidence. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Thus, the administrative law judge failed to "weigh" all the relevant evidence together pursuant to 20 C.F.R. §718.202(a), but, rather, summarily found it to be in "equipoise." We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a) and remand the case for the administrative law judge to reconsider whether the newly submitted evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thus establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. If reached, the administrative law judge must also determine whether the relevant evidence as a whole establishes pneumoconiosis pursuant Section 718.202(a) on the merits of the claim. *Williams*, 114 F.3d at 22, 21 BLR at 2-104; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-6.

Claimant next contends that the administrative law judge erred in allowing employer to submit, post-hearing, a supplemental report by Dr. Levinson developed post-hearing as it was not, therefore submitted at least twenty days before the hearing, as

required by 20 C.F.R. §725.456(b)(2). The hearing was held on August 24, 2004.[3] Dr. Levinson's August 30, 2004 supplemental report was based on his review of Dr. Kraynak's deposition testimony of July 23, 2004. Employer's Exhibit 8; Claimant's Exhibit 4. Thus, on these facts, the twenty day rule is not at issue as the late evidence, dated August 30, 2004, was developed post-hearing as the administrative law judge allowed.

Claimant contends that the administrative law judge denied claimant his right to due process by not affording him an opportunity to respond to employer's post-hearing evidence, namely Dr. Levinson's August 30, 2004 report. This contention lacks merit. The administrative law judge stated at the hearing that after claimant's receipt of Dr. Levinson's supplemental report, claimant could make a motion to submit additional evidence. Hearing Transcript at 13. At the close of the hearing, the administrative law judge left the record open for thirty days after the last evidence was submitted, to permit the parties to take action that they considered appropriate in response to this evidence. Hearing Transcript at 45. 20 C.F.R. §725.456. Claimant, however, did not file any motion or submit any additional evidence in response to Dr. Levinson's post-hearing report.

Claimant specifically contends that the administrative law judge's admission of Dr. Levinson's post-hearing supplemental report into the record is a violation of the evidentiary limitations set forth at 20 C.F.R. §725.414(a). The Director responds, contending that because "employer is permitted two medical reports in support of its affirmative case, and has only submitted one, the supplemental report from Dr. Levinson could be considered employer's second medical report in support of its affirmative

[3] During the hearing, the administrative law judge permitted claimant to submit two pulmonary function studies and Dr. Kraynak's testimony, relying on those tests, in exchange for claimant's withdrawal of his objection to the submission of Dr. Levinson's supplemental opinion. Hearing Transcript at 11. The administrative law judge allowed thirty days for the submission of Dr. Levinson's report. Hearing Transcript at 45. Dr. Levinson's supplemental report of August 30, 2004, is date stamped as received on September 3, 2004. Employer's Exhibit 8. Thus, Dr. Levinson's report was submitted within the thirty days allowed by the administrative law judge at the hearing held on August 24, 2004.

case."[4] Director's Brief at 6. The regulation at 20 C.F.R. §725.414(a)(3)(i) permits a responsible operator, in this case employer, to 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."[5] 20 C.F.R. §725.414(a)(3)(i). Similar restrictions are imposed upon claimants. *See* 20 C.F.R. §725.414(a)(2)(i). These evidentiary limitations may be exceeded only for good cause. 20 C.F.R. §725.456(b)(1). Employer submitted the following reports: Dr. Levinson's medical report dated March 17, 2004, Employer's Exhibit 1; Dr. Levinson's report dated June 24, 2004 invalidating the pulmonary function study performed June 8, 2004 by Dr. Kraynak, Employer's Exhibit 4; Dr. Levinson's deposition testimony dated July 19, 2004 that was based on his January 21, 2004 examination of claimant, Employer's Exhibit 5; Dr. Levinson's report dated August 30, 2004, Employer's Exhibit 8. Dr. Levinson's March 17, 2004 report and his deposition testimony are both based on his January 21, 2004 examination. These two documents may be considered as one report as they are based on the same examination. 20 C.F.R. §725.414(a)(1). Inasmuch as employer has only submitted one medical report, but is permitted to submit two medical reports in support of its affirmative case, we agree with the Director's argument that Dr. Levinson's supplemental report be considered employer's second medical report in support of its affirmative case. Thus, we hold that

[4] In a footnote, the Director, Office of Workers' Compensation Programs (the Director), states, "We note that Dr. Kraynak's independent review and invalidation of Dr. Levinson's ventilatory test itself exceeds the limitations on rebuttal evidence since claimant ultimately submitted Dr. Simelaro's report invalidating that test (CX 3). 20 C.F.R. §725.414(a)(2)(ii)." Director's Brief at 5, n.6; *see* Claimant's Exhibit 4 (Dr. Kraynak's deposition testimony). The Director further questions the basis upon which the administrative law judge admitted Dr. Kraynak's critique of Dr. Levinson's invalidation report. *Id.* at 6 n.7. The Director also discusses the fact that the administrative law judge admitted into the record results of medical testing performed on two miners other than claimant. Director's Brief at 4; *see* Hearing Transcript at 5-14; Claimant's Exhibit 4. In view of the Director's comments, we instruct the administrative law judge on remand to apply the provisions at 20 C.F.R. §725.414 to resolve these issues. *Smith v. Martin County Coal Corp.*, 24 BLR 1-69 (2004). Specifically, the administrative law judge must delineate a proper basis upon which evidence is admitted to the record, reexamining the propriety of admitting medical evidence relevant to miners other than the claimant.

[5] "Medical reports" are defined as: "A physician's written assessment. A medical report may be prepared by the physician who examined the miner and/or reviewed the available admissible evidence. A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section." 20 C.F.R. §725.414(a)(1).

the admission of the post-hearing report does not violate the evidentiary limitations. Therefore, claimant's contention that the administrative law judge failed to make a good cause finding for allowing the late submission of Dr. Levinson's supplemental report pursuant to 20 C.F.R. §725.456(b) lacks merit, as the evidentiary limitations have not been violated and the record was held open for the admission of post-hearing evidence. Thus, we uphold the administrative law judge's decision to admit the post-hearing supplemental report by Dr. Levinson.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. If, on remand, the administrative law judge finds the newly submitted evidence sufficient to establish the existence of pneumoconiosis, and thus a change in the sole applicable condition of entitlement at 20 C.F.R. §725.309, he must then consider all the evidence of record in determining whether it establishes the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, total disability at

20 C.F.R. §718.204(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c)(2) on the merits of the claim, as reached.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge