BRB No. 05-0516 BLA

FRED RAINES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TALL TIMBER COAL COMPANY	)	DATE ISSUED: 02/16/2006
	)	
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 – Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; 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, SMTH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-5227) of Administrative law Judge Joseph E. Kane 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). Claimant filed the instant, subsequent claim on October 24, 2001.[1] Director's Exhibit 2. The administrative law judge initially determined, pursuant to 20 C.F.R. §725.309, that the new evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis, and therefore, that claimant established a change in an applicable condition of entitlement since the denial of his prior claim. The administrative law judge also found that claimant was totally disabled due to pneumoconiosis based on a review of the record evidence as a whole. Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge erred by admitting into the record two supplemental reports by Dr. Gaziano, dated December 10, 2002 and January 8, 2003, which were proffered by claimant as rebuttal evidence. Employer's Exhibits 18-21. Employer also asserts that the administrative law judge erred in excluding from the record rebuttal x-ray interpretations by Dr. Wiot, the medical opinion of Dr. Rosenberg, and the deposition testimony of Dr. Dahhan.[2] Employer's Brief at 21-24. Employer further argues that the administrative law judge erred by not reviewing the new medical evidence, including the negative x-rays and the opinions of Drs. Dahhan and Rosenberg, relevant to the existence of pneumoconiosis.[3] Employer's Brief at 29-36.

[1] Claimant first filed a claim for benefits on January 17, 1989, which was finally denied on November 27, 1992 because claimant failed to establish a totally disabling respiratory or pulmonary impairment. *See Raines v. Tall Timber Coal Co.*, BRB No. 92-0331 BLA (Nov. 27, 1992); Director's Exhibit 1. Although claimant also filed a claim on September 22, 2000, at his request, this claim was withdrawn and is considered never to have been filed. S*ee* 20 C.F.R. §725.306; Director's Exhibit 1.

[2] Employer notes that the administrative law judge mistakenly referenced in his Decision and Order that employer proffered the opinion of Dr. Hussain when Dr. Hussain's treatment notes were actually submitted by claimant as part of his hospitalization records. Employer further notes that the administrative law judge confused Dr. Hussain with Dr. Dahhan when he discussed the medical opinion evidence relevant to the issue of disability causation. Decision and Order at 10; Employer's Brief at 28-29.

[3] Employer challenges the validity of the revised regulations and contends that all of the evidence that the administrative law judge excluded in this case pursuant to 20 C.F.R. §725.414 should be admitted under the "good cause" exception of 20 C.F.R. §725.456(b)(1) because such evidence is relevant. We reject employer's arguments based on our holding in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

Since employer does not challenge the administrative law judge's determination that claimant is totally disabled by a respiratory or pulmonary impairment, we affirm the

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has also filed a brief. The Director maintains that the administrative law judge had discretion to admit Dr. Gaziano's supplemental reports in order to satisfy the Directors' obligation to provide claimant with a credible, complete pulmonary evaluation. Director's Brief at 1-2 The Director further asserts that the administrative law judge acted properly in excluding Dr. Wiot's' x-ray readings. Director's Brief at 3. The Director, however, agrees with employer that the administrative law judge erred in excluding, in its entirety, Dr. Dahhan's deposition testimony without first ascertaining whether that testimony, relevant to the existence of pneumoconiosis and disability causation, was inextricably tied to Dr. Dahhan's review of Dr. Wiot's inadmissible x-ray readings. Director's Brief at 3-4. The Director also agrees with employer that "the administrative law judge erred by giving preclusive effect to the finding of pneumoconiosis made in claimant's previous claim." Director's Brief at 4. The Director takes no position on the merits of claimant's entitlement to benefits. Director's Brief at 1.

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).

We reject employer's contention that the administrative law judge erred in admitting into the record the supplemental opinions of Dr. Gaziano dated December 10, 2002 and January 8, 2003. Claimant's Exhibit 1. In this case, claimant underwent a Department of Labor sponsored examination with Dr. Gaziano on June 6, 2002. In preparation for the hearing, claimant's counsel obtained supplemental reports from Dr. Gaziano because he believed that Dr. Gaziano had not adequately addressed the cause of claimant's respiratory or pulmonary impairment and whether or not claimant was totally disabled. *See* Hearing Transcript at 8-10. These supplemental reports were proffered by claimant as rebuttal evidence at the hearing over employer's objections. In his Decision and Order, the administrative law judge admitted Dr. Gaziano's supplemental reports into

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administrative law judge's finding at 20 C.F.R. §725.309 that claimant established a change in an applicable condition of entitlement since the denial of his prior claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also* 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994).

[4] Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

the record because he found that Dr. Gaziano's initial, June 6, 2002, report did not fully address all of the requisite elements of entitlement. The administrative law judge specifically ruled that Dr. Gaziano's supplemental reports would be admitted, not as rebuttal evidence, but to satisfy the Director's obligation to provide claimant with a complete and credible pulmonary examination.[5] Decision and Order at 5.

In her brief, counsel for the Director maintains that the administrative law judge correctly determined that Dr. Gaziano's initial report did not address whether claimant's moderate respiratory impairment due to pneumoconiosis was totally disabling or whether it would preclude claimant from returning to his usual coal mine employment.[6] *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); Director's Brief at 2, n.3; Decision and Order at 5. Additionally, the regulation at Section 725.456(e) provides:

> If the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to [Section] 725.406, or any part thereof, fails to comply with the applicable quality standards, or fails to address relevant conditions of entitlement…in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

20 C.F.R. §725.456(e). Thus, based on the Director' concession and the plain language of Section 725.456(e), the administrative law judge had the discretion to admit into the

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[5] The Department of Labor (DOL) has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

[6] Dr. Gaziano completed a Department of Labor (DOL) examination form in conjunction with his January 6, 2002 examination, indicating that claimant had pneumoconiosis due to coal mining and arteriosclerosis heart disease due to non-occupational factors. Dr. Gaziano noted that claimant's coal workers' pneumoconiosis caused a moderate impairment, while his heart disease caused a severe impairment. Although he stated that claimant was totally disabled for work, Dr. Gaziano did not specifically address whether claimant was totally disabled due to pneumoconiosis. Director's Exhibit 10. In his supplemental reports dated December 10, 2002 and January 8, 2003, Dr. Gaziano opined that claimant's pulmonary impairment was due in part to his coal mine employment, and that claimant's pulmonary impairment would prevent him from returning to his usual coal mine work. Claimant's Exhibit 1.

record the supplemental reports of Dr. Gaziano in order to clarify the doctor's opinion as to a requisite element of entitlement, and to ensure that the Director fulfilled his statutory obligation.[7]

Furthermore, while employer maintains that the administrative law judge erred by not remanding the case to the district director in order for it to respond to Dr. Gaziano's supplemental reports, we note that the issue of a remand for further medical development was never raised by employer below. Employer's counsel did not request the opportunity to respond to Dr. Gaziano's supplemental opinions at the hearing or in her post-hearing brief. She only objected to their admission. We therefore decline to address employer's allegation of error, and affirm the administrative law judge's evidentiary ruling with respect to the admission of Dr. Gaziano's supplemental opinions as within the administrative law judge's discretion. *See Taylor v. 3D Coal Co*., 3 BLR 1-350 (1981); Hearing Transcript at 8-10; Decision and Order at 5-6.

Notwithstanding, we agree with employer that the administrative law judge's exclusion of Dr. Wiot's "x-ray rebuttal interpretations" is problematic. We are unable to identify, from the Decision and Order, what x-ray evidence the administrative law judge considered to be a part of the record and; specifically, what x-rays constituted affirmative and rebuttal readings proffered by the parties in accordance with Section 725.414.[8] *See* 20 C.F.R. §725.414; 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).

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[7] We reject employer's contention that opinions submitted by employer's physicians are sufficient to meet the Director's statutory duty of providing claimant with an "an opportunity to substantiate his claim." *See Hodges*, 18 BLR at 1-84.

[8] The revised regulation at Section 725.414, provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. *See* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted as the opposing party's case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit one piece of rehabilitative evidence. *Id*. Notwithstanding these limits, "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). Each x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report referenced in a medical report must either be admissible under the [Section] 725.414(a) limits, or be admissible as a hospitalization or treatment record under [Section] 725.414(a)(4). *See* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i).

Our review of the record reveals rereadings by both employer and claimant of two x-rays dated September 13 and 17, 2002, which were contained in medical treatment notes proffered by claimant. Because we are unable to identify the x-ray record, we are unable to decide whether Dr. Wiot's readings were properly excluded for the reasons stated by the administrative law judge. We, therefore, vacate the award of benefits and remand this case for further consideration. On remand, the administrative law judge is directed to clarify which x-rays were admitted into the record in accordance with 20 C.F.R. §725.414.

Furthermore, we note that while there is no direct regulatory authority for the rebuttal of hospitalization and medical treatment records that are received into evidence pursuant to 20 C.F.R. §725.414(a)(4),[9] under certain circumstances, employer may be permitted to submit rebuttal readings of such evidence if claimant relies on the objective studies contained in the medical treatment or hospitalization records admitted under Section 725.414(a)(4) to establish his affirmative case, or if the administrative law judge could otherwise count them as supporting a finding of pneumoconiosis.[10] Consequently,

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[9] Medical or hospital treatment records are not considered evidence submitted as part of a party's affirmative case. Instead, such records are automatically admitted under an exception to the rules limiting each party's evidence. 20 C.F.R. §725.414(a)(4); *see Dempsey*, 23 BLR at 1-47. In its second notice of proposed rulemaking, the Department of Labor explained that:

> The Department believes that proposed subsection (a)(4) would require the admission of any medical record relating to the miner's respiratory or pulmonary condition without regard to the limitations set forth elsewhere in [Section] 725.414.... The Department has not included an independent provision governing rebuttal of this evidence. As a general rule, this evidence is not developed in connection with a party's affirmative case for or against entitlement, and therefore the Department does not believe that independent rebuttal provisions are appropriate. Any evidence that predates the miner's claim for benefits may be addressed in the two medical reports permitted each side by the regulation. If additional evidence is generated as the result of a hospitalization or treatment that takes place after the parties have completed their evidentiary submission, the ALJ has the discretion to permit the development of additional evidence under the "good cause" provision of [Section] 725.456.

64 Fed. Reg. 54996 (Oct. 8, 1999).

[10] We note that claimant proferred positive rereadings of the x-rays dated September 13 and 17, 2002, to which employer might be entitled to submit Dr. Wiot's

we vacate the administrative law judge's findings pursuant 20 C.F.R. §718.202(a)(1) and direct him to further explain his evidentiary rulings with respect to the x-ray evidence.

Depending upon his evidentiary rulings on remand, the administrative law judge may have to reconsider whether to exclude the opinions of Drs. Dahhan and Rosenberg.[11] *See Harris v. Old Ben Coal Company*, BRB No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery and Hall, J.J., concurring and dissenting). We note that, when presented with a situation where an otherwise admissible medial opinion reviews or discusses evidence that is deemed inadmissible under Section 725.414, the administrative law judge should not *automatically* exclude the medical opinions without first ascertaining what portions of the opinions are tainted by the review of inadmissible evidence. If the administrative law judge considers the opinions to be tainted, he or she is not required to exclude the report or testimony in its entirety. The administrative law judge may redact the objectionable content, ask the physicians to submit new reports, or simply factor in the physicians' reliance upon the inadmissible evidence when deciding the weight to which their opinions are entitled. *Id*.

Lastly, we agree with employer and the Director that the administrative law judge erred in giving preclusive effect to findings made with respect to claimant's prior claim, and by refusing to review the new evidence relevant to whether claimant established the existence of pneumoconiosis. After determining that claimant established, based on the new evidence, a change in an applicable condition of entitlement since the prior denial pursuant to 20 C.F.R §725.309, *i.e.*, a total respiratory disability, the administrative was required to consider all of the record evidence relevant to the issues of entitlement. Instead, the administrative law judge noted, with respect to 20 C.F.R. §718.202(a), that the existence of pneumoconiosis was already established because, in the prior claim, the Board determined that claimant had pneumoconiosis based on the x-ray evidence. Decision and Order at 12; s*ee Raines v. Tall Timber Coal Co.*, BRB No. 92-0331 BLA (Nov. 27, 1992); Director's Exhibit 1.

This statement was in error. Because the miner's prior claim was denied, the Board's decision does not serve to preclude consideration of whether claimant

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rebuttal readings, depending on the parties' designation of evidence pursuant to 20 C.F.R. §725.414. *See* Claimant's Exhibits 5, 6.

[11] The applicable regulation provides that each x-ray mentioned in a medical report must be admissible under Sections 725.414(a)(2)(i), (a)(3)(i), or Section 725.414(a)(4), which provides for the admission of hospital and treatment records. *See* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). The regulations are silent as to what an administrative law judge should do when evidence that exceeds the limitations is referenced in an otherwise admissible medical opinion. *See Dempsey*, 23 BLR at 1-47.

established the existence of pneumoconiosis in this subsequent claim. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (*en banc*), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994); *Raines*, BRB No. 92-0331 BLA. We, therefore, vacate the administrative law judge's finding at Section 718.202(a) as he failed to properly review the record as a whole to determine whether the old and new evidence established the existence of pneumoconiosis. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). To the extent that the administrative law judge's finding on the issue of disability causation was dependent on his finding at Section 718.202(a), we also vacate his finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[12]

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed in part, 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

[12] The administrative law judge specifically erred when he stated: "Where Dr. Hussain's [sic] [Dr. Dahhan's] interpretation of the x-ray as negative contradicts the prior findings of the Benefits Review Board, that [c]laimant established pneumoconiosis by x-ray evidence, his opinion is undermined and does not serve to rebut the presumption of causation or the finding that [c]laimant is totally disabled due to pneumoconiosis." Decision and Order at 11.