BRB No. 03-0757 BLA

LLOYD ROSCOE TEAGUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APPLE COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 07/22/2004
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 of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Thomas M. Cole (Arnett, Draper & Hagood), Knoxville, Tennessee, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Helen H. Cox (Howard M. 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2002-BLA-5257) of Administrative Law Judge Fletcher E. Campbell, Jr. 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).[1] Claimant filed his application for benefits on May 1, 2001. Director's Exhibit 2. The district director denied benefits and claimant requested a hearing, Director's Exhibits 23, 24, which was held before the administrative law judge on February 11, 2003.

In a Decision and Order issued on July 9, 2003, the administrative law judge accepted the parties' stipulations that claimant has "at least 15 years" of coal mine employment[2] and is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 9. The administrative law judge found that the x-ray evidence viewed in light of the readers' radiological credentials did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, he determined that the medical opinion evidence established the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(1),(a)(2). The administrative law judge found that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding evidence submitted by employer in excess of the limitations set forth at 20 C.F.R. §725.414. Employer further asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant established the existence of pneumoconiosis and that his total disability is due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's evidentiary rulings under Section 725.414 and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's evidentiary rulings under Section 725.414.[3]

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[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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record indicates that claimant's coal mine employment occurred in Tennessee. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The Director also moves to amend the caption in this case to reflect that claimant's name is Lloyd Roscoe Teague, not Roscoe Lloyd Teague, as previously listed in the Board's August 14, 2003 letter acknowledging employer's appeal. Director's Brief

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).

Employer contends that the administrative law judge erred by excluding medical evidence submitted by employer in excess of the evidentiary limits imposed by revised 20 C.F.R. §725.414.[4] Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the quantity of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). Employer argues that Section 725.414 is "unconstitutionally discriminatory and arbitrary." Employer's Brief at 4. Employer's unsupported assertion lacks merit. By its terms, Section 725.414 applies to both claimants and responsible operators. 20 C.F.R. §725.414(a)(2),(a)(3). Additionally, the Board has rejected the argument that Section 725.414 is arbitrary. *Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A at 7 (Jun. 28, 2004)(*en banc*)(published); *see also Nat'l Mining Ass'n v. Dep't. of Labor*, 292 F.3d 849, 874 (D.C. Cir. 2002)(holding that Section 725.414 is not arbitrary and capricious). We therefore reject employer's contention that Section 725.414 is invalid.

Employer argues that the administrative law judge erred in excluding several chest x-ray readings that employer proffered as treatment records. Under Section 725.414, employer could submit two x-ray readings "in support of its affirmative case," 20 C.F.R. §725.414(a)(3)(i), and one x-ray reading in rebuttal of each x-ray submitted by claimant or the Director. 20 C.F.R. §725.414(a)(3)(ii). Employer did so, Director's Exhibit 9; Employer's Exhibits 3, 4, 11, but also submitted additional readings of May 2, 1994, August 16, 1994, and May 3, 1995 x-rays that employer claimed were admissible as claimant's medical treatment records. Director's Exhibit 10; Employer's Exhibit 2. Under Section 725.414(a)(4), "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," "[n]otwithstanding the limitations" of Section 725.414. 20 C.F.R. §725.414(a)(4). Claimant objected that the proffered x-rays were not treatment records, but were readings developed in claimant's state claim for

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at 1 n.1. The Director's request is unopposed and is supported by the record. Director's Exhibit 2. Accordingly, the Director's motion is granted and the caption is amended to read "Lloyd Roscoe Teague."

[4] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on May 1, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

benefits. Claimant pointed out to the administrative law judge that several reports of the x-ray readings were addressed to a law firm. Review of the record confirms claimant's point. Director's Exhibit 10. The administrative law judge "agree[d] with [c]laimant that these records are not hospitalization or treatment records within the meaning of [S]ection 725.414(a)(4)" because they were "not readings of X-rays taken in connection with a hospital stay or treatment." Decision and Order at 12. Because substantial evidence supports the administrative law judge's finding, we affirm his conclusion that the x-ray readings in question were not records of claimant's "hospitalization for . . . or medical treatment for a respiratory or pulmonary or related disease" under Section 725.414(a)(4). 20 C.F.R. §725.414(a)(4).

Employer next contends that the administrative law judge should have admitted the challenged x-ray readings because they were state claim evidence which, in employer's view, is exempt from the evidentiary limits of Section 725.414. Employer's contention lacks merit. *See Dempsey*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A at 9-10 (holding that state claim pulmonary function and blood gas studies were properly excluded under Section 725.414). Chest x-rays are specifically limited by Section 725.414. 20 C.F.R. §725.414(a)(2),(a)(3). The state claim evidence employer sought to admit consisted solely of chest x-rays. Director's Exhibit 20; Employer's Exhibit 2. The administrative law judge found that the state claim, chest x-rays did not fall within the exception for hospitalization or treatment records. *See* 20 C.F.R. §725.414(a)(4). Nor are they covered by the "subsequent claim" provision requiring the admission of prior *federal* black lung claim evidence. *See* 20 C.F.R. §725.309(d)(1). Thus, the administrative law judge properly excluded the chest x-ray readings under Section 725.414, as employer had already reached its limit of two x-ray readings in its affirmative case and one rebuttal reading for each x-ray submitted by claimant or the Director. Director's Exhibit 9; Employer's Exhibits 3, 4, 11.

Employer argues that good cause existed for exceeding the limits of Section 725.414 with the additional x-ray readings submitted at Director's Exhibit 10 and Employer's Exhibit 2. 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). Employer argued to the administrative law judge and argues on appeal that good cause exists because the x-rays are "probative and relevant to the issue of whether claimant has pneumoconiosis and whether his total disability is related to coal workers' pneumoconiosis." Employer's Brief at 7. The administrative law judge did not consider this argument or make a good cause finding. The Director states that in his view "more than an assertion of relevance is necessary to establish good cause," but requests that we instruct the administrative law judge to "consider whether employer has established good cause to exceed the evidentiary limitations." Director's Brief at 8. Because we must remand this case to the administrative law judge for further analysis of the medical evidence, and because the good cause issue is committed to his discretion,

see Dempsey, BRB Nos. 03-0615 BLA, 03-0615 BLA-A at 10; *Nat'l Mining*, 292 F.3d at 874, we instruct the administrative law judge to address employer's good cause argument and make a finding at Section 725.456(b)(1).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(4), employer contends that the administrative law did not adequately explain why he credited doctors' opinions that claimant has clinical pneumoconiosis when the administrative law judge found that the same doctors' x-ray readings did not establish the existence of clinical "CWP" pursuant to Section 718.202(a)(1). Decision and Order at 12. Drs. Baker, Myers, Robinette, and Broudy examined claimant and diagnosed "CWP" or "silicosis" with x-ray profusion levels of 1/0, 1/1, 1/2, and 1/0, respectively. Director's Exhibit 8; Claimant's Exhibits 1, 2; Employer's Exhibit 1. The administrative law judge declined to credit these physicians' x-ray readings at Section 718.202(a)(1), Decision and Order at 12, but accepted their diagnoses of "medical CWP" at Section 718.202(a)(4). Decision and Order at 13. The administrative law judge's Decision and Order contains no discussion of whether he considered these "clinical" pneumoconiosis opinions to be based on anything more than the physicians' x-ray readings. Such an explanation is warranted, as the Sixth Circuit court has held that "[a]n ALJ may not rely on a doctor's opinion that a patient had medical pneumoconiosis when the physician bases his opinion entirely on x-ray evidence the ALJ has already discredited," *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003), and that "a mere restatement of an x-ray should not count as a reasoned medical judgment." *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, we vacate the administrative law judge's finding that the medical opinions established the existence of "clinical" pneumoconiosis and remand this case for him to examine each opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983), and to explain whether the diagnoses of "clinical" pneumoconiosis constitute reasoned medical judgments under Section 718.202(a)(4). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120.

Employer contends that when the administrative law judge found the existence of "legal" pneumoconiosis established at Section 718.202(a)(4) in the form of chronic obstructive pulmonary disease (COPD) related to coal dust exposure, he did not adequately explain his reasons for crediting the opinions of Drs. Baker, Myers, and

Robinette, or give valid reasons for discounting the opinions of Drs. Broudy and Dahhan. Employer's contention has merit. The administrative law judge accepted the opinions of Drs. Baker, Myers, and Robinette as "persuasive," providing no explanation of this finding. Decision and Order at 13; *see* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), 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); *Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 1-101 (2000)(*en banc*). Additionally, the administrative law judge erroneously presumed that claimant's COPD arose out of coal mine employment, and thus required the opinions of Drs. Broudy and Dahhan "to rebut the presumption." Decision and Order at 13. The burden is on claimant to establish by a preponderance of the evidence that he has pneumoconiosis as defined under Section 718.201. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-6-9 (1994); 5 U.S.C. §556(d); 20 C.F.R. §725.103. Consequently, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and instruct him to determine whether claimant has established by a preponderance of the evidence that his COPD is pneumoconiosis as defined under Section 718.201.

Pursuant to Section 718.204(c), employer challenges the administrative law judge's determination to accord less weight to the disability causation opinion of Drs. Broudy and Dahhan. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we also vacate his disability causation finding and instruct him to reweigh the medical opinions after he has reassessed the existence of pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge