BRB No. 08-0707 BLA

W.S. (o/b/o of J.S.) Claimant-Petitioner v. PEABODY COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/10/2009 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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:

Claimant[1] appeals the Decision and Order – Denying Benefits (06-BLA-5098) of Administrative Law Judge Donald W. Mosser rendered 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). The administrative law judge credited the miner with "at least" seventeen years of coal mine employment[2] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Decision and Order at 3. The administrative law judge found that the evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), but did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidentiary limitations at 20 C.F.R. §725.414(a)(2)(ii) precluded claimant from submitting an additional report from Dr. Cohen, in response to Dr. Repsher's deposition testimony criticizing Dr. Cohen's conclusions. Claimant further asserts that the administrative law judge erred in his consideration of the x-ray, computerized tomography (CT) scan, and medical opinion evidence pursuant to 20 C.F.R. §§718.107(b), 718.202(a)(1), (4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director), has filed a brief addressing claimant's evidentiary arguments.[3] The Director contends that this case must be remanded because the administrative law judge "incorrectly concluded that the evidence limiting rules do not allow for rebuttal and/or rehabilitation of medical opinion evidence." Director's Brief at 3.

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,

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[1] Claimant is the widow of the deceased miner, J.S., who died on January 19, 2006, while his claim was pending. Claimant is pursuing the miner's claim on his behalf. Decision and Order at 3.

[2] The law of the United States Court of Appeals for the Seventh Circuit is applicable as the miner was last employed in the coal mining industry in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least seventeen years of qualifying coal mine employment, as well as the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was 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).

Turning first to the merits of entitlement, we address claimant's contention that the administrative law judge erred in weighing the x-ray evidence of record relevant to the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1). Claimant specifically asserts that the administrative law judge improperly performed a "simple 'head count'" of negative x-ray interpretations. Claimant's Brief at 6. We discern no error in the administrative law judge's weighing of this evidence. The administrative law judge accurately reviewed the x-ray evidence of record, and permissibly relied on the preponderance of negative interpretations by dually qualified Board-certified radiologists and B readers.[4] Decision and Order at 11; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). As the administrative law judge properly considered the contemporaneous nature of the x-rays, as well as the qualifications of the physicians, we affirm the administrative law judge's finding that claimant failed to meet her burden of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence. *See Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983).

We next address claimant's contention that the administrative law judge erred in his evaluation of the CT scan evidence in finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant asserts that the administrative law judge failed to fully analyze the conflicting CT scan interpretations

[4] The x-ray evidence consists of eight interpretations of two x-rays. The November 11, 2002 x-ray was read as negative for pneumoconiosis by Drs. Whitehead, Wiot, and Spitz, all dually qualified physicians, and as positive by Drs. Cappiello and Ahmed, both dually qualified physicians. Director's Exhibits 19, 35; Employer's Exhibit 14; Claimant's Exhibits 1, 2. The May 15, 2003 x-ray was read as negative for pneumoconiosis by Dr. Repsher, a B reader, and by Dr. Wiot, and as positive by Dr. Ahmed. Director's Exhibit 43; Employer's Exhibit 4; Claimant's Exhibit 3.

of Drs. Cohen and Wiot.[5] In considering the CT scan evidence of record, the administrative law judge stated:

> The CT scan reports produced varying interpretations from the physicians that interpreted them. At best, these CT scans represent unstable evidence that the Seventh Circuit Court of Appeals has ruled is not conclusive. *Consolidation Coal Co. v. Director, OWCP*, [*Stein*], 294 F.3d 885, [22 BLR 2-409] (7th Cir. 2002).

Decision and Order at 15.

As claimant asserts, the administrative law judge did not address whether the parties showed that CT scans are medically acceptable and relevant to establishing pneumoconiosis, *see* 20 C.F.R. §718.107(b), and it is unclear from the administrative law judge's decision why he found the CT scan reports to be "unstable." Claimant's Brief at 8-9. We therefore vacate the administrative law judge's findings regarding the CT scans pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration. On remand, the administrative law judge must address whether a foundation was laid for admitting the CT scan interpretations, and then reconsider the probative value of the conflicting interpretations. In so doing, the administrative law judge must determine whether Drs. Cohen and Wiot are qualified by knowledge, training, or expertise to review CT scans for the presence or absence of pneumoconiosis, and, if so, whether the physicians applied recognized and accepted medical principles in a reliable way. *See Stein*, 294 F.3d at 893, 22 BLR at 2-423; *Peabody Coal Co. v. McCandless*, 255 F.3d. 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001). Further, the administrative law judge must explain his findings.

Claimant also contends that in evaluating the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in discrediting the opinions of Drs. Theertham, Harris, and Cohen. Claimant's Brief at 7, 9-13. The administrative law judge considered five medical opinions, noting, correctly, that Drs. Theertham, Harris, and Cohen diagnosed the miner

[5] The computerized tomography (CT) scan evidence consists of four interpretations of three scans. Dr. Konijeti interpreted scans dated February 7, 2002 and July 17, 2002, that were performed during the course of the miner's treatment at Terre Haute Regional Hospital. Dr. Konijeti opined that the scans revealed areas of atelectasis, infiltrates, and a mild interstitial pattern, but did not comment on whether the scans were consistent with pneumoconiosis. Director's Exhibits 11, 34. The May 14, 2003 scan was read as negative for pneumoconiosis by Dr. Wiot, and as positive for pneumoconiosis by Dr. Cohen. Employer's Exhibit 3; Claimant's Exhibit 5.

with either clinical or legal pneumoconiosis,[6] or both, while Drs. Repsher and Renn opined that the miner had chronic obstructive pulmonary disease (COPD) due entirely to tobacco abuse, and did not suffer from any coal dust related disease. Decision and Order at 13; Director's Exhibits 43, 57; Employer's Exhibits 1, 24. Finding that none of the medical opinions was well reasoned, the administrative law judge determined that they were all entitled to little weight, and he concluded that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7] Decision and Order at 13-15.

Initially, we reject claimant's assertion that the administrative law judge erred in discrediting the opinion of Dr. Theertham, the miner's treating physician.[8] Contrary to

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[6] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] Contrary to employer's arguments, the administrative law judge acted within his discretion in discounting, as insufficiently reasoned, the opinions of Drs. Repsher and Renn, who did not diagnose either clinical or legal pneumoconiosis, because, while both physicians diagnosed chronic obstructive pulmonary disease (COPD), they "fail[ed] to illustrate how they rationally eliminated the miner's seventeen years of coal mine employment as a contributor to the disease." Decision and Order at 14; *see Freeman United Coal Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-280 (7th Cir. 2001); Employer's Brief at 20 n.1; Director's Exhibits 43, 57 at 34-37; Employer's Exhibits 1, 24 at 71-72, 76-77. Thus, the administrative law judge found their opinions to be "little more than observations that coal mine dust usually does not cause [COPD], followed by a conclusion that the miner's [COPD] was, therefore, probably not caused by dust exposure." Decision and Order at 15. Therefore, the administrative law judge permissibly concluded that Drs. Repsher and Renn had not offered reasoned opinions based on the miner's individual circumstances. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). As the administrative law judge's findings are supported by substantial evidence, they are affirmed.

[8] Dr. Theertham, the miner's treating physician, opined that the miner had "severe [chronic obstructive pulmonary disease] with a "very low" FEV1 and PO2 and "significant coal miner's exposure," and stated:

> Considering his history and considering his FEV1 alone [sic] with emphysema causing all these problems, is probably not correct. I would consider if he has [a] significant diffusion problem, probably secondary to

claimant's arguments, the administrative law judge acted within his discretion in finding Dr. Theertham's opinion, that the miner's diffusion problem was "probably secondary to coal miner's disease" to be "equivocal and vague," and not "credible in light of its reasoning and documentation and the record as a whole." *See Freeman United Coal Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-280 (7th Cir. 2001); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 13; Director's Exhibit 6.

The administrative law judge also permissibly discounted the opinion of Dr. Harris, that the miner had legal pneumoconiosis in the form of COPD and chronic bronchitis, due to both smoking and coal mine dust exposure. Director's Exhibit 14. Contrary to claimant's assertion, the administrative law judge acted within his discretion in finding Dr. Harris' opinion to be "unsupported" and lacking rationale because Dr. Harris "summarily opine[d] that the miner's chronic obstructive pulmonary disease and chronic bronchitis were due to a combination of cigarette smoking and coal dust exposure, but he provide[d] no further statements that link the miner's coal dust exposure to his pulmonary diseases."[9] Decision and Order at 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

> coal miner's disease which may be causing more than 25%, [sic] would expect is probably 50% of his problem.
>
> I would like to emphasize that he is completely disabled and is [sic] a significant factor from pneumoconiosis added to the disease process which he has now in addition to his severe emphysema and the end results of cor pulmonale.

Director's Exhibits 12, 36.

[9] Claimant further asserts that the administrative law judge mischaracterized Dr. Harris' opinion as being based in part on a smoking history of forty pack-years. Claimant's Brief at 14; Decision and Order at 7. As claimant correctly contends, Dr. Harris recorded that the miner began smoking at age twenty, and quit at age sixty-five, for a smoking history of at least forty-five pack-years. Director's Exhibit 14. However, as we have affirmed the administrative law judge's discrediting of Dr. Harris' report on other grounds, any error in the administrative law judge's characterization of Dr. Harris' notation of the miner's smoking history is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We find merit, however, in claimant's contention that the administrative law judge erred in discrediting Dr. Cohen's opinion that the miner suffered from both clinical pneumoconiosis, and legal pneumoconiosis, in the form of COPD caused by smoking and coal mine dust exposure. Claimant's Exhibits 5, 6. The administrative law judge accorded little weight to Dr. Cohen's diagnosis of clinical pneumoconiosis, because it was "based primarily on x-ray and CT scan evidence" that the administrative law judge had earlier discredited. Decision and Order at 14. The administrative law judge also discounted Dr. Cohen's diagnosis of legal pneumoconiosis, stating that while Dr. Cohen "opined that even if the miner's x-ray evidence was interpreted as negative for the disease, he would still diagnose clinical, physical exam, and physiological evidence of legal pneumoconiosis[,] [Dr. Cohen] provide[d] no support or rationale for this opinion beyond this statement." Decision and Order at 14. Thus, the administrative law judge concluded that Dr. Cohen had "not provided a sufficient causal link between the miner's coal dust exposure and his obstructive impairment to establish legal pneumoconiosis." Decision and Order at 14.

First, as we have vacated the administrative law judge's evaluation of the CT scan evidence pursuant to 20 C.F.R. §§718.107, 718.202(a)(4), we must also vacate the administrative law judge's discrediting of Dr. Cohen's diagnosis of clinical pneumoconiosis. Second, we agree with claimant that the administrative law judge erred in finding that Dr. Cohen failed to offer any support or rationale for his opinion. As claimant asserts, Dr. Cohen reviewed the results of two clinical examinations, objective tests, and treatment records, and based his opinion, that both smoking and coal dust exposure significantly contributed to the miner's obstructive impairment, on current scientific knowledge and the miner's work and medical histories. Claimant's Brief at 11-12; Claimant's Exhibit 5. Dr. Cohen explained that the only risk factors that the miner was exposed to were his forty-two to fifty-two pack-years of smoking and seventeen years of coal mine dust exposure, and that the effect of one year of post-1970 occupational dust exposure was equivalent to smoking approximately one-half pack per day. Claimant's Exhibit 5 at 2, 13, 16. Because the administrative law judge did not address Dr. Cohen's rationale for finding that coal mine dust exposure was a significant contributing cause of the miner's COPD, we vacate the administrative law judge's determination to discredit the opinion of Dr. Cohen pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(2),(b). On remand, while the administrative law judge is not bound to credit Dr. Cohen's opinion, he must consider the entirety of Dr. Cohen's opinion and rationale, and explain his credibility determination. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988).

Finally, we address claimant's assertion that the administrative law judge erred in finding that the evidentiary limitations precluded claimant from submitting an additional report from Dr. Cohen, in response to Dr. Repsher's deposition testimony criticizing Dr.

Cohen's conclusions. The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark*, 12 BLR at 1-153.

Following the district director's July 31, 2003 Proposed Decision and Order denying benefits, Director's Exhibit 30, claimant requested a hearing, and the case was transferred to the Office of Administrative Law Judges. A formal hearing was scheduled for June 13, 2007. Claimant submitted the opinion of Dr. Cohen as one of her two affirmative case medical reports, pursuant to 20 C.F.R. §725.414(a). On April 10, 2007, employer submitted the January 23, 2007 deposition testimony of Dr. Repsher, in which he criticized the opinion of Dr. Cohen as being based on flawed medical studies. Employer's Exhibit 25 at 59-60.

Pursuant to the parties' agreement to cancel the hearing and allow a decision to be made on the record, by Order dated June 18, 2007, the administrative law judge allowed the parties thirty days to file objections to the admission of evidence. In a response dated July 17, 2007, claimant objected to the admission of Dr. Repsher's deposition testimony, asserting that claimant was entitled to rehabilitate Dr. Cohen's opinion in response to Dr. Repsher's criticism. Claimant stated that she had not obtained a rehabilitative statement from Dr. Cohen earlier because, by the time she received Dr. Repsher's deposition testimony, it was too late to obtain a response from Dr. Cohen by the twenty-day deadline for the submission of evidence, pursuant to 20 C.F.R. §725.456. Claimant requested either that Dr. Repsher's comments addressing Dr. Cohen's report be excluded from the record, or that claimant be given additional time to obtain rehabilitative evidence. Employer did not object to claimant's request.

By Order dated August 20, 2007, the administrative law judge denied claimant's request to rehabilitate Dr. Cohen's opinion. The administrative law judge found that the regulation at 20 C.F.R. §725.414 permits rehabilitative evidence to be submitted only in response to rebuttal evidence that tends to undermine a physician's interpretation of objective medical studies (*i.e.*, pulmonary function studies or arterial blood gas studies). The administrative law judge ruled that because Dr. Repsher had not presented specific evidence undermining any objective medical test performed by Dr. Cohen, claimant was not entitled to rehabilitate Dr. Cohen's opinion merely because Dr. Repsher's opinion criticized that of Dr. Cohen.

Claimant contends that the administrative law judge erred by not allowing her to respond to Dr. Repsher's deposition testimony. The Director responds, asserting that the administrative law judge "incorrectly concluded that the evidence limiting rules do not

allow for rebuttal and/or rehabilitation of medical opinion evidence."[10] Director's Brief at 3; Decision and Order at 14.

We agree with claimant and the Director, that the salient question presented in this case is whether claimant may submit a "supplemental report" in response to Dr. Repsher's opinion. Claimant's Brief at 5-6; Director's Brief at 3-4. Since a medical report may be submitted by a physician who has examined the miner "and/or" reviewed admissible evidence, and the evidentiary limitations do not require that a "medical report" be contained in a single document, 20 C.F.R. §725.414(a)(1), the administrative law judge erred in determining that the evidentiary limitations precluded claimant from obtaining an additional report from Dr. Cohen, in response to Dr. Repsher's criticisms. *See generally Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006); *C.L.H. v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007)(unpub.)(deferring to the Director's position that supplemental reports based on review of admissible evidence do not exceed the two-report limitation). Because, as discussed above, we must remand this case for further consideration of the merits of claimant's entitlement, we instruct the administrative law judge, on remand, to reconsider whether claimant is entitled to submit a supplemental report from Dr. Cohen in response to Dr. Repsher's testimony.

In summary, on remand, following consideration of claimant's request to submit a supplemental opinion from Dr. Cohen pursuant to 20 C.F.R. §725.414, the administrative law judge should reconsider the relevant CT scan and medical opinion evidence of record pursuant to 20 C.F.R. §718.202(a)(4), address the explanations provided by the

[10] Section 725.414, in conjunction with 20 C.F.R. §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." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(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*.

physicians, and fully set forth his reasons for crediting or discrediting their opinions as to whether claimant has established the existence of pneumoconiosis. In so doing, the administrative law judge should consider the physicians' credentials, the quality of their reasoning, and whether their reports are supported by the remaining evidence of record. *See* 30 U.S.C. §923(b); *see Summers*, 272 F.3d at 483, 22 BLR at 2-280; *Stein*, 294 F.3d at 893, 22 BLR at 2-423. In addition, if, on remand, the administrative law judge finds that the miner's smoking history is relevant to his consideration of the credibility of the physicians' opinions, we agree with claimant that he must explain the basis for his finding that the miner had a smoking history of between fifty and seventy-five pack-years.[11] Decision and Order at 7; Claimant's Brief at 13-14. Finally, if reached, the administrative law judge must consider whether claimant has established that pneumoconiosis was a substantially contributing cause of the miner's total disability under 20 C.F.R. §718.204(c). *See Burns*, 855 F.2d at 501.

[11] The administrative law judge found that the physicians of record had noted various smoking histories, apparently based on inconsistent histories reported by the miner. Based on his "interpretation of these histories," the administrative law judge concluded that the miner had between fifty and seventy five "pack-years of smoking history at the time of his death." Decision and Order at 7 n.5. The administrative law judge concluded that this amount was "somewhat similar" to the smoking histories reported by the physicians, and determined that he "did not find any discrepancy to be material enough to warrant discrediting any individual opinion." Decision and Order at 7 n.5.

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.

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