

BRB No. 12-0350 BLA

CLABURN J. WEBB)
Claimant-Respondent)
v.)
DRUMMOND COAL COMPANY,)
INCORPORATED)
Employer-Petitioner) DATE ISSUED: 03/27/2013
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 Ralph A. Romano,
Administrative Law Judge, United States Department of Labor.**

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Katherine A. Collier (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05009) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp.

2011) (the Act).¹ This case involves a subsequent claim filed on August 31, 2009.² After crediting claimant with thirteen years of coal mine employment,³ as stipulated by the parties, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. On the merits of entitlement, the administrative law judge found that claimant is entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment. The administrative law judge further found that the evidence of record is sufficient to establish that claimant is totally disabled at 20 C.F.R. §718.204(b)(2)(i), (iv), and that pneumoconiosis is a contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in allowing claimant to develop post-hearing evidence, pursuant to 20 C.F.R. §725.456(b)(3). Employer also argues that the administrative law judge did not properly weigh the evidence relevant to the existence of pneumoconiosis, at 20 C.F.R. §718.202(a), and further erred in finding that claimant's pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b). Employer also challenges the administrative law judge's determination that claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Finally, employer challenges the administrative law judge's determination of the date for the commencement of benefits. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited

¹ Because the parties stipulated that claimant has thirteen years of coal mine employment, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case. *See* Pub. L. No. 111-148, §1556(a), (c); 30 U.S.C. §§921(c)(4) and 932(l).

² The instant claim is claimant's third. Claimant's prior claim, filed on June 23, 2006, was finally denied because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 16; Director's Exhibits 1, 4.

response brief, urging the Board to reject employer's arguments regarding the administrative law judge's admission of claimant's post-hearing evidence.⁴

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address employer's contention that the administrative law judge erred in admitting into the record four readings of the October 8, 2009 x-ray, and a medical report, from claimant's consulting physicians. Employer contends that claimant failed to establish good cause for failing to exchange the evidence at least twenty days prior to the hearing, in accordance with 20 C.F.R. §725.456(b)(3).

Pursuant to 20 C.F.R. §725.456(b)(2), documentary evidence that was not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). Evidence not exchanged within the twenty-day timeframe may still be admitted at the hearing with the written consent of the parties, or on the record at the hearing, or upon a showing of good cause. 20 C.F.R. §725.456(b)(3). If the parties do not waive the requirement, or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3). Further, Section 725.456(b)(4) provides that "a medical report which is not made available to the parties in accordance with paragraph (b)(2) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least [thirty] days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence." 20 C.F.R. §725.456(b)(4). An administrative law judge's finding on the issue of "good cause" is reviewed for an abuse of the broad discretion granted to him in resolving procedural issues. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established thirteen years of coal mine employment and 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, 1-711 (1983).

The administrative law judge did not abuse his discretion in admitting claimant's evidence into the record. Twenty days before the hearing, by letter dated June 22, 2011, claimant's counsel informed the administrative law judge and employer's counsel that she had not yet received the x-ray readings from Drs. Alexander, Miller and Groten, and the medical report of Dr. Hawkins, that the exhibits would be submitted as soon as they were received, and that she would file a motion for an extension of time. Claimant's counsel identified the evidence as Claimant's Exhibits 1, 2, 3, and 5. On June 24, 2011, claimant's counsel filed a motion for an extension of time, explaining that she was not able to provide claimant's evidence in a timely manner because she had not yet received it. Employer opposed claimant's motion. At the hearing, held on July 12, 2011, the parties and the administrative law judge discussed claimant's request for an extension of time to submit his x-ray and medical opinion evidence. Hearing Tr. at 12-13. Claimant's counsel again explained that she had not yet received the exhibits from her consulting physicians. After considering the parties' arguments, the administrative law judge stated:

“All right, what I’m going to do is I’m going to leave the record open for forty-five days for the Claimant’s submission of 1, 2, 3, and 5 and I’m going to permit the Employer sixty days to rebut that, but I’m not going to remand the case.”

Hearing Tr. at 12-13. Subsequently, the administrative law judge explicitly found that “good cause ha[d] been stated” for claimant’s late submissions, and that claimant would be permitted to submit x-ray readings of the October 8, 2009 x-ray by Drs. Alexander, Miller, and Groten, and the medical report of Dr. Hawkins, identified as Claimant’s Exhibits 1, 2, 3, and 5. The administrative law judge reiterated that employer would be allowed to “rebut and/or submit new evidence” in response. Hearing Tr. at 49. After requesting additional extensions of time, claimant’s counsel completed her evidentiary submissions on September 2, 2011. However, claimant’s counsel substituted a reading of the October 8, 2009 x-ray by Dr. Smith, for the planned reading from Dr. Groten. On October 31, 2011, employer submitted a supplemental report from Dr. Russakoff, dated October 16, 2011, in response to claimant’s new evidence.

Based upon these facts, we decline to disturb the administrative law judge’s resolution of this issue. The administrative law judge provided both parties the opportunity to explain their positions, and credited claimant’s counsel’s statements regarding the difficulties she had experienced in obtaining the evidence and found that this constituted good cause for allowing claimant additional time to procure the x-ray readings and medical report. Hearing Tr. at 8-14, 46-49. Further, the administrative law judge properly allowed employer additional time to submit responsive evidence, and employer did so. Nor is there merit to employer’s additional contentions that the administrative law judge erred in allowing claimant to substitute the x-ray reading of Dr. Smith for the planned reading by Dr. Groten, and in failing to offer employer the

opportunity to object. Employer's Brief at 6, 26. Employer concedes that claimant notified both the administrative law judge and employer that the substitution was necessary in the interest of time, because the Department of Labor sent the x-ray film to Dr. Smith's office for re-reading, instead of to Dr. Grotens's office. Employer's Brief at 6. Employer has not explained how it was prejudiced by the substitution, or why it could not have objected to the substitution when it was notified by claimant. We, therefore, affirm the administrative law judge's determinations, as they do not represent an abuse of discretion. *Keener*, 23 BLR at 1-236; *Morgan*, 8 BLR at 1-493.

Employer also challenges the administrative law judge's findings in regard to the merits of claimant's 2009 subsequent claim. In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he suffers from pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

Initially, we reject employer's argument that the administrative law judge erred in his evaluation of the x-ray evidence, in finding the existence of pneumoconiosis established. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven readings of one x-ray, taken on October 8, 2009. The administrative law judge correctly noted that Drs. Ahmed, Alexander, Miller, and Smith, who are all Board-certified radiologists and B readers, read claimant's x-ray as positive for pneumoconiosis. Decision and Order at 5; Director's Exhibit 11; Claimant's Exhibits 1-3. The administrative law judge also considered that Drs. Wheeler, Scott, and Meyer, who are also Board-certified radiologists and B readers, read the same x-ray as negative for pneumoconiosis. Decision and Order at 11; Director's Exhibit 36.

Contrary to employer's contention, the administrative law judge properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the radiological qualifications of the physicians, and found that the majority of the readings by well qualified radiologists establish that claimant has pneumoconiosis. We, therefore, reject employer's assertion of error and affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis by a

preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *White*, 23 BLR at 1-4-5; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

Employer also argues that the administrative law judge failed to consider whether the medical opinions established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and failed to weigh this evidence together with the x-ray evidence, pursuant to 20 C.F.R. §718.202(a). In support of its argument, employer cites the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). This contention is without merit.

As indicated above, because claimant's coal mine employment occurred in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Hearing Tr. at 16; Director's Exhibits 1, 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc). Contrary to employer's argument, the Eleventh Circuit has not adopted the interpretation of Section 718.202(a) set forth in *Compton*. See *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 991, 23 BLR 2-213, 2-236-38 (11th Cir. 2004)(noting that *Compton* is not binding authority in the Eleventh Circuit); but see *Dixie Fuel Co. v. Director, OWCP [Hensley]*, No. 11-4298, 2012 WL 5935574 (6th Cir. Nov. 28, 2012); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Because the administrative law judge found that the x-ray evidence established that claimant suffers from pneumoconiosis pursuant to Section 718.202(a)(1), he was not required to consider the remaining methods at Section 718.202(a)(2)-(4). We, therefore, affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a).⁵ Thus, we also affirm the administrative law judge's finding that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309.

There is merit, however, to employer's contention that the administrative law judge erred in finding that claimant's pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b). The administrative law judge properly found that, as claimant has established at least ten years of coal mine employment, he is entitled to the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); Decision and Order at 6. However, in finding that claimant established this element of entitlement, the administrative law judge did not consider whether the presumption was rebutted. Moreover, as employer asserts, the record contains evidence that the x-ray changes seen by Drs. Ahmed, Alexander, Smith,

⁵ We note that the record contains no autopsy, biopsy, or computerized tomography evidence which could directly contradict the x-ray evidence.

and Miller, either do not represent abnormalities within the lungs, or, if present, did not arise out of coal mine employment.⁶ Employer's Brief at 33-34; Hearing Tr. at 29, 31, 40-42. We, therefore, must vacate the administrative law judge's finding at 20 C.F.R. §718.203(b) and remand the case for further consideration of the evidence. On remand, the administrative law judge must weigh the relevant evidence to determine whether it is sufficient to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment. 20 C.F.R. §718.203(b).

In light of our decision to vacate the administrative law judge's finding that claimant's pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), we also vacate his finding that claimant's total disability is due to coal workers' pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). If the administrative law judge finds that employer failed to rebut the presumption that claimant's clinical pneumoconiosis arose out of his coal mine employment, he must reconsider whether the evidence establishes that claimant's total disability is due to his clinical pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). In so doing, the administrative law judge must discuss and weigh all of the relevant evidence, and set forth the specific bases for his findings. We note that, relevant to the cause of claimant's respiratory impairment, the administrative law judge did not consider Dr. Russakoff's supplemental report, dated October 16, 2001, which employer submitted in response to claimant's post-hearing

⁶ Claimant testified that he was diagnosed with asbestosis, following twenty-one years of employment in a steel mill, where he worked on brakes, tore out insulation, and worked as a welder. Hearing Tr. at 29, 31, 40-42. The record contains a treatment note dated March 9, 2001 from Dr. Cross, noting that claimant's x-ray showed mild interstitial changes consistent with asbestosis. Director's Exhibit 1. The record also contains an x-ray report dated June 29, 2002, in which Dr. Ballard, a B reader, stated that he had reviewed an x-ray dated June 21, 2002 "for the presence of and classification of pneumoconiosis (asbestosis)" and that the film contained "small and irregular opacities of size and shape s/t, profusion 1/0" which were "consistent with asbestosis." Director's Exhibit 1. The record contains a second letter from Dr. Ballard, also dated June 29, 2002, in which he stated that an x-ray of unspecified date was "reviewed for the presence and classification of pneumoconiosis (Coal workers' pneumoconiosis)" and revealed "small and irregular opacities of size and shape s/t, profusion 1/0" which were "consistent with coal workers' pneumoconiosis acquired through occupational exposure to asbestos." Director's Exhibit 1. Finally, in medical reports dated June 6, 2011 and October 16, 2011, Dr. Russakoff opined that obesity is known to accentuate normal lung markings to the extent that they appear to be abnormalities when seen on x-ray. Dr. Russakoff concluded that for this reason, together with the presence of the opacities in all six lung zones, he discounted the positive x-ray readings. Employer's Exhibit 3.

evidence, pursuant to 20 C.F.R. §725.456(b)(4).⁷ It is not clear whether the administrative law judge admitted, or intended to admit, Dr. Russakoff's supplemental report into evidence. This evidence is relevant to determining whether claimant's disability is due to pneumoconiosis.⁸ On remand, the administrative law judge must specifically address whether Dr. Russakoff's October 16, 2001 report is admitted into evidence, or explain why it was not admitted.

In sum, on remand, the administrative law judge must address whether employer rebutted the presumption that claimant's clinical pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b).⁹ If employer has not rebutted the presumption, then the administrative law judge must reconsider whether claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), and explain whether he has considered Dr. Russakoff's October 16, 2001 report in making his determination. Finally, because we have vacated the award of benefits, we vacate the

⁷ As set forth above, at the hearing the administrative law judge left the record open to allow employer to submit evidence responsive to claimant's post-hearing evidentiary submissions. By letter dated October 31, 2011, employer submitted Dr. Russakoff's October 16, 2011 supplemental report, addressing Claimant's Exhibits 1, 2, 3, and 5.

⁸ In his June 6, 2011 report, Dr. Russakoff based his opinion, that claimant's disabling respiratory impairment is due to obesity, and not pneumoconiosis, in part on the lack of significant change in claimant's pulmonary function tests over the last decade. Employer's Exhibit 3. The administrative law judge discounted Dr. Russakoff's opinion, solely because the physician did not review Dr. Hawkins' 2011 pulmonary function studies, which produced values indicative of disability, pursuant to the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11. As employer asserts, however, in his supplemental report dated October 16, 2001, Dr. Russakoff reviewed the results of Dr. Hawkins' 2011 pulmonary function testing. Employer's Brief at 20-21, 36-37.

⁹ If, on remand, the administrative law judge determines that employer has rebutted the presumption that claimant's clinical pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), the administrative law judge must consider whether claimant established the existence of legal pneumoconiosis, at 20 C.F.R. §718.202(a)(4), and total disability due to legal pneumoconiosis, at 20 C.F.R. §718.204(c).

administrative law judge's finding as to the date for the commencement of benefits, and instruct him to reconsider this issue, if reached.¹⁰ See 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order Awarding 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹⁰ We note, however, that there is no merit to employer's contention that the administrative law judge erred in his consideration of the date for the commencement of benefits. Employer's Brief at 37-38.