

BRB Nos. 05-0788 BLA
and 05-0788 BLA-S

DONALD R. HENLEY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
COWIN & COMPANY, INCORPORATED)	
)	DATE ISSUED: 05/30/2006
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of the Decision and Order-Award Of Benefits and the Supplemental Decision and Order-Conditional Award of Attorney Fees and Costs of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, & Rutherford), Norton, Virginia, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award Of Benefits and the Supplemental Decision and Order-Conditional Award of Attorney Fees and Costs (04-BLA-5607) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a subsequent 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's initial claim, filed on August 2, 1993, was denied because claimant did not establish the existence of pneumoconiosis.¹ Director's Exhibit 1. The Board affirmed the denial of benefits on April 24, 2001. *Henley v. Cowin & Co.*, BRB No. 00-0556 BLA (Apr. 24, 2001)(unpub.). Claimant filed this claim more than one year later, on July 15, 2002. Director's Exhibit 3; *see* 20 C.F.R. §725.309(d).

The administrative law judge credited claimant with eighteen years of coal mine employment² and found that employer was the responsible operator. The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). The administrative law judge further found that employer did not rebut the presumption of 20 C.F.R. §718.203(b) that claimant's complicated pneumoconiosis arose out of coal mine employment. Accordingly, the administrative law judge awarded benefits, finding February 1, 2002 to be the onset date of claimant's complicated pneumoconiosis.

Subsequently, the administrative law judge considered claimant's counsel's petition for a fee and employer's objections thereto, and awarded a fee of \$7,012.50, conditional on a final award of benefits reflecting a successful prosecution of the claim.

On appeal, employer contends that the administrative law judge erred in admitting into the record medical evidence submitted by a potential responsible operator that was dismissed from the case. Employer further asserts that the administrative law judge erred

¹ The Board set forth the full history of claimant's initial claim in *Henley v. Cowin & Co.*, BRB No. 00-0556 BLA (Apr. 24, 2001)(unpub.); *Henley v. Cowin & Co.*, 21 BLR 1-147 (1999); and *Henley v. Cowin & Co.*, BRB Nos. 96-1770 BLA, 96-1770 BLA-A (Sep. 29, 1997)(unpub.).

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

in excluding three x-ray readings submitted by employer. Additionally, employer argues that the administrative law judge did not apply the proper standard to determining whether claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Employer also contends that the administrative law judge erred in his analysis of the medical evidence when he found the existence of complicated pneumoconiosis arising out of coal mine employment established. Employer additionally challenges the administrative law judge's onset date finding, and contends that employer is entitled to an offset against any award of benefits because of an overpayment that occurred in the initial claim. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge erred in some of his evidentiary rulings, and asserting that employer is not entitled to an offset. Employer has filed a reply brief reiterating its contentions.

In its appeal of the administrative law judge's supplemental decision awarding a fee, employer contends that the administrative law judge lacked jurisdiction to consider the fee petition, and erred in awarding fees for services performed after the hearing. Claimant has not responded to employer's appeal of the fee award. The Director has indicated that he will not respond to employer's appeal of the fee award.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, 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).

Employer contends that the administrative law judge erred in admitting into evidence Dr. Cherry's medical report at Director's Exhibit 12 despite employer's objection that it was developed by a potential responsible operator, Jim Walter Resources, that was dismissed as a party. The Director agrees, citing 20 C.F.R. §725.421(b)(4), which limits the medical evidence to be placed in the hearing record to the evidence submitted by the Director, "the claimant, and the potentially liable operator designated as the responsible operator in the [district director's] proposed decision and order" 20 C.F.R. §725.421(b)(4).

We agree that the administrative law judge erred in admitting Director's Exhibit 12 into evidence. The record reflects that Jim Walter Resources submitted this medical

³ We affirm as unchallenged on appeal the administrative law judge's findings that claimant has eighteen years of coal mine employment and that employer is the responsible operator. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

evidence to the district director while Jim Walter Resources was designated as a potentially liable operator. Director's Exhibits 12, 17, 28. Subsequently, in a proposed decision and order issued pursuant to 20 C.F.R. §725.418, the district director designated employer as the responsible operator. Director's Exhibit 29; *see* 20 C.F.R. §725.418(d)(requiring the "final designation" of a single responsible operator). Accordingly, the district director dismissed Jim Walter Resources as a party. Director's Exhibit 30. For reasons not disclosed by the record, the district director nevertheless transmitted the Jim Walter Resources evidence to the Office of Administrative Law Judges. *Cf.* 20 C.F.R. §725.421(b)(4). There is no indication that either claimant or employer adopted this evidence. Consequently, the administrative law judge erred in admitting Director's Exhibit 12 into the record.⁴ Further, a review of the administrative law judge's Decision and Order reflects that he relied upon Dr. Cherry's medical report at Director's Exhibit 12 to find the existence of complicated pneumoconiosis established. Decision and Order-Award of Benefits at 20. Therefore, we must vacate the administrative law judge's evidentiary ruling and remand this case to him for further consideration.

Employer next contends that the administrative law judge erred in excluding three of six x-ray readings that employer submitted as rebuttal to readings of three x-rays dated February 15, 2002, October 3, 2002, and February 26, 2003. The Director responds that, assuming *arguendo* that the original x-ray readings were subject to rebuttal, the administrative law judge did not err in admitting three and excluding the other three proposed rebuttal readings. However, the Director also "concede[s] that the evidentiary situation [was] more complex than the ALJ supposed" because the original readings of the February 26, 2003 x-ray that employer sought to rebut were inadmissible, and because the original reading of the February 15, 2002 x-ray was not subject to rebuttal under 20 C.F.R. §725.414(a)(3)(ii). Director's Brief at 2.

Because we are remanding this case for further consideration, we will address the administrative law judge's rulings on these x-ray readings as follows: The original readings by Drs. Corea and Patel of the February 26, 2003 x-ray were submitted by the dismissed operator, Jim Walter Resources. Director's Exhibit 12. As just discussed, Director's Exhibit 12 was not admissible unless adopted by a party to the claim. We therefore vacate the administrative law judge's ruling and instruct him to reconsider the

⁴ The administrative law judge's reliance on *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), as the basis for admitting Director's Exhibit 12 was misplaced, because *York* did not address the regulations applicable to this claim that limit the operator evidence to that submitted by the finally designated responsible operator. 20 C.F.R. §§725.2(c); 725.414(a)(3)(i); 725.421(b)(4).

admissibility of the original readings of the February 26, 2003 x-ray and of any evidence submitted in response to them.⁵

Additionally, the record reflects that Dr. Ebeo's reading of the February 15, 2002 x-ray that employer sought to rebut was contained in treatment records from Pulmonary Associates submitted by claimant pursuant to 20 C.F.R. §725.414(a)(4).⁶ The administrative law judge permitted employer one rebuttal reading of this x-ray. However, as the Director notes, 20 C.F.R. §725.414 contains no provision for the rebuttal of treatment records, and subsection (a)(4) does not create an exception to the evidentiary limitations for evidence submitted in response to treatment records. *See* 20 C.F.R. §725.414(a)(3)(ii), (a)(4). Because we are remanding this case for further consideration, we vacate the administrative law judge's ruling regarding the February 15, 2002 x-ray and instruct him to reconsider the admissibility of employer's proffered rereadings.

Finally, the October 3, 2002 x-ray was interpreted as positive for pneumoconiosis by Dr. Forehand as part of the Director's complete pulmonary evaluation. Director's Exhibit 9. Because one interpretation of this x-ray was submitted by the Director, employer was entitled to one rebuttal reading. 20 C.F.R. §725.414(a)(3)(ii); *see Ward v. Consolidation Coal Co.*, --- BLR ---, BRB No. 05-0595 BLA (Mar. 28, 2006). The administrative law judge admitted one rebuttal reading, by Dr. Scott. Employer's Exhibit 3. On appeal, employer specifies no error by the administrative law judge in choosing Dr. Scott's reading over that of Dr. Wheeler.⁷ Detecting no abuse of discretion by the administrative law judge, we affirm his ruling on the October 3, 2002 x-ray. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004)(*en banc*).

Employer additionally argues that the administrative law judge failed to consider whether "good cause" for the admission of excess evidence was established under 20 C.F.R. §725.456(b)(1). The Director disagrees, noting that employer did not raise the good cause issue with the administrative law judge. A party wishing to submit excess

⁵ Because employer did not designate any affirmative case x-ray readings pursuant to 20 C.F.R. §725.414(a)(3)(i) before the administrative law judge, we decline employer's request to now consider certain readings as employer's affirmative case x-ray readings. Employer's Brief at 10 n.2 The parties should make any such requests to the administrative law judge on remand.

⁶ Section 725.414(a)(4) provides that "any record of a miner's . . . medical treatment for a respiratory or pulmonary or related disease, may be received into evidence," notwithstanding the evidentiary limitations. 20 C.F.R. §725.414(a)(4).

⁷ Employer was not present at the hearing to choose one of the two readings, having waived its appearance. Hearing Tr. at 16-18.

evidence must raise the good cause issue with the administrative law judge and make the good cause showing. *Brasher v. Pleasant View Mining Co.*, --- BLR ---, BRB No. 05-0570 (Apr. 28, 2005). Employer did not raise the issue below. Therefore, the administrative law judge did not err in not addressing it.

To be entitled 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).

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, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also U.S. Steel Mining Co. v. Director, OWCP, [Jones]*, 42 F.3d 993, 23 BLR 2-213 (11th Cir. 2004)(holding under former provision that claimant must establish one of the elements of entitlement that was previously resolved against him). The administrative law judge applied this standard in his decision. Decision and Order at 8-9. Therefore, employer’s contention that the administrative law judge applied the wrong standard lacks merit.

The administrative law judge found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(3), based on a finding that the existence of complicated pneumoconiosis was established. As discussed, the administrative law judge based this finding in part on evidence that was not admissible, and must reconsider on remand the admissibility of other relevant evidence. We must therefore vacate the administrative law judge’s finding under 20 C.F.R. §725.309(d) that the existence of complicated pneumoconiosis was established pursuant to 20 C.F.R. §718.304 and instruct him to reconsider the issue.

Additionally, pursuant to 20 C.F.R. §718.304(a), employer contends that the administrative law judge erred in finding that Dr. Scott read the x-rays as positive for complicated pneumoconiosis. The administrative law judge noted that Dr. Scott read claimant’s x-rays as positive for simple pneumoconiosis and identified category “C” large opacities. The administrative law judge discounted Dr. Scott’s comments that the

large opacities were probably due to granulomatous disease or tumor, finding Dr. Scott's suggestion of several alternative causes to be equivocal, and noting that the record did not support the alternative diagnoses. Since the administrative law judge considered Dr. Scott's comments in light of medical evidence that was not admissible, Decision and Order at 20-21; Director's Exhibit 12, we instruct the administrative law judge to reconsider on remand Dr. Scott's x-ray comments. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*).

Pursuant to 20 C.F.R. §718.304(c), employer contends that the administrative law judge did not give proper weight to claimant's treating doctor's failure to diagnose pneumoconiosis. The record reflects that after reviewing the results of an open-lung biopsy, Dr. Mehta rendered an alternative diagnosis of either idiopathic pulmonary fibrosis or progressive coal workers' pneumoconiosis. Claimant's Exhibit 5 (entry dated Jan. 23, 2004). The administrative law judge found that Dr. Mehta's opinion was "not inconsistent with the presence of complicated pneumoconiosis." Decision and Order at 21. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33-34. Since the administrative law judge must reweigh the evidence on remand, he should explain the weight he accords to Dr. Mehta's opinion.

Employer next argues that the administrative law judge erred in finding an onset date of February 2002, rather than using the month of the claim's filing, July 2002. Because we have vacated the award of benefits, we vacate the administrative law judge's onset finding and instruct him to reconsider this issue, if reached. *See* 20 C.F.R. §725.503(b).

Employer asserts that if benefits are awarded, it is entitled to a \$44,284.17 offset to reflect the amount that claimant was overpaid in his prior denied claim. The Director responds that the Black Lung Disability Trust Fund (the Trust Fund), paid those interim benefits, and that it was therefore the Trust Fund, not employer, that was owed the debt when claimant's claim was denied. The Director points out that the Trust Fund granted claimant a waiver of the recovery of the full amount of the overpayment. In view of these undisputed facts, we reject employer's argument. The record reflects that claimant owes employer nothing, since the Trust Fund paid claimant's interim benefits in the prior claim. Director's Exhibit 1. After the claim was denied, the Trust Fund waived recovery of the overpayment. *Id.* Once a waiver is granted, "[t]here shall be no adjustment or recovery of an overpayment" 20 C.F.R. §725.542.

Employer challenges the administrative law judge's award of an attorney's fee, alleging that the administrative law judge lacked jurisdiction to consider the fee petition, and that the administrative law judge erred in awarding fees for services performed after the hearing. The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer has not demonstrated any abuse of discretion by the administrative law judge. Contrary to employer's first contention, the administrative law judge was not barred from considering counsel's fee petition because employer had appealed the administrative law judge's decision awarding benefits. The administrative law judge correctly recognized that any fee could not be enforced until there was a final award of benefits. *See* 20 C.F.R. §725.367(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995). As to employer's second contention, the administrative law judge considered employer's objections to the post-hearing services and found that the requested charges were neither unreasonable nor excessive. Supplemental Decision and Order at 2; 20 C.F.R. §725.366. Detecting no abuse of discretion by the administrative law judge, we affirm the fee award. *Jones*, 21 BLR at 1-108. A fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *Goodloe*, 19 BLR at 1-100 n.9.

Accordingly, the administrative law judge's Decision and Order-Award Of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion, and the Supplemental Decision and Order-Conditional Award of Attorney Fees and Costs is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge