BRB No. 07-0691 BLA

M.B. (on behalf of R.B., deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BELLAIRE CORPORATION	)	
	)	DATE ISSUED: 05/29/2008
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision on Remand – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

John C. Artz (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant[1] appeals the Decision on Remand – Denying Benefits (04-BLA-5802) of Administrative Law Judge Joseph E. Kane 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). This case is before the Board for the second time. In his original Decision and Order, the administrative law judge credited the miner with twenty-six and one-half years of coal mine employment, and determined that this case involved a request for modification of the district director's denial of this subsequent claim, filed on September 24, 2002.[2] Applying the regulatory provisions at 20 C.F.R. Part 718, the administrative law judge found that the district director had made no mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge further found that the evidence submitted after the district director's denial of this subsequent claim on July 7, 2003 was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Thus, the administrative law judge found that claimant had also failed to establish a change in conditions pursuant to 20 C.F.R. §725.310, and denied benefits.

On appeal, the Board vacated the denial of benefits and remanded the case for the administrative law judge to determine, in accordance with *Hess v. Director, OWCP*, 21 BLR 1-141 (1999), whether the evidence submitted since the denial of the miner's original 1982 claim was sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant established a basis for modification of the district director's denial of the instant 2002 subsequent claim under 20 C.F.R. §725.310. [*M.B.*] *v. Bellaire Corp.*, BRB No. 05-0803 BLA (July 11, 2006) (unpublished). The Board instructed the administrative law judge to reconsider the weight to be accorded to the opinions of Drs. Grant and Fino on remand, and to reconsider his exclusion of Dr. Lenkey's report from the record. The Board further instructed the administrative law judge to determine whether Dr. Lenkey's evaluation should be categorized as a hospitalization record or treatment note admissible pursuant to 20 C.F.R. §725.414(a)(4), and if neither, to consider the admissibility of Dr.

[1] Claimant is the widow of the miner, whose present claim for benefits was pending at the time of his death on April 29, 2004. Director's Exhibit 3; Claimant's Exhibit 2.

[2] The miner's original claim for benefits, filed on January 6, 1982, was finally denied by the district director on March 1, 1982, for failure to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1.

Lenkey's evaluation into the record in light of the evidentiary limitations outlined at 20 C.F.R. §§725.414 and 725.456(b)(1).[3] *Id.*

On remand, the administrative law judge determined that Dr. Lenkey's report constituted a medical opinion rather than a treatment record, and found that it was inadmissible under the evidentiary limitations, "since both parties have already submitted one medical opinion report each." Decision on Remand at 4. The administrative law judge further concluded that Dr. Lenkey's report, even if admissible, would not change the disposition of this case because the physician did not diagnose legal pneumoconiosis. Decision on Remand at 4, n. 1. The administrative law judge again reviewed the evidence submitted after the district director's denial of this subsequent claim on July 7, 2003, and found that it was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, or total disability at 20 C.F.R. §718.204(b). The administrative law judge concluded that because claimant failed to prove a change in conditions since the denial of the miner's 2002 claim under 20 C.F.R. §725.310, claimant also could not establish a change in conditions since the denial of the miner's original 1982 claim pursuant to 20 C.F.R. §725.309(d). Decision on Remand at 4, 12. Accordingly, benefits were denied.

In the present appeal, claimant contends that the administrative law judge erred in finding that Dr. Lenkey did not diagnose legal pneumoconiosis and that his opinion was inadmissible as excessive under the evidentiary limitations at 20 C.F.R. §§725.310(b), 725.414. Claimant further contends that the administrative law judge failed to consider all of the evidence submitted since the denial of the miner's 1982 claim, as directed by the Board. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to remand, agreeing with claimant's argument that the administrative law judge failed to properly apply the evidentiary limitations, thereby denying each party the full complement of evidence allowed on modification.

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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[3] In her appellate brief in the prior appeal, claimant asserted that, if the administrative law judge determined that Dr. Lenkey's report constituted a medical opinion, claimant should be allowed to redesignate her evidence on remand in order to either: (1) submit both of Dr. Grant's reports as one opinion, and Dr. Lenkey's report as a second opinion; or (2) withdraw one of Dr. Grant's reports and add Dr. Lenkey's evaluation as her second opinion. The Board noted that these were issues for the administrative law judge to decide, if reached on remand. [*M.B.*] *v. Bellaire Corp.*, BRB No. 05-0803 BLA (July 11, 2006) (unpublished).

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).

Turning first to the evidentiary issue, claimant and the Director maintain that the administrative law judge incorrectly interpreted the regulations to unduly restrict the evidence admissible on modification. Because claimant had submitted no medical reports with his subsequent claim, and then submitted two reports from Dr. Grant and one report from Dr. Lenkey on modification, claimant and the Director contend that the administrative law judge erred in finding that Dr. Lenkey's report exceeded the evidentiary limitations. We agree. Subsequent to the issuance of our previous Decision and Order remanding this case to the administrative law judge for further consideration, the Board issued its decision in *Rose v. Buffalo Mining Co.*, 23 BLR 1-221 (2007), holding that Section 725.310(b) must be read in tandem with Section 725.414. Consequently, if a party had not submitted the full complement of evidence allowed by Section 725.414 in its affirmative case in support of the underlying claim, on modification, that party would be permitted to submit any additional evidence allowed under Section 725.414, as well as the additional medical evidence allowed by Section 725.310(b). *Id.* In the instant case, each party is allowed a full complement of three medical reports as affirmative case evidence under the regulations [two pursuant to Section 725.414, and one pursuant to Section 725.310(b)], as well as three x-ray interpretations, the results of three pulmonary function tests, and the results of three arterial blood gas studies. 20 C.F.R. §§725.414(a)(2)(i), (a)(3)(i), 725.310(b). Moreover, the administrative law judge's exclusion of Dr. Lenkey's opinion from the record does not constitute harmless error. Dr. Lenkey opined that the miner had a one hundred percent pulmonary impairment, attributable fifty percent to smoking and fifty percent to coal dust exposure. Employer's Exhibit 4. Thus, the opinion, if credited, would support a finding of legal pneumoconiosis, total disability due to pneumoconiosis, and a change in conditions. Accordingly, we vacate the administrative law judge's Decision on Remand – Denying Benefits, and remand this case for the administrative law judge to apply the evidentiary limitations and grant each party the full complement of evidence allowed in light of *Rose*; to consider the credibility of Dr. Lenkey's medical opinion; and to reconsider the weight of all the admissible evidence.

Claimant next contends that the administrative law judge failed to comply with the Board's remand instructions to determine, in accordance with *Hess*, 21 BLR 1-141,

[4] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1, 4.

whether the evidence submitted since the denial of the miner's original 1982 claim was sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), *rather than* considering whether the evidence submitted since the district director's denial of the instant 2002 subsequent claim established a basis for modification under Section 725.310. We agree. Claimant correctly notes that the administrative law judge failed to consider and determine the validity of a January 7, 2003 pulmonary function study submitted as part of Dr. Knight's evaluation,[5] and failed to consider a qualifying blood gas study obtained on October 16, 2003, submitted as part of Dr. Lenkey's report.[6] Claimant's Brief at 9; Director's Exhibit 15; Employer's Exhibit 3. Consequently, on remand, the administrative law judge is instructed to determine the admissibility of all the evidence developed since 1982, and discuss its weight when determining if a change in an applicable condition of entitlement has been demonstrated. 20 C.F.R. §725.309(d); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Additionally, on remand, the administrative law judge is directed to apply the provisions at 20 C.F.R. §718.104(d) in weighing the opinion of Dr. Grant, the miner's treating physician. *See generally Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

Lastly, claimant contends that the administrative law judge erred in finding that Dr. Fino's opinion is well-reasoned, arguing that the opinion conflicts with the medical record and is contrary to the Department of Labor's legislative findings. Claimant's Brief at 11. Specifically, claimant challenges Dr. Fino's assertion that "the studies on latency and coal mine dust related lung disease would not support the development of any obstruction due to coal mine dust subsequent to 1982, assuming that [the miner] was no longer exposed to coal mine dust." Employer's Exhibit 4. The United States Court of Appeals for the Sixth Circuit has recognized the progressive nature of pneumoconiosis, and has "reject[ed][employer's] argument that pneumoconiosis cannot arise or progress in the absence of continued exposure to coal dust." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003). The Sixth Circuit has explained that if a physician's belief is "inconsistent with congressional intent and the spirit of the Act," and that belief "forms the primary basis for his conclusion that the miner's pneumoconiosis is not totally disabling, or that any respiratory impairment which the miner has could not be

[5] The Board instructed the administrative law judge on remand to resolve the conflict in the evidence concerning the validity of the January 7, 2003 pulmonary function study. [*M.B.*], slip op. at 5, n. 8.

[6] We note that the administrative law judge stated in a footnote that "even if I had to reopen the record and examine the evidence from the 2003 and 1982 claims, claimant would not have proven total disability through the arterial blood gas evidence." Decision on Remand at 11, n. 7.

due to pneumoconiosis . . .," the opinion may be discredited for improper bias. *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987); *see Mountain Clay, Inc. v. Collins*, 256 Fed.Appx. 757 (6th Cir. 2007). Accordingly, on remand, the administrative law judge is instructed to consider the Sixth Circuit's standard on hostility to the Act as set forth in *Adams*, and to address Dr. Fino's opinion in light of that standard.

Accordingly, the administrative law judge's Decision on Remand – Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, concurring:

I concur with the decision of my colleagues to vacate the administrative law judge's Decision on Remand – Denying Benefits and to remand this case for further consideration. I do not agree, however, that Dr. Fino's opinion can be considered contrary to legislative findings, and note that the Director's response brief does not address this issue. In all other respects, I agree with my colleagues.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge