BRB No. 03-0403 BLA

MANFORD J. HENLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 02/25/2004
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 Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

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

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jennifer U. Toth (Howard 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: DOLDER, Chief Administrative Appeals Judge, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (01-BLA-0709) of Administrative Law Judge Robert J. Lesnick 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] After crediting claimant with at least twenty-one years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). The administrative law judge, however, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Moreover, after weighing all of the relevant evidence together, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii), he found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R §718.204(b)(2)(ii) and (iv). Weighing all the relevant evidence together, the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge also found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that claimant's claim for benefits was untimely filed. Employer also contends that the administrative law judge erred in admitting certain post-hearing evidence into the record. Employer further argues that the administrative law judge erred in retroactively applying the amended regulations to claimant's claim. Additionally, employer argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer further argues that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer finally argues that 20 C.F.R. §725.503(b) is invalid. 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 response, requesting that that Board uphold the administrative law judge's application of the amended regulations set out at 20 C.F.R. §§718.201(a)(2) and 718.204(b)(2). The Director also contends that 20

[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.

C.F.R. §725.503(b) represents a reasonable exercise of the Secretary's rulemaking authority.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Initially, we must determine which law to apply in this case. The Board has held that, in order to establish consistency in determining the applicable law in cases before the Board, it will apply the law of the United States Court of Appeals for the circuit in which the miner most recently performed coal mine employment. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Because claimant's most recent coal mine employment took place in West Virginia,[3] we will apply the law of the United States Court of Appeals for the Fourth Circuit.

Employer contends that claimant's claim for benefits was untimely filed. Employer argues that claimant's application for benefits is barred by the time limitations set forth in Section 725.308. Section 725.308 provides in relevant part that:

> (a) A claim for benefits. . .shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner. . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . the time limits in

[2] Inasmuch as no party challenges the administrative law judge's finding that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Employer's Potomac Division (located in Mount Storm, West Virginia) provided a list of claimant's coal mine employment. Employer indicated that claimant's last coal mine work occurred at its Dobbin mine site. Director's Exhibit 3. The Director, Office of Workers' Compensation Programs, notes that the Mine Safety and Health Administration's web site indicates that employer's Dobbin mine is located in West Virginia. *See* Director's Brief, Exhibit A. We further note that the record contains a report from the West Virginia Occupational Pneumoconiosis Board. *See* Director's Exhibit 8.

> this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

The administrative law judge found that employer failed to provide sufficient credible evidence to rebut the presumption of timeliness. Decision and Order at 5.

The Board has held that, in view of the remedial purpose of the Act, Section 725.308(a) requires a *written* medical report, found to be probative, reasoned and documented by the administrative law judge, indicating total respiratory disability due to pneumoconiosis in such a manner that the miner was aware, or in the exercise of reasonable diligence should have been aware, that he was totally disabled due to pneumoconiosis arising out of coal mine employment. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-36 (1993).

Employer notes that the Sixth Circuit, in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001), held that the three-year limitations clock begins to tick the first time that a miner is *told* by a physician that he is totally disabled by pneumoconiosis. However, because the present case arises within the jurisdiction of the Fourth Circuit, we will continue to hold that Section 725.308(a) requires a written medical report to start the three year limitations period. *Adkins*, 19 BLR at 1-43. Because there is no evidence that claimant received any written notice that he was totally disabled due to pneumoconiosis more than three years before he filed his instant claim, we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness set out at 20 C.F.R. §725.308(a).

Employer also argues that the administrative law judge erred in admitting Dr. Cohen's October 14, 1992 post-hearing supplemental report into the record. At the hearing, employer sought to introduce evidence in response to claimant's timely submission of Dr. Cohen's July 11, 2002 report.[4] Despite the fact that the administrative

[4] Arguably, the administrative law judge was not obligated to provide employer with an opportunity to respond to claimant's timely submission of Dr Cohen's July 11, 2002 report. The United States Court of Appeals for the Fourth Circuit has held that submissions timely under the twenty-day rule should not, in the vast majority of cases, give rise to claims of unfair surprise and requests for further discovery, testimony and time to respond. *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991). The Board has similarly noted that the exchange of evidence on the eve of the twenty day deadline prior to the hearing provided by 20 C.F.R. §725.456(b) does not constitute unfair surprise when the evidence at issue contains conclusions that are no

law judge had already granted employer's request to take Dr. Renn's post-hearing deposition, thereby providing employer with an opportunity to respond to Dr. Cohen's initial report, employer also sought to introduce Dr. Castle's July 29, 2002 supplemental report and Dr. Zaldivar's July 30, 2002 supplemental report into the record. Transcript at 12-13. The administrative law judge admitted these reports into the record after employer agreed to allow claimant an opportunity to have Dr. Cohen respond to criticisms of his July 11, 2002 report. *Id.* at 14-15.

An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Under the facts of this case, we hold that the administrative law judge did not abuse his discretion in admitting Dr. Cohen's October 15, 2002 supplemental report into the record.[5]

Employer contends that the administrative law judge erred in retroactively applying the revised regulations set out at 20 C.F.R. §§718.201 and 718.204 in the instant case. We disagree. The United States Court of Appeals for the District of Columbia held that the provisions of revised Section 718.201 are not impermissibly retroactive as applied to pending claims. *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 864, --- BLR --- (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001). In regard to revised Section 718.204, the United States Court of Appeals for the District of Columbia held that only the revised part of the regulation set out at 20 C.F.R. §718.204(a) is impermissibly retroactive as applied to pending cases. The Court did not hold that 20 C.F.R. §718.204(b) and (c) were impermissibly retroactive as applied to pending claims.

Turning to the merits, we initially address claimant's contention that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In considering

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different from conclusions contained within reports already exchanged with the other parties. *Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25, 1-34 n.9 (1993).

[5] In his response brief, claimant contends that the administrative law judge erred in striking a portion of Claimant's Exhibit 12 from the record. In a response brief, a party is limited to raising arguments which either respond to arguments raised in petitioner's brief or support the decision below. 20 C.F.R. §802.212(b). Claimant's arguments regarding the administrative law judge's exclusion of evidence neither respond to arguments raised in employer's brief nor support the administrative law judge's decision. Consequently, these arguments are not properly before the Board. *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Cabral*, 18 BLR at 1-34; *King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983).

whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis,[6] the administrative law judge acted within his discretion in according the greatest weight to the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 8-9, 22. Because claimant's August 7, 2000, January 24, 2001 and August 13, 2001 x-rays were each read as positive and negative by the best qualified physicians (*i.e.*, physicians dually qualified as B readers and Board-certified radiologists), the administrative law judge properly found that the x-ray evidence was inconclusive. Decision and Order at 22. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[7] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Five physicians offered opinions regarding the existence of pneumoconiosis. The opinions of Drs. Rasmussen and Cohen support a finding of both clinical and legal pneumoconiosis. Director's Exhibit 11; Claimant's Exhibits 13, 14. The opinions of Drs. Zaldivar, Renn and Castle support a finding that claimant does not suffer from pneumoconiosis. Employer's Exhibits 4, 7, 9, 10, 17, 18, 22-24. In the instant case, the administrative law

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[6] The record contains interpretations of eight chest x-rays taken on June 4, 1994, October 26, 1998, February 11, 1999, July 29, 1999, August 7, 2000, January 24, 2001, July 17, 2001 and August 13, 2001.

Dr. Wiot, a physician dually qualified as a B reader and Board-certified radiologist, was the only physician to interpret claimant's June 4, 1994, October 26, 1998, February 11, 1999 and July 29, 1999 x-rays, finding each of the films to be negative for pneumoconiosis. Employer's Exhibits 1, 2.

Claimant's x-rays taken on August 7, 2000, January 24, 2001 and August 13, 2001 were interpreted as both positive and negative by physicians dually qualified as B readers and Board-certified radiologists. Director's Exhibits 13, 14, 22; Claimant's Exhibits 1-3, 7-9; Employer's Exhibits 13-16, 19-20. Dr. Renn, a B reader, was the only physician of record to render an interpretation of claimant's July 17, 2001 x-ray, finding it to be negative for pneumoconiosis. Employer's Exhibit 7.

[7] "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).

judge found that the medical opinion evidence was sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 24.

Employer specifically argues that the administrative law judge failed to explain why the opinions of Drs. Rasmussen and Cohen that claimant suffers from pneumoconiosis are better reasoned than the contrary opinions of Drs. Zaldivar, Renn and Castle. We agree. Although the administrative law judge cited the bases provided by Dr. Cohen in support of his opinion that claimant suffered from "legal" pneumoconiosis, the administrative law judge failed to explain why the opinions of Drs. Cohen and Rasmussen were better reasoned than the contrary opinions of Drs. Zaldivar, Renn and Castle. In addition to criticizing Dr. Cohen's findings, Drs. Zaldivar, Renn and Castle provided detailed explanations for concluding that claimant does not suffer from "legal" pneumoconiosis. Consequently, the administrative law judge's analysis of whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) does not comply with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On remand, when reconsidering whether the medical opinion evidence is sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians,[8] the explanations of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.[9] *See Milburn*

[8] We agree with employer that the administrative law judge erred by crediting Dr. Rasmussen's opinion without weighing his credentials. While Drs. Cohen, Zaldivar, Renn and Castle are Board-certified in Internal Medicine and Pulmonary Disease, Claimant's Exhibit 13; Employer's Exhibits 4, 17, 24, Dr. Rasmussen is Board-certified in only Internal Medicine. Director's Exhibit 11. The Fourth Circuit has held that experts' respective qualifications are important indicators of the reliability of their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Consequently, on remand, the administrative law judge must reconsider the medical opinion evidence in light of the respective qualifications of the physicians.

[9] We reject employer's argument that because Dr. Cohen did not examine claimant, his opinion cannot be credited unless it is corroborated by Dr. Rasmussen's opinion. The Fourth Circuit has held that an administrative law judge may not discredit a physician's opinion solely because the physician did not examine the claimant. *Island*

Colliery Co. v. Hicks, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

We also agree with employer's contention that the administrative law judge failed to resolve conflicts in the medical opinions of record. For example, the administrative law judge cited the absence of any definitive evidence that claimant suffered from congestive heart failure. Dr. Renn, however, accurately noted that claimant's hospital records documented his diagnosis of congestive heart failure.[10] Employer's Exhibit 24 at 42. Dr. Renn explained that the treatment that claimant received, as well as the increase in his diuretic medication, evidenced his congestive heart failure. *Id.* Dr. Renn further explained that his cardiac examination of claimant revealed an S4 gallop. *Id.* Because claimant's dependent edema had resolved, Dr. Renn concluded that claimant's congestive heart failure had been treated and had cleared somewhat. *Id.* On remand, the administrative law judge must consider the inconsistencies in the medical evidence and provide an explanation for his conclusions. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Finally, employer argues that the administrative law judge erred in relying upon the findings of the West Virginia Occupational Pneumoconiosis Board to support a finding of coal workers' pneumoconiosis. Employer's contention has merit. In his summary of the medical evidence in this case, the administrative law judge noted that the 1986 findings of the West Virginia Occupational Pneumoconiosis Board were not controlling in this claim since the underlying statutes, regulations and medical evidence were not identical. Decision and Order at 11 n.5. The administrative law judge further noted that, after the state board issued its findings, claimant returned to the coal mines and worked for many years until retiring in 1993. *Id.* The administrative law judge, however, cited the State Occupational Pneumoconiosis Board findings in support of his finding of "legal pneumoconiosis." *Id.* at 24. On remand, the administrative law judge is

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Creek Coal Co. v. Compton, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), the Fourth Circuit held that a non-examining physician's opinion on matters not addressed by examining physicians is insufficient as a matter of law to rebut an interim presumption under 20 C.F.R. §727.203. Because Dr. Cohen provided opinions on matters already addressed by examining physicians, *Massey* does not require that his opinion be corroborated.

[10] Claimant's discharge summary from his hospitalization from April 24, 2001 to April 26, 2001 notes that his "CHF had improved." Claimant's Exhibit 12. Claimant's discharge summary from his hospitalization from July 18, 2001 to July 21, 2001 notes that he had "a bout with CHF." *Id.*

instructed to provide an explanation for what weight, if any, he accords the 1986 findings of the West Virginia Occupational Board.[11] *Clark*, 12 BLR at 1-152.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration. On remand, the administrative law judge must weigh the relevant evidence together under 20 C.F.R. §718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Because the administrative law judge must reevaluate whether the medical evidence is sufficient to establish the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).[12]

[11] On remand, when reconsidering what weight, if any, to accord the West Virginia Occupational Pneumoconiosis Report, the administrative law judge should address the credentials of the physicians preparing the report, the explanations of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276.

[12] We reject employer's contention that 20 C.F.R. §725.503(b) is invalid. *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

Accordingly, the administrative law judge's Decision and Order awarding benefits 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge