BRB No. 04-0519 BLA

CLYDE WARD	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY INCORPORATED	)	DATE ISSUED: 02/28/2005
	)	
Employer/Carrier-Petitioner	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (02-BLA-5443) of Administrative Law Judge Joseph E. Kane (the administrative law judge) 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).[1] Claimant's prior application for benefits, filed on April 15, 1994, was denied on November 24, 1997 by Administrative Law Judge Rudolph L. Jansen because claimant did not establish the existence of a totally disabling respiratory impairment.[2] On appeal, in a decision dated December 18, 1998, the Board affirmed Judge Jansen's finding that claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c)(1)-(4) (2000). *Ward v. Southern Ohio Coal Co.*, BRB No. 98-0482 BLA (Dec. 18, 1998)(unpublished). On May 7, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 2.

In a Decision and Order - Awarding Benefits dated February 26, 2004, the administrative law judge credited claimant with twenty-eight years of coal mine employment[3] and found that the medical evidence developed since the prior denial of benefits established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found 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 claimant established the existence of pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §718.202(a)(1) and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits as of May 1, 2001, the month in which the subsequent claim was filed.

[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.

[2] Claimant's first application for benefits, filed on March 11, 1981, was finally denied by the district director on June 23, 1981. Director's Exhibits 20, 24.

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

On appeal, employer contends that the administrative law judge erred in excluding evidence submitted by employer in excess of the evidentiary limits imposed by the revised regulation at 20 C.F.R. §725.414.[4] Employer further argues that 20 C.F.R. §§725.414, 725.701, 718.104(d), 718.201(c) and 718.204(a) of the revised regulations are invalid. Employer also contends that the administrative law judge erred in his evaluation of the x-ray and medical opinion evidence of record, both in finding established a change in an applicable condition of entitlement, and in his *de novo* review of the merits of this claim. Neither claimant nor the Director has filed a brief in response to employer's appeal.

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

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 a finding of 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).

Employer initially contends that the administrative law judge erred by excluding medical evidence submitted by employer in excess of the evidentiary limits imposed by 20 C.F.R. §725.414. Employer argues that 20 C.F.R. §725.414 is invalid and that the administrative law judge erred in applying it.

The regulation at 20 C.F.R. §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 responsible operator 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). In rebuttal of the case presented by the opposing party, or in rebuttal to evidence submitted by the Director as part of the

[4] The revised regulation at 20 C.F.R. §725.414 applies to this claim because it was filed on February 8, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

complete pulmonary evaluation, 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). 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*. "Notwithstanding the limitations" of 20 C.F.R. §725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of 20 C.F.R. §725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

At the hearing, employer and claimant submitted a Joint Stipulation of Evidence containing evidence dating from 1981 to 2003, including thirty-two x-ray readings of fifteen x-rays, ten pulmonary function studies, six blood gas studies and twenty-five physical examination, hospitalization and treatment reports. Joint Exhibit 1. On February 4, 2004, the administrative law judge issued a show cause Order directing the parties to submit evidence summary forms within the limitations set forth at 20 C.F.R. §725.414. Both claimant and employer did so. In a decision dated February 26, 2004, the administrative law judge found that the two medical reports submitted by employer as part of its affirmative case, those of Drs. Zaldivar and Bellotte,[5] contained "references to, and relied on, evidence submitted with Mr. Ward's prior claims." Decision and Order at 7. The administrative law judge concluded that under the revised regulations at 20 C.F.R. §725.414(a)(1), because the medical reports relied on inadmissible evidence, the reports themselves were inadmissible and, thus, he excluded them from the record. Decision and Order at 8. The administrative law judge also excluded three x-ray readings by Dr. Wiot, submitted by employer in rebuttal to the x-ray readings performed as part of the Director's complete pulmonary evaluations in the prior claims, and further excluded an x-ray reading by Dr. Cappiello, submitted by claimant as rebuttal evidence, finding that it did not rebut any reading submitted by any party. Decision and Order at 7-8, 18.

[5] Employer also "proffered" the report of Dr. Spagnolo, "not to be considered by [the administrative law judge] in the rendering of [his] decision, but to remain in the record for appellate purposes for challenging the application and the constitutionality of the revised regulations on appeal." Employer's revised evidence summary form dated February 12, 2004.

Employer argues that 20 C.F.R. §725.414 is invalid because it imposes arbitrary limits on evidence in violation of the Administrative Procedure Act (APA), 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), and further conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Employer's Brief at 6. Employer further argues that, assuming, *arguendo*, the validity of the evidentiary limitation provisions, the administrative law judge improperly excluded from consideration the reports of Drs. Zaldivar and Bellotte on the grounds that they referenced and relied on evidence contained in claimant's prior claims, and thereby exceeded the limitations set forth at 20 C.F.R. 20 C.F.R. §725.414. Employer's Brief at 10-13.

Regarding the validity of 20 C.F.R. §725.414, the Board recently held, in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-53 (2004)(*en banc*), that 20 C.F.R. §725.414 does not conflict with either the APA or *Underwood*. We thus reject employer's preliminary arguments for the reasons set forth in *Dempsey*. Employer's remaining contention, however, that the administrative law judge erred in his application of 20 C.F.R. §725.414 to exclude from the record the reports of Drs. Zaldivar and Bellotte, has merit.

The revised regulations at 20 C.F.R. §§725.414(a)(1) and 725.414(a)(2)(i), provide that any "x-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, and physicians' opinions that appear in a medical report must each be admissible" under the evidentiary limitation provisions. In this case, the administrative law judge excluded the reports of Drs. Zaldivar and Bellotte, submitted by employer, because they contained references to additional x-rays readings, test results and medical reports, contained in the miner's prior claims, which were outside of the strict limitations on evidence described in 20 C.F.R. §725.414. However, 20 C.F.R. §725.309(d) of the revised regulations specifically provides that prior claim evidence is automatically admissible in a subsequent claim. Thus, it is permissible under 20 C.F.R. §725.414 for a medical opinion to reference or review, in conjunction with a subsequent claim, evidence contained in the miner's prior claims. We therefore hold that the administrative law judge improperly excluded the medical reports of Drs. Bellotte and Zaldivar on the ground that they contained references to evidence contained in the miner's prior claims, and we remand this case for consideration of all the relevant, admissible evidence.

Employer further contends that in considering the evidence pursuant to 20 C.F.R. §725.414, the administrative law judge erred in excluding from the record three x-ray readings by Dr. Wiot which employer submitted in rebuttal to x-rays taken as part of the

Director's complete pulmonary evaluations in the prior claims.[6] Employer's Brief at 20-21. Employer asserts that as the evidence from the prior claims is admissible into the record of the current claim, employer is entitled to rebut these x-ray readings. We disagree.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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., Inc*., 23 BLR 1-1, 1-3 (2004). However, 20 C.F.R. §725.309(d)(4) specifically provides that a change in a condition of entitlement must be established through new evidence. 20 C.F.R. §725.309(d)(4). While Dr. Wiot's recent re-readings of prior x-rays are technically "new evidence," they are not relevant to claimant's current condition, but to claimant's condition at the time of his prior claims. Therefore, these new readings are not relevant to the issue of whether claimant established a change in an applicable condition of entitlement, as contemplated by the regulations. Accordingly, we hold that these three x-ray readings by Dr. Wiot were properly excluded from consideration by the administrative law judge.

Employer asserts that the administrative law judge further erred in his evaluation of the x-ray evidence of record in that he mischaracterized the credentials of Dr. Spitz, finding that he was only a Board-certified radiologist, and not a B-reader, on the ground that Dr. Spitz's B-reader certification had expired at the time of his 2003 x-ray reading. Decision and Order at 18 n.8; Employer's Brief at 21. We agree. As employer correctly asserts, the record contains Dr. Spitz's current B-reader certificate showing a valid certification between May 2001 and April 2005. Employer's Exhibit 23. In light of the administrative law judge's accordance of greatest weight to the readings by dually qualified readers, and as Dr. Spitz was improperly excluded from their ranks, we vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(1). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Additionally, a review of the record reveals that the administrative law judge also erred in rejecting claimant's request for admission of Dr. Cappiello's March 5, 2003 rebuttal reading of a September 4, 2002 x-ray on the ground that it did not rebut any reading submitted by any party. Decision and Order at 18. Contrary to the administrative law judge's finding, Dr. Cappiello's reading was intended to rebut an April 23, 2003 reading of the September 4, 2002 x-ray by Dr. Spitz, Employer's Exhibit

[6] Employer submitted a September 19, 2002 reading of an April 4, 1981 x-ray, a September 19, 2002 reading of a May 31, 1994 x-ray, and an October 25, 2002 reading of a December 14, 1994 x-ray. Employer's Exhibits 2, 10 (excluded).

16, which was submitted by employer as part of its affirmative case and which the administrative law judge also erred in failing to consider. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Therefore, on remand, the administrative law judge must reconsider all of the relevant x-ray evidence of record, including the readings of the September 4, 2002 x-ray by Drs. Cappiello and Spitz, consistent with the principles set forth by the United States Court of Appeals for the Sixth Circuit in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Employer next asserts that in evaluating the medical opinion evidence at 20 C.F.R. §§725.309(d) and 718.204(b)(2)(iv), the administrative law judge erred in crediting the medical opinions of Drs. Gaziano and Rasmussen, each of whom opined that claimant is totally disabled due to pneumoconiosis. Employer specifically asserts that the administrative law judge erred in finding Dr. Rasmussen "highly qualified" when he is not Board-certified in pulmonary medicine, and further erred in finding both physicians' opinions to be documented and reasoned. Employer's Brief at 17-19. Employer's arguments are without merit.

In his evaluation of the medical opinion evidence, the administrative law judge accurately characterized Dr. Rasmussen as being Board-certified in internal medicine and forensic medicine and examination, and a B-reader. Claimant's Exhibit 2; Decision and Order at 8. In addition, in finding the reports of Drs. Gaziano and Rasmussen to be sufficiently reasoned and documented, the administrative law judge properly examined the validity of the physicians' reasoning in light of the studies they conducted and the objective indications upon which their medical conclusions are based. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 8-10, 13, 22-23. It is the job of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). We, therefore, reject employer's arguments regarding the administrative law judge's crediting of Dr. Rasmussen's and Gaziano's reports.

Finally, we hold that employer's remaining assertions regarding the validity of the revised regulations at 20 C.F.R. §§725.701, 718.104(d), 718.201(c) and 718.204(a) are without merit. Contrary to employer's arguments, the treating physician provisions in 20 C.F.R. §725.701 and 718.104(d), were countenanced by the United States Court of Appeals for the Sixth Circuit in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Further, employer's objections to the validity of 20 C.F.R. §718.201(c), regarding the principle that pneumoconiosis can be a latent disease, were rejected by the Board in *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) and *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004). Finally, employer's assertion that the revised regulation at 20 C.F.R. §718.204(a), regarding the consideration of a miner's nonpulmonary or nonrespiratory disease, is invalid, was rejected by the

United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n v. U.S. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

Based on the foregoing, we hold that the administrative law judge erred in his application of 20 C.F.R. §725.414 in ruling on the admissibility of the reports of Drs. Zaldivar and Bellotte, and the admissibility of Dr. Cappiello's March 5, 2003 reading of the September 4, 2002 x-ray, but did not err in excluding from the record the three x-ray readings by Dr. Wiot submitted in rebuttal of x-rays contained in claimant's prior claims. We further vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) as the administrative law judge mischaracterized the qualifications of Dr. Spitz and failed to consider Dr. Spitz's April 23, 2003 reading of the September 4, 2002 x-ray. We affirm, however, the administrative law judge's crediting of the opinions of Drs. Gaziano and Rasmussen as within his discretion. Finally, we reject employer's arguments regarding the validity of the revised regulations at 20 C.F.R. §§725.414, 725.701, 718.104(d), 718.201(c) and 718.204(a) as contrary to law. We remand this case for further findings based on the new evidence at 20 C.F.R. §718.204(b) and at 20 C.F.R. §725.309(d). Should the administrative law judge again find, on remand, that claimant established a change in an applicable condition of entitlement, he must consider the instant, subsequent claim on its merits.

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 proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge