BRB No. 05-0489 BLA

LLOYD ROSCOE TEAGUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APPLE COAL COMPANY	)	
	)	DATE ISSUED: 02/15/2006
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 on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Thomas M. Cole (Arnett, Draper & Hagood), Knoxville, Tennessee, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (02-BLA-5257) of Administrative Law Judge Larry W. Price 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). This case has been before the Board previously. Initially, in a Decision and Order issued on July 9, 2003, Administrative Law

Judge Fletcher E. Campbell, Jr. accepted the parties' stipulations that claimant has "at least 15 years" of coal mine employment[1] and is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). 2003 Decision and Order at 9. Judge Campbell found that the x-ray evidence viewed in light of the readers' radiological credentials did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, he determined that the medical opinion evidence established the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(1),(a)(2). Judge Campbell found that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and accordingly, he awarded benefits.

Upon review of employer's appeal, the Board vacated in part Judge Campbell's Decision and Order and remanded the case for further consideration. *Teague v. Apple Coal Co.*, BRB No. 03-0757 BLA (Jul. 22, 2004)(unpub.). Specifically, the Board held that Judge Campbell did not adequately explain his finding that the medical opinions pursuant to Section 718.202(a)(4) established the existence of clinical pneumoconiosis, considering that he discredited the same physicians' positive x-ray readings for clinical pneumoconiosis under Section 718.202(a)(1), and those physicians appeared to rely on their own positive x-ray readings to diagnose clinical pneumoconiosis in their medical opinions. *Teague*, slip op. at 5. Additionally, the Board held that when Judge Campbell found the existence of legal pneumoconiosis established by the medical opinions, he gave no explanation for crediting the opinions submitted by claimant and he erroneously presumed that claimant's chronic obstructive pulmonary disease (COPD) arose out of claimant's coal mine employment, rather than requiring claimant to prove that fact. *Teague*, slip op. at 5-6. Because the Board vacated Judge Campbell's finding that the existence of pneumoconiosis was established, the Board also vacated his finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c)(1). *Teague*, slip op at 6. Further, the Board upheld Judge Campbell's application of revised Section 725.414 to exclude certain exhibits proffered by employer, but instructed Judge Campbell to consider on remand employer's argument that good cause under Section 725.456(b)(1) justified the admission of evidence exceeding the limits of Section 725.414. *Teague*, slip op. at 3-5.

On remand, Judge Campbell was unavailable and the case was reassigned, without objection, to Administrative Law Judge Larry W. Price (the administrative law judge). The administrative law judge found that employer failed to establish good cause for

[1] The record indicates that claimant's coal mine employment occurred in Tennessee. Director's Exhibit 4. 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*).

admitting additional evidence under 20 C.F.R. §725.456(b)(1). Pursuant to Section 718.202(a)(4), the administrative law judge reconsidered the medical opinions and found that the opinions of Drs. Robinette, Baker, and Broudy diagnosing claimant with clinical pneumoconiosis were reasoned medical judgments documented by more than just the doctors' discredited x-ray interpretations. He therefore concluded that these opinions established the existence of clinical pneumoconiosis. On the issue of legal pneumoconiosis, the administrative law judge found the opinions of Drs. Robinette, Baker, and Myers that claimant's COPD was due in part to coal dust exposure, to be more persuasive than the contrary opinions of Drs. Broudy and Dahhan. The administrative law judge therefore found that claimant established that "his COPD is legal pneumoconiosis as defined under § 718.201." Decision and Order at 6. The administrative law judge further found that employer did not rebut the presumption of 20 C.F.R. §718.203(b) that claimant's pneumoconiosis arose out of coal mine employment. The administrative law judge concluded that claimant's total disability is due to his pneumoconiosis, and awarded benefits.

On appeal, employer contends that the administrative law judge abused his discretion in finding that employer did not establish good cause pursuant to Section 725.456(b)(1). Employer also contends that the administrative law judge erred in his weighing of the medical opinions regarding the existence of pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds that the administrative law judge properly determined that employer failed to establish good cause for admitting evidence in excess of the Section 725.414 limitations.

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).

Employer contends that the administrative law judge erred by failing to follow the holding of *Underwood v. Elkay Mining*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997) concerning the admissibility of cumulative evidence in black lung hearings, when he determined whether "good cause" was established under Section 725.456(b)(1). We disagree. First, this claim arises under the law of the Sixth Circuit, not the Fourth. *See* note 1, *supra*. Second, *Underwood* was decided under the former regulations, which placed no limits on evidence, and thus the court did not address the regulatory evidentiary limitations currently in effect, and therefore had no occasion to address how an administrative law judge should decide what might constitute "good cause" for exceeding

those limitations under revised Section 725.456(b)(1).[2] *See Underwood*, 105 F.3d at 951, 21 BLR at 2-32; *see also Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*)(rejecting coal mine operator's contention that the Department of Labor's evidentiary limitations regulations conflicted with *Underwood*). Thus, we reject employer's argument that the administrative law judge was bound to apply *Underwood* as a guide to determining whether employer established good cause for admitting excess evidence under Section 725.456(b)(1).

In the case at bar, the administrative law judge correctly stated that employer bore the burden of demonstrating that good cause exists. Decision and Order on Remand at 2; 20 C.F.R. 725.456(b)(1); *Dempsey*, 23 BLR 1-62. The administrative law judge noted that employer argued that good cause existed because the evidence employer sought to admit was material, relevant, and equally available to both parties. Decision and Order on Remand at 2–3. In finding that employer failed to establish good cause, the administrative law judge properly found that employer must do more than claim that the excess evidence was relevant. *Dempsey*, 23 BLR at 1-61-62.

Employer also contends that the administrative law judge abused his discretion because he failed to consider employer's good cause arguments in their entirety. Employer's Brief at 9–10. Review of employer's closing brief to the administrative law judge discloses that employer argued that good cause existed because: (1) the evidence was developed in claimant's state workers' compensation claim; (2) the evidence was probative and relevant, and (3) the evidence was equally available to both parties and thus, did not violate the intent of the evidentiary limitations of Section 725.414. Employer's Closing Argument at 7. Argument one was merely a repeat of employer's argument, already rejected by Judge Campbell, that state claim evidence is not subject to the evidentiary limits. The administrative law judge on remand considered and rejected arguments two and three. Decision and Order on Remand at 2-3. Moreover, we agree with the Director that argument three is specious: employer asserts that admission of excess evidence would be consistent with Section 725.414 because the evidence was equally available to the parties. That contention is irrelevant to the purpose of the

[2] In *Underwood*, which was issued prior to the regulatory revisions placing limits on certain types of evidence in black lung claims, the issue was what standard administrative law judges should apply in exercising their discretion to exclude unduly repetitious evidence under Section 556(d) of the Administrative Procedure Act, while still considering all relevant evidence under Section 923(b) of the Act. The Fourth Circuit held that administrative law judges "must consider all relevant evidence, erring on the side of inclusion, but . . . they should exclude evidence that becomes unduly repetitious in the sense that the evidence provides little or no additional probative value." *Underwood v. Elkay Mining*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997).

regulatory revision which was to enable administrative law judges to focus on the quality, rather than the quantity, of evidence. 65 Fed. Reg. 79993 (Dec. 20, 2000). Considering that it was employer's burden to demonstrate good cause, we detect no abuse of discretion in the administrative law judge's finding that employer did not establish good cause in this case. *Dempsey*, 23 BLR at 1-61.

To establish entitlement 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).

Pursuant to Section 718.202(a)(4), employer contends that substantial evidence does not support the administrative law judge's finding that Drs. Baker, Broudy, and Robinette relied on more than their own discredited chest x-ray readings to diagnose clinical pneumoconiosis. We need not address this issue. Unlike the situation in the prior appeal, where Judge Campbell did not make a proper finding that claimant established the existence of legal pneumoconiosis, the administrative law judge on remand found that claimant established that his COPD is legal pneumoconiosis as defined under Section 718.201. A finding of legal pneumoconiosis at Section 718.202(a)(4), if affirmable, obviates the need to consider whether the x-ray evidence under subsection (a)(1) supports a finding of the existence of clinical pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-639-40 (6th Cir. 2003); *Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985).

Employer contends that the administrative law judge erred in finding that claimant established that he suffers from legal pneumoconiosis pursuant to Section 718.202(a)(4) and 718.201. The administrative law judge found that claimant provided well reasoned and documented medical opinions by Drs. Robinette, Baker, and Myers, that claimant's COPD arose out of his coal mine employment. Decision and Order on Remand at 5 – 6. By contrast, the administrative law judge accorded less weight to the opinions by Drs. Dahhan and Broudy because he found that the physicians did not adequately explain their conclusions that claimant's COPD was entirely attributable to smoking. Decision and Order on Remand at 6.

Employer first argues that the administrative law judge erred in crediting Dr. Robinette's opinion because Dr. Robinette did not specifically state that claimant's condition is related to or aggravated by dust exposure. Employer's Brief at 14. We disagree. Dr. Robinette examined claimant in October 2002 and diagnosed obstructive lung disease without response to bronchodilator therapy. Claimant's Exhibit 1. In discussing the results of the pulmonary function and blood gas studies, Dr. Robinette

opined that his findings were "consistent with an underlying diagnosis of an obstructive lung disease in the s[e]tting of a coal workers' pneumoconiosis and a history of cigarette consumption in the past." Claimant's Exhibit 1 at 3. Dr. Robinette further opined that "[i]t is my impression that Mr. Teague has developed an occupational pneumoconiosis which is directly related to his prior coal mining employment" and that claimant would be unable to return to work "in the setting of radiographic abnormalities consistent with coal workers' pneumoconiosis and a functional impairment." *Id*. Dr. Robinette finally stated that "[t]his condition is at least partially related to his prior coal mining employment. It is acknowledged that his cigarette consumption may have contributed to his subjective dyspnea and chronic cough." Claimant's Exhibit 1 at 3. Substantial evidence supports the administrative law judge's finding that Dr. Robinette diagnosed legal pneumoconiosis. *See* 20 C.F.R. §718.201.

Employer next argues that the administrative law judge erred in finding the opinions of Drs. Robinette, Myers, and Baker well-reasoned because they failed to explain why claimant's smoking history is not a significant factor in claimant's respiratory condition and provided little explanation for their findings that claimant's impairment is due to coal dust exposure, whereas, in employer's view, Drs. Broudy and Dahhan provided well-reasoned opinions that claimant's respiratory condition is due to cigarette smoking. Employer's Brief at 14–18. We disagree. The administrative law judge acted within his discretion in finding that Drs. Robinette, Myers, and Baker provided well-reasoned and documented opinions based upon physical examination, smoking, medical, and employment histories, and the results of objective tests. Decision and Order on Remand at 4–6; *see Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). Additionally, contrary to employer's assertion, to establish legal pneumoconiosis, claimant needed only to demonstrate that his respiratory impairment arose out of coal mine employment; he was not required to prove that smoking was not the sole cause of his pulmonary impairment. *See* 20 C.F.R. §718.201; *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984).

The administrative law judge then found that, in relating claimant's COPD solely to smoking, Dr. Dahhan did not adequately explain his opinion when he "rel[ied] on the cessation of coal dust exposure in 1995 as evidence that coal dust exposure does not contribute to Claimant's impairment," without considering "the fact that Claimant's cigarette smoking actually ceased long before his retirement from the mines." Decision and Order on Remand at 6. The administrative law judge also found that Dr. Dahhan did not explain his rationale in view of the regulation's recognition that pneumoconiosis "may first appear after the termination of coal dust exposure." *Id*., citing 20 C.F.R. §718.201(c). The administrative law judge further found that Dr. Broudy's opinion

suffered from the same "lack of consideration given to these factors," and he gave the opinion "less weight." Decision and Order on Remand at 6. Contrary to employer's contention, there is substantial evidence in support of the administrative law judge's findings, which were within his discretion. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Rowe*, 710 F.2d at 255, 5 BLR 2-103.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion in light of the underlying objective evidence and explained whether the diagnoses contained therein constituted reasoned medical judgments under Section 718.202(a)(4), we affirm the administrative law judge's finding that Drs. Baker, Robinette, and Myers provided opinions that were "more persuasive than those provided by Employer" and which established the existence of legal pneumoconiosis.[3] Decision and Order on Remand at 6.

Employer does not otherwise challenge the administrative law judge's award of benefits. The award of benefits is therefore affirmed. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

[3] The administrative law judge's finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) is affirmed as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge