BRB No. 10-0115 BLA

MICHAEL S. DAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/14/2010
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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:

Claimant appeals the Decision and Order – Denial of Benefits (06-BLA-5411) of Administrative Law Judge Richard T. Stansell-Gamm on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and credited the parties' stipulation that claimant worked in qualifying coal mine employment for at least thirty-three years. The administrative law judge found that, while claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). In addition, the administrative law judge found that the evidence of record was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, because the evidence did not establish that claimant suffered from complicated pneumoconiosis. Benefits were, therefore, denied.

On appeal, claimant argues that the administrative law judge impermissibly admitted CT scan evidence proffered by employer into the record, and improperly credited the opinions of Drs. Crisalli and Wheeler, which were based, in part, on inadmissible evidence. Claimant also challenges the administrative law judge's finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Employer/carrier respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal.[1]

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. *Day v. Eastern Assoc. Coal Corp.*, BRB No. 10-0115 BLA (June 18, 2010) (unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23,

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least thirty-three years of coal mine employment and total respiratory disability pursuant to Section 718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 24-26.

2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] All parties have responded. Claimant maintains that the recent amendments are applicable to the instant claim, filed on January 19, 2005, because the parties stipulated to thirty-three years of coal mine employment, and the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Hence, claimant avers that the case must be remanded for the administrative law judge to address whether claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis in accordance with the recent amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and if so, whether employer has established rebuttal. Employer has filed a supplemental letter brief, averring that the recent amendments may apply to the instant case, but asserting that the record is unclear as to whether claimant worked in an underground mine or whether the conditions of his employment were substantially similar to conditions in an underground mine.[3] Employer contends further that, assuming claimant is entitled to invocation of the presumption set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge's determination that the preponderance of the evidence failed to establish the existence of pneumoconiosis, if affirmed, is sufficient to establish rebuttal.[4] Alternatively, employer requests that the parties be afforded an opportunity to develop evidence to respond to the changes in the law. The Director agrees with claimant that this case must be remanded to the administrative law judge for consideration of the claim under Section 411(c)(4).[5] On remand, the Director asserts that

[2] Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[3] To invoke the Section 411(c)(4) presumption, claimant must initially establish that he worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

[4] Contrary to employer's assertion, if the presumption is invoked, the burden of proof shifts to employer on rebuttal to establish that claimant did not have pneumoconiosis, or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

[5] The Director additionally asserts that claimant's thirty-three years of employment as a continuous miner operator, shuttle car operator, brattice man, scoop

the administrative law judge must allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1), if evidence exceeding those limitations is offered. As set forth *infra*, we agree with the position of claimant and the Director.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant initially challenges the administrative law judge's admission of Dr. Scatarige's interpretation of the May 23, 2005 CT scan into the record, arguing that employer is limited to the admission into evidence of Dr. Wheeler's interpretation of the same CT scan. Claimant contends that the administrative law judge improperly relied on the Board's decision in *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007) (unpub.) to support his admission of Dr. Scatarige's CT scan report into the record, as *Mullins* is an unpublished decision and, as such, it does not constitute controlling,

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operator, and roof bolter, were indisputably performed in underground coal mines. Thus, the Director urges the Board to affirm the administrative law judge's determination that claimant established total respiratory disability pursuant to Section 718.204(b), as unchallenged on appeal, hold that claimant has established invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and remand this case for the administrative law judge to determine whether employer has established rebuttal. We decline to hold that invocation is established, as the determination of whether claimant's coal mine employment was performed underground or in substantially similar conditions involves findings of fact beyond the scope of our review.

[6] The law of the United States Court of Appeals for the Fourth Circuit applies because claimant was employed in coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

legally binding precedent. Claimant argues further that the Board's reasoning in *Mullins* was injudicious. Claimant maintains that the admission of multiple interpretations of the same CT scan is antithetical to "the intent and spirit of the evidentiary limitations," since this practice places the party who originally proffered the evidence, which was favorable at the time of submission, in the undesirable position of either having "his favorable evidence outweighed by numbers" or incurring the expense of obtaining additional interpretations to sustain the favorable integrity of the originally proffered evidence. Claimant's Brief at 4. Hence, claimant contends that the administrative law judge's erroneous admission of Dr. Scatarige's interpretation of the May 23, 2005 CT scan, which the administrative law judge found supportive of Dr. Wheeler's interpretation of this same CT scan, tainted the administrative law judge's overall weighing of CT scan evidence and his resultant finding that the CT scan evidence at 20 C.F.R. §718.107 was negative for pneumoconiosis.[7] Claimant's arguments lack merit.

While claimant is correct that unpublished decisions typically possess diminished value as legal precedent, the holding in *Mullins* was based on the Board's published decision in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*). In *Webber*, the Board held that:

> 20 C.F.R. §718.107 is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. We decline to hold, however, as urged by claimant, that a party may submit only the first, or original, results of each test or procedure, rather than the best interpretation of each test or

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[7] Section 718.107 provides that:

> (a) The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment may be submitted in connection with a claim and shall be given appropriate consideration.
>
> (b) The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

20 C.F.R. §718.107.

> procedure, as to do so is potentially unworkable, unnecessary, and contrary to the stated goal of the revised regulations to maintain a focus on the quality of evidence. … Instead, we hold that each party may choose which set of results to submit, for each test or procedure, in order to best support its position. … Therefore, we vacate the administrative law judge's ruling as to the CT scan readings and instruct him to require employer to select and submit pursuant to 20 C.F.R. §718.107(a) only one reading of the May 14, 2002 CT scan, which the administrative law judge should then consider together with any supporting evidence submitted pursuant to 20 C.F.R. §718.107(b), and in conjunction with any rebuttal evidence submitted by claimant pursuant to 20 C.F.R. §725.414(a)(2)(ii).

Webber, 23 BLR at 1-135; *see also Webber*, 24 BLR at 1-10; *Mullins*, *slip op*. at 5. In the present case, the administrative law judge determined that claimant had submitted Dr. Muto's positive interpretation of a May 23, 2005 CT scan as affirmative case evidence and, relying on *Mullins*, the administrative law judge concluded that employer "was entitled to submit not only a rebuttal reading of the CT scan but also one affirmative reading of the same study." Decision and Order at 2. As the administrative law judge's holding was consistent with *Webber*, and claimant had the option of submitting another CT scan interpretation in rebuttal to employer's affirmative case interpretation, the administrative law judge properly admitted the interpretations by Drs. Scatarige and Wheeler of the May 23, 2005 CT scan into the record. 20 C.F.R. §§718.107; 725.414(a)(2)(i), (ii), (a)(3)(i), (ii); *Webber*, 23 BLR at 1-135; *see also Webber*, 24 BLR at 1-10; Decision and Order at 2-3. Consequently, we reject claimant's arguments.

Next, claimant contends that, because the opinions of Drs. Crisalli and Wheeler contained references to inadmissible x-ray evidence, the administrative law judge erred in fully crediting these opinions.[8] Claimant notes that, where a medical opinion is tainted by the physician's review of inadmissible evidence, the Board has acknowledged various remedies that the administrative law judge may properly apply, *i.e.*: exclude the report; redact the objectionable content; request a new report from the physician; or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. Since the administrative law judge fully credited the

[8] The administrative law judge found that Dr. Crisalli considered x-ray interpretations rendered by Dr. Wheeler of films dated September 2, 2003, January 6, 2004, September 7, 2004, and January 8, 2007, that were not contained in the evidentiary record. Decision and Order at 3; Employer's Exhibit 8. The administrative law judge similarly found that, in his deposition testimony, Dr. Wheeler referenced several of his own chest x-ray interpretations that were not admitted into the evidentiary record. Decision and Order at 3; Employer's Exhibit 6.

opinions of Drs. Crisalli and Wheeler, rather than according them diminished weight, claimant contends that the administrative law judge abused his discretion. We disagree.

Because the applicable regulations are silent as to what an administrative law judge should do when evidence that exceeds the evidentiary limitations is referenced in an otherwise admissible medical opinion, the disposition of this issue is committed to an administrative law judge's discretion. *Harris*, 23 BLR at 1-108; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). In the present case, in accordance with *Harris*, the administrative law judge fashioned a permissible remedy for the physicians' review of inadmissible evidence, by determining to redact only those portions of Dr. Crisalli's report and Dr. Wheeler's deposition testimony that relied on the excluded x-ray readings. Decision and Order at 3. As the administrative law judge determined that Dr. Crisalli considered other admissible x-ray evidence that supported his findings, and that Dr. Wheeler "reviewed sufficient similar radiologic evidence to support his conclusions," we can discern no abuse of discretion in the administrative law judge's conclusion that the physicians' opinions did not suffer a loss of probative value. *Id.* Consequently, we reject claimant's arguments.

With respect to the merits of entitlement, claimant generally challenges the administrative law judge's weighing of the evidence of record in finding that pneumoconiosis was not established at Section 718.202, asserting that the administrative law judge failed to consider that medical evidence favorable to claimant was originally obtained by employer in the course of this litigation. Claimant avers that because the positive x-ray interpretation by Dr. Willis, the positive CT scan interpretation by Dr. Muto, and the diagnosis of pneumoconiosis by Dr. Zaldivar, were initially generated by employer, rather than claimant, this circumstance provides a compelling ground upon which to defer to this evidence. Claimant's argument lacks merit. Reports prepared in the course of litigation at the request of any party constitute probative evidence and are not presumptively entitled to greater weight contingent on the party obtaining it. *Richardson v. Perales*, 401 U.S. 389 (1971); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (*en banc*). In the present case, the administrative law judge properly considered multiple factors in weighing the conflicting medical evidence of record on the issues of the existence of clinical and legal pneumoconiosis at Section 718.202(a), and complicated pneumoconiosis at Section 718.304, including the respective qualifications of the physicians, and the reasoning and documentation underlying 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). Because claimant has not delineated how the administrative law judge erred in his analysis of the medical evidence relevant to Sections 718.202(a) and 718.304, and has not otherwise raised any allegations of error with respect to the administrative law judge's weighing of the medical evidence, he fails to provide a basis upon which the Board can review the

administrative law judge's findings. Thus, since claimant has offered no specific legal or factual challenge to the administrative law judge's rationale, we affirm the administrative law judge's finding that the weight of the evidence was insufficient to establish either the existence of simple pneumoconiosis pursuant to Section 718.202(a) or complicated pneumoconiosis pursuant to Section 718.304. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Nevertheless, we must vacate the administrative law judge's denial of benefits, and remand the case to the administrative law judge for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4). The administrative law judge must initially determine whether claimant worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine, *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). The administrative law judge must also allow the parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at Section 725.414, or upon a showing of good cause pursuant to Section 725.456(b)(1). If, on remand, the administrative law judge determines that claimant is entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), the administrative law judge must then determine whether employer has established rebuttal.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in part, 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge