BRB No. 05-0335 BLA

RALPH WEBBER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/15/2007
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER on RECONSIDERATION *EN BANC*
	)	
Party-in-Interest	)	

Appeal of the Decision and Order – Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

Mark Solomons and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Jonathan L. Snare, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant and employer have filed timely Motions for Reconsideration requesting that the Board reconsider its Decision and Order dated January 27, 2006 issued in the captioned case, which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In that decision, the Board held, in part, that in claims arising under the revised regulations: the x-ray standards

described in Appendix A to Part 718 do not apply to digital x-rays; that digital x-rays constitute "[o]ther medical evidence" under 20 C.F.R. §718.107(a); and that the admission of digital x-rays is properly considered under Section 718.107, where the administrative law judge must determine, on a case-by-case basis, pursuant to Section 718.107(b), whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement. *Webber v. Peabody Coal Co*., 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring).

The Board further held that the regulation at Section 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. The Board declined 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 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 the evidence. Instead, the Board held that each party may choose which set of results to submit, for each test or procedure, in order to best support its position. Therefore, the Board vacated the administrative law judge's admission into the record of several readings of a May 14, 2002 computerized tomography (CT) scan and a May 14, 2002 digital x-ray. The Board instructed the administrative law judge to require employer to select and submit only one reading of each test, 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). *Id*.

In addition, the Board held that where a party offers a physician's statement or testimony to satisfy its burden of proof at 20 C.F.R. §718.107(b) pertaining to the medical acceptability and relevance of "other medical evidence," and the proffered statement or testimony contains additional discussion by the physician, the administrative law judge should consider whether the additional comments are admissible pursuant to 20 C.F.R. §§725.414 or 725.456(b)(1). If the additional comments are not admissible, the administrative law judge need not exclude the statement or testimony in its entirely, but may sever and consider separately those portions relevant to 20 C.F.R. §718.107(b). Thus, the Board concluded that under the facts of this case, the administrative law judge properly admitted, pursuant to 20 C.F.R. §718.107(b), the deposition testimony of Dr. Wiot pertaining to the medical acceptability and relevance of digital x-rays and CT scans.

Considering the merits of entitlement, the Board held that the administrative law judge acted within his discretion in severing Dr. Wiot's testimony, pertaining to the medical acceptability and relevance of digital x-rays and CT scans, and considering it separately from the rest of his opinion regarding whether the miner in this case suffered from pneumoconiosis. The Board further held that the administrative law judge

permissibly found Dr. Wiot's opinion of little probative value for the purpose of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. The Board also affirmed, as supported by substantial evidence, the administrative law judge's finding that the conventional x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Finally, pursuant to Section 718.202(a)(4), the Board affirmed the administrative law judge's determination to accord less weight to the opinion of Dr. Sparks, but vacated the administrative law judge's conclusion that the weight of the medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). The Board remanded the case for further consideration of the medical evidence relevant to the existence of pneumoconiosis. *Id*.

Both claimant and employer responded to each other's Motion for Reconsideration, and the Director, Office of Workers' Compensation (the Director), also filed a response to each party's motion. Employer replied to the response briefs submitted by both claimant and the Director.

Admission of the Digital X-ray Interpretations

On reconsideration, claimant contests the Board's holding that, because the x-ray standards described in Appendix A to Part 718 do not apply to digital x-rays, the admission of digital x-rays is properly considered under 20 C.F.R. §718.107. Claimant's Brief on Reconsideration at 3. Claimant asserts that, contrary to the Board's discussion in *Webber*, digital x-rays do utilize film, and, therefore, the quality standards at Appendix A to Part 718 are applicable to digital x-rays. Claimant's Brief on Reconsideration at 3-4. Claimant contends that, therefore, if a digital x-ray is not in substantial compliance with the quality standards, the proper remedy is to exclude that x-ray from the record. Claimant's Brief on Reconsideration at 4. We disagree. Contrary to claimant's argument, as asserted by the Director, while digital x-rays may be viewed on film, they are not captured on film. Thus, we reaffirm our prior holding that the quality standards for analog x-rays, set forth at Appendix A to Part 718, do not apply to digital x-rays. Therefore, we also reaffirm our prior holdings that digital x-rays constitute "other medical evidence," and that their admissibility is properly considered at Section 718.107.

We also reject employer's assertion that the Board erred in requiring the parties to establish, pursuant to Section 718.107(b), the medical acceptability of digital x-rays on a case-by-case basis. Employer's Brief on Reconsideration at 7-8. Employer specifically contends that, under the facts of *Webber*, the Board "held that digital x-rays, like CT-scans…should be admitted because the evidence established that the technology was medically acceptable." Employer's Brief on Reconsideration at 7. Employer maintains that either a technology is medically acceptable or it is not, and that fact does not change on a case-by-case basis. Rather, employer argues, the only question for an administrative

law judge to consider, on a case-by-case basis, is whether a particular film is sufficiently reliable. Employer's Brief on Reconsideration at 7. Contrary to employer's arguments, the Board did not hold in *Webber* that digital x-rays are medically acceptable. Rather, we simply held, and again hold, that the administrative law judge must determine whether the party proffering "other medical evidence" has established its medical acceptability and relevance pursuant to Section 718.107(b). 20 C.F.R. §718.107(b); *Webber*, 23 BLR at 1-133.

Administrative Law Judge's Application of 20 C.F.R. §718.107 to Admit Multiple Readings of the May 14, 2002 CT Scan

Employer further challenges the Board's holding 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. Employer's Brief on Reconsideration at 4. Employer contends that "without explanation or rationale, and without even mentioning *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-59 (2004)(*en banc*), the Board did an about-face" and departed from its prior holding therein, that "Section 718.107(a) contains no specific numerical limits." Employer's Brief on Reconsideration at 3-4. We reject employer's argument as without merit. First, as claimant correctly asserts, employer previously raised substantially the same arguments on appeal. Employer's Supplemental Brief on appeal at 3-6. Second, as the Director correctly points out, contrary to employer's argument, in *Webber* the Board fully discussed its prior decision in *Dempsey* and explained why it was necessary to refine its prior interpretation of Section 718.107(a). *Webber*, 23 BLR at 1-133-135.

Employer also contends that in holding that Section 718.107(a) is reasonably interpreted to allow for the submission of *one* reading of each separate test or procedure undergone by claimant, as part of a party's affirmative case, the Board erred in according deference to the Director's "new" interpretation of the regulation. Employer's Brief on Reconsideration at 5. Employer specifically asserts that deference to the Director's position is impermissible because the Director's "newfound interpretation" of Section 718.107, to include numerical limits on evidence, reflects a "flip-flop" from the agency's prior interpretation of the regulation in violation of the Administrative Procedure Act and proper notice and comment rulemaking procedures.[1] Employer's Brief on Reconsideration at 4-6, citing on 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

[1] Initially, we note that in the prior appeal, employer alluded to this argument, but did not contend that the Director's interpretation of 20 C.F.R. §718.107 violated any constitutional or statutory mandate. Employer's Supplemental Brief on appeal at 7.

On February 17, 2005, the Board requested that the Director file a brief in this case addressing employer's challenge to the Director's interpretation of Section 718.107, and its implementation of that regulation without notice and comment. The Director filed his brief in response to the Board's Order on July 21, 2006. The Director maintains that his position is consistent with that set forth in *Dempsey*, and that his interpretation of Section 718.107 can be implemented without notice and comment rulemaking procedures. Director's Supplemental Brief on reconsideration at 2-3, 8-9. Employer filed a reply to the Director's supplemental brief. Claimant did not file a separate reply brief on this issue.

Initially, we note that the Director did not abandon his prior position in *Dempsey*, as employer asserts. Rather, the Director consistently argued in both *Dempsey* and *Webber* that "the results" referred to in Section 718.107 is properly interpreted to mean one set of results. Director's Brief on appeal at 2-3. In addition, we agree with the Director's position that, contrary to employer's argument, adoption of an interpretation of Section 718.107 as having an implicit numerical limit, *i.e.* one set of results, does not require separate notice and comment.

As the Director contends, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that agencies may interpret and re-interpret their regulations through adjudication, without notice and comment. *Bullwinkel v. F.A.A.*, 23 F.3d 167, 171 (7th Cir. 1994); Director's Supplemental Brief on reconsideration at 7-9. In addition, the United States Court of Appeals for the District of Columbia Circuit, wherein the challenge to the revised regulations at Section 725.414 arose,[2] has concurred with this approach, provided that the agency is not rewriting the plain language of the regulation and the change is not arbitrary or unexplained. *See Kidd Commc'ns v. FCC*, 427 F.3d 1, 5 (D.C. Cir. 2005); *American Federation of State, County*

[2] In *Nat'l Mining Ass'n v. U.S. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002) [*NMA*], the court held, with respect to the evidentiary limitations set forth at 20 C.F.R. §§725.310(b), 725.414, 725.456, 725.457(d) and 725.458, that the revised regulations are consistent with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which empowers agencies to exclude irrelevant, immaterial or unduly repetitious evidence, and with the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.*, which authorizes the Secretary to issue regulations providing for the nature and extent of the proofs, and the methods of taking and furnishing the proofs. In addition, the court held that the evidentiary rules are not arbitrary, capricious or artificial, but rather enable administrative law judges to focus their attention on the quality of the medical evidence in the record. *NMA*, 292 F.3d at 873-874.

and Municipal Employees Capital Area Council 26 v. FLRA, 395 F.3d 443 (D.C. Cir. 2005); *Consolidated Edison of New York, Inc. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003); *Marseilles Land and Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir 2003). As we noted in *Webber*, while the language of Section 718.107 is virtually unchanged from the prior regulation, the revised regulation at Section 725.414 specifically references Section 718.107, providing that in any case in which a party has submitted the results of other testing pursuant to Section 718.107, the opposing party shall be entitled to submit "one physician's assessment of each piece of such evidence in rebuttal." 20 C.F.R. §725.414(a)(2)(ii), (3)(ii); *Webber*, 23 BLR at 1-134. Because the limitations on Section 718.107 rebuttal evidence in Section 725.414 tie the two regulations together, it would be illogical to allow parties to submit unlimited CT scans or other new types of evidence, while restricting other commonly accepted medical evidence such as x-rays.[3] Therefore, the interpretation of Section 718.107, as allowing for the submission of only one set of results, is both reasonable and foreseeable.[4] Thus, the change in the Director's interpretation of Section 718.107 is not arbitrary. *See Bullwinkel*, 23 F.3d at 171. In addition, as the Director's interpretation does not constitute a rewriting of the plain language of Section 718.107, and as we provided, in *Webber*, a full explanation for our holding that Section 718.107 is properly 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 reject employer's arguments and reaffirm our prior holding. *See Kidd*, 427 F.3d at 5; *American Federation of State, County and Municipal Employees Capital Area Council 26*, 395 F.3d at 443; *Consolidated Edison of New York, Inc.*, 315 F.3d at 323; *Marseilles Land and Water Co.*, 345 F.3d at 920; *Webber*, 23 BLR at 1-135.

[3] We note that more than one set of results of a test or procedure, such as a computerized tomography (CT) scan or digital x-ray, may be admissible pursuant to sections supplementary to Section 718.107, such as the good cause provision of Section 725.456, or the provision for hospitalization or treatment records in Section 725.414(a)(4).

[4] In addition, if multiple readings of a single CT scan were deemed admissible as affirmative evidence, a party would be able to subvert the specific rebuttal limitations simply by designating its multiple readings as affirmative evidence.

Claimant next asserts that the Board erred in holding, pursuant to Section 718.107, that each party may choose which set of results it wishes to submit. In *Webber*, after holding that Section 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, the Board stated:

> 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 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 the evidence. 64 Fed. Reg. at 54994 (Oct. 8, 1999). 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.

Claimant contends, on reconsideration, that the Board erred in failing to explain why requiring a party to submit the original results of a test or procedure is "potentially unworkable, unnecessary, and contrary to the stated goal of the revised regulations to maintain a focus on the quality of the evidence." Claimant's Brief on Reconsideration at 5. Claimant specifically asserts that it is easily workable to rely on the original results, that the original results are not contrary to the goal of focusing on the quality of evidence, as there are no quality standards in place, and that because the parties are not medical experts, the parties do not know what the "best interpretation" of a CT scan would be. Claimant's Brief on Reconsideration at 5. We disagree.

We note that claimant's current arguments are similar to those raised by claimant previously. Claimant's Brief on appeal at 7-8. Therefore, we reaffirm our prior holding that Section 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. *Webber*, 23 BLR at 1-135; s*ee Witherow v. Rushton Mining Co.*, 8 BLR 1-232, 233 (1985).

Merits of Entitlement

With respect to the merits of entitlement, claimant reiterates his argument that the Board erred in holding that, pursuant to 20 C.F.R. §718.107(b), the administrative law judge acted within his discretion in severing Dr. Wiot's testimony pertaining to the medical acceptability and relevance of digital x-rays and CT scans, and considering it separately from the rest of his opinion regarding whether the miner in this case suffers from pneumoconiosis. Claimant's Brief on Reconsideration at 5-6. Claimant also reasserts that the Board erred in affirming the administrative law judge's finding that Dr. Wiot's opinion is of little probative value for the purpose of establishing the existence of

pneumoconiosis at 20 C.F.R. §718.202(a)(4).[5] Claimant's Brief on Reconsideration at 5-6. Lastly, claimant repeats his prior argument that the Board erred in affirming the administrative law judge's weighing of the June 14, 2001 conventional x-ray at Section 718.202(a)(1), and further erred in affirming the administrative law judge's discrediting of Dr. Sparks' opinion at Section 718.202(a)(4). Claimant's assertions merely represent contentions previously raised and rejected when this case was initially before the Board. There have been no changes in Board or circuit court law that would affect the Board's previous disposition of claimant's contentions. We therefore adhere to our previous affirmance of the administrative law judge's findings, and decline to address specifically claimant's contentions. *See Witherow*, 8 BLR at 1-233.

[5] In considering the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted that, while Dr. Wiot's report and deposition testimony were negative for pneumoconiosis, the physician's expertise was in radiology, not pulmonology. Decision and Order at 14. The administrative law judge further noted that Dr. Wiot's opinion focused primarily on the issue of clinical pneumoconiosis, relevant to his x-ray and CT scan findings, and did not expressly rule out the possibility of legal pneumoconiosis. Decision and Order at 14. Thus, the administrative law judge concluded that the "crux of this case rests with the relative weight I accord the medical opinions of Drs. Tuteur, Renn, and Cohen, respectively." Decision and Order at 14.

Accordingly, we deny the Motion for Reconsideration submitted by claimant, and the Motion for Reconsideration submitted by employer, and reaffirm our Decision and Order of January 27, 2006.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge