BRB No. 06-0207 BLA

ARLEY H. ROSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	DATE ISSUED: 01/31/2007
and	)	
	)	
PITTSTON COMPANY	)	
	)	
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 on Modification-Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification-Denying Benefits (04-BLA-5051) of Administrative Law Judge Richard A. Morgan 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). This case involves the interplay between the evidentiary limitations applicable to a claim under 20 C.F.R. §725.414, and the evidentiary limitations applicable to a petition to modify the decision on that claim under 20 C.F.R. §725.310(b). Because the administrative law judge misapplied the regulations to unduly restrict the amount of medical evidence that the parties could submit on modification, we vacate his Decision and Order and remand this case for further consideration.

Claimant filed a subsequent claim for benefits on November 15, 2001.[1] Director's Exhibit 4. The district director denied the claim on March 25, 2003. Director's Exhibit 37. The district director's Proposed Decision and Order informed claimant that unless he requested a hearing within thirty days, the decision would become final. Director's Exhibit 37; *see* 20 C.F.R. §725.419(d).[2] Rather than request a hearing within thirty days, claimant requested modification of the decision on May 6, 2003. Director's Exhibit 40; *see* 20 C.F.R. §725.310(a)(providing for modification of a denial of benefits based on a change in conditions or mistake in a determination of fact).

Following the modification request, claimant submitted x-ray and CT-scan interpretations diagnosing him with complicated pneumoconiosis. He designated these items variously as affirmative-case evidence, rebuttal evidence, and medical treatment

[1] Claimant filed three previous claims. Director's Exhibits 1, 2. The first, filed on April 6, 1973, was denied on May 30, 1980, because claimant did not establish any element of entitlement. Director's Exhibit 1. The second, filed on July 17, 1990, was denied on February 28, 1992, because claimant did not establish that he was totally disabled. Director's Exhibit 1. The third claim, filed on October 20, 1994, was denied on March 30, 1995, because claimant did not establish that he was totally disabled. Director's Exhibit 2. The record reflects that the denials in all three claims became final. Director's Exhibits 1, 2.

[2] Section 725.419 provides, in relevant part, that if no response is sent to the district director within the thirty-day period, "the proposed decision and order shall become a final decision and order," and "all rights to further proceedings with respect to the claim shall be considered waived, except as provided in §725.310." 20 C.F.R. §725.419(d).

records under 20 C.F.R. §725.414.[3] Employer responded with negative x-ray and CT-scan interpretations which it designated as affirmative, rebuttal, and treatment records evidence; it also submitted two affirmative-case medical reports, along with the physicians' depositions.

Notwithstanding the parties' designation of their evidence under 20 C.F.R. §725.414, the administrative law judge ruled that because claimant requested modification of the district director's decision, the parties' rights to submit medical evidence were determined solely by 20 C.F.R. §725.310(b).[4] The administrative law

[3] Section 725.414 applies to claims filed after January 19, 2001, and limits the amount of specific types of medical evidence that the parties may submit. 20 C.F.R. §§725.2(c); 725.414. 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, 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 these limitations, "any record of a miner's hospitalization . . . or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Types of medical evidence not listed in 20 C.F.R. §725.414, such as CT-scans, may be admissible as other medical evidence. *See* 20 C.F.R. §718.107(a). Finally, 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).

[4] Section 725.310(b) provides, in relevant part:

> Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator . . . shall each be entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414.

judge concluded that 20 C.F.R. §725.310(b) limited each party to one x-ray interpretation, one pulmonary function study, one blood gas study, and one medical report. He therefore excluded most of the parties' x-ray readings and one of employer's two medical reports. The administrative law judge also ruled that the parties could not submit any type of medical evidence that was not mentioned in 20 C.F.R. §725.310(b). He therefore excluded several CT-scan readings and the physicians' depositions. Additionally, the administrative law judge ruled that the reference in 20 C.F.R. §725.310(b) to the rebuttal provisions in 20 C.F.R. §725.414 allowed the parties to rebut only the one piece of evidence permitted by 20 C.F.R. §725.310(b), not any evidence that was submitted in the initial proceedings. The administrative law judge therefore excluded x-ray and CT-scan readings that claimant had submitted as rebuttal to affirmative-case evidence that employer submitted before claimant requested modification.

Thereafter, in the Decision and Order on Modification-Denying Benefits, the administrative law judge credited claimant with "at least 35 years" of coal mine employment.[5] Decision and Order at 5. The administrative law judge found that the medical evidence developed since the previous denial of benefits did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and therefore did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his application of 20 C.F.R. §725.310(b). Employer responds, agreeing that the administrative law judge misapplied 20 C.F.R. §725.310(b) to exclude evidence, but asserts that the error was harmless, because the excluded evidence would not change the result.

On October 17, 2006, the Board issued an order requesting that the Director, Office of Workers' Compensation Programs (the Director), file a brief addressing whether the administrative law judge's evidentiary rulings were correct. *Rose v. Buffalo Mining Co.*, BRB No. 06-0207 BLA (Oct. 17, 2006)(Order). The Director has responded that the administrative law judge "erroneously interpreted the regulations to require an

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20 C.F.R. §725.310(b).

[5] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

unduly restricted limitation on the amount of medical evidence a party may proffer in modification proceedings." Director's Brief at 2. The Director therefore requests that we vacate the administrative law judge's decision and remand this case for further consideration.

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).

Claimant contends that the administrative law judge erred in applying 20 C.F.R. §725.310(b) to exclude the bulk of claimant's medical evidence without reference to whether it was admissible under 20 C.F.R. §725.414. The Director agrees that the administrative law judge erred in applying 20 C.F.R. §725.310(b) as if it displaces 20 C.F.R. §725.414. The Director's position is that 20 C.F.R. §§725.414 and 725.310(b) work in tandem to establish a ceiling on the amount of certain types of medical evidence the parties may submit in the combined initial and modification proceedings on a claim. The Director explains that 20 C.F.R. §725.414 applies to all proceedings on a claim, including modification proceedings, and 20 C.F.R. §725.310(b) is an exception that augments the limitations imposed by 20 C.F.R. §725.414. The Director states that his "interpretation recognizes the unique nature of modification in reopening the underlying claim in the context of limitations on the evidence used to adjudicate the claim." Director's Brief at 10. He therefore sees "the §725.310(b) limitations as supplementing, not supplanting, the §725.414 limitations." Director's Brief at 10-11.

Thus, in the Director's view, each party can submit "the full complement of evidence allowed by §§725.414 and 725.310 at any stage of the combined proceedings, including all of the evidence for the first time on modification." Director's Brief at 16. Because the administrative law judge did not apply the regulations in this manner, the Director requests that this case be remanded for the parties to have "the opportunity to resubmit the excluded evidence and designate the individual items as affirmative-case or rebuttal evidence. The [administrative law judge] must then determine whether each proffered piece of evidence is admissible." Director's Brief at 20.

The Director's reasonable interpretation of the regulations is entitled to deference. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426, 23 BLR 2-321, 2-330 (4th Cir. 2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-110 (2006)(*en banc*). We agree that 20 C.F.R. §§725.414 and 725.310(b) should be read together to establish combined evidentiary limits on modification, to allow a party to submit for the first time in a modification proceeding all of the evidence permitted by each regulation. Section 725.414 provides in part that "the limitations set forth in this section shall apply to all

proceedings conducted with respect to a claim," "except to the extent permitted by . . . §725.310(b)." 20 C.F.R. §725.414(d). In turn, Section 725.310(b) provides that "[m]odification proceedings shall be conducted in accordance with the provisions of this part as appropriate . . . ." 20 C.F.R. §725.310(b). Section 725.414 is a provision of Part 725. Therefore, the evidentiary limitations of 20 C.F.R. §725.414 apply on modification. 20 C.F.R. §§725.414(d); 725.310(b); *see also Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 548, 22 BLR 2-429, 2-455 (7th Cir. 2002)(concluding, under 20 C.F.R. §725.310(b), that "the requirements of §725.414 apply to modification proceedings").

Section 725.310(b) provides further that Part 725 applies, "except that," each party "shall be entitled to submit no more than one additional" x-ray interpretation, pulmonary function study, blood gas study, and medical report as affirmative-case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b). Thus, the evidentiary limitations of 20 C.F.R. §725.414 apply, "except that" each party may submit one "additional" piece of the specified types of evidence. Giving effect to every term used in the regulation, *see Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-15 (2003), the term "additional" means "in addition to" the amount of evidence permitted by 20 C.F.R. §725.414. That is, in addition to the affirmative case evidence a party submitted, or could submit, under 20 C.F.R. §725.414, it may also submit one affirmative-case x-ray interpretation, pulmonary function study, blood gas study, and medical report under 20 C.F.R. §725.310(b). The remainder of 20 C.F.R. §725.310 explicitly refers to the rebuttal evidence and rehabilitative statement provisions of 20 C.F.R. §725.414. Consequently, 20 C.F.R. §§725.414 and 725.310(b) apply together in modification proceedings on a claim.

Therefore, where a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b). The administrative law judge therefore erred in applying 20 C.F.R. §725.310(b) as a stand-alone rule that strictly limited the amount of evidence the parties could submit, without reference to whether they had yet submitted their evidence permitted by 20 C.F.R. §725.414. Contrary to employer's suggestion, we cannot conclude that the administrative law judge's erroneous exclusion of multiple items of medical evidence was harmless. The Board is not authorized to determine the weight of the evidence. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Consequently, we vacate the administrative law judge's Decision and Order and remand this case to him so the parties may resubmit and redesignate their evidence under 20 C.F.R. §§725.414 and 725.310(b). The administrative law judge should then rule on the

admissibility of each piece of evidence, and reconsider claimant's request to modify the denial of his subsequent claim. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded 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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REGINA C. McGRANERY
Administrative Appeals Judge