BRB No. 97-1557 BLA

KELLY HYATT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
RED ASH SALES COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Virginia Thornsbury (Lay Representative), Iaeger, West Virginia, for claimant.

K. Keian Weld (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-1427) of Administrative Law Judge Samuel J. Smith 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). Claimant originally filed for benefits on May 1, 1987, which was denied by the district director on October 23, 1987, and no appeal was taken. Decision and Order at 4; Director's Exhibit 22. Subsequently, claimant filed a second claim for benefits on March 3, 1992, which was denied by the district director on August 5, 1992, and again no appeal was taken. Decision and Order at 4; Director's Exhibit 23. Claimant filed the instant claim on September 9, 1993, which the district director denied on March 7, 1994 and December 19, 1994. Decision and Order at 4; Director's Exhibits 1, 14, 18. Claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges. Decision and Order at 4; Director's Exhibit 19. At the hearing, the administrative law judge admitted Director's Exhibits 1-10 and 13-24, Claimant's Exhibits 1-15 and Employer's Exhibits 1-2 and 9-12 into evidence and left the record open for thirty days to permit employer to obtain rereadings of two x-rays.[1] Decision and Order at 2; Hearing Transcript 18, 30, 46. In his Decision and Order, the administrative law judge credited claimant with twenty-four years and one month of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the admissible x-ray evidence of record, old and new, was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 14-17. The administrative law judge further found that the new medical evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) and that, in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 17-25. Additionally, the administrative law judge found the evidence of record sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment

[1] The administrative law judge did not admit two pages of notes in Claimant's Exhibit 2 or Dr. Boutros' report contained in Claimant's Exhibit 3. Decision and Order at 2; Hearing Transcript at 31-32. The administrative law judge also reserved ruling on claimant's objection to all of Employer's Exhibits. Decision and Order at 10; Hearing Transcript at 38-42, 44. The administrative law judge admitted Employer's Exhibits 13-14 post-hearing. Decision and Order at 2-3.

pursuant to 20 C.F.R. §718.203 and to establish the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Decision and Order at 25-28. Accordingly, benefits were awarded. Employer appeals, arguing that the administrative law judge made several errors in his determinations regard the admissibility of the evidence as well as in his findings of fact and his application of the law in awarding benefits.[2] The Director, Office of Workers' Compensation Programs (the Director), responds to several specific arguments raised by employer, but does not address the administrative law judge's weighing of the evidence. Claimant responds, urging affirmance of the award of benefits.

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 applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

A review of the hearing transcript in the instant case indicates that employer objected to the admission of Dr. Aycoth's May 26, 1987 and April 1, 1992 x-ray readings contained in Claimant's Exhibits 8-9 as well as Dr. Aycoth's curriculum vitae contained in Claimant's Exhibit 10 because they were submitted within twenty days before the hearing. *See* 20 C.F.R. §725.456(b)(1). The administrative law judge admitted the x-ray readings and curriculum vitae and informed the parties that employer would be allowed to submit post-hearing evidence to rebut the x-ray reports by Dr. Aycoth and stated that the physician's qualifications were not "terribly critical". Hearing Transcript at 22-28. Claimant objected to the admission of Employer's Exhibits 3-8 and Director's Exhibits 11-12, which were rereadings of the October 6, 1993 x-ray which claimant was unable to obtain and have reread.

[2] Employer also filed a motion for Oral Argument which the Board denied by Order dated March 17, 1998.

Apparently, the actual original x-ray film was misplaced upon its return to the Director after being reread by employer's physicians. Hearing Transcript at 16-18, 43-46. Claimant also objected to all of employer's other medical evidence submissions as well because it was not developed when the case was before the district director, citing 20 C.F.R. §725.414. The administrative law judge reserved ruling on this objection until after the hearing. Decision and Order at 12; Hearing Transcript at 38-44.

In his Decision and Order, the administrative law judge, upon further reflection and prior to considering the new evidence on the merits, determined that employer had not undertaken a good faith effort to develop evidence during the pendency of the claim at the district director level and thus had waived it rights to develop further evidence pursuant to Section 725.414(e)(2). The administrative law judge thus excluded Employer's Exhibits 1-2 and 9-12 from consideration as evidence. Decision and Order at 10-12. The administrative law judge also determined that the original reading of the October 6, 1993 x-ray, which was admitted at the hearing, Director's Exhibit 10, as well as all rereadings, Director's Exhibits 11-12, must be rejected as evidence, citing the provisions of 20 C.F.R. §718.102(d) requiring the exclusion in a living miner's claim of all x-ray readings of any x-ray where the original film is unavailable. Decision and Order at 14, 16-17.

Employer initially contends that the administrative law judge erred in excluding all of its medical evidence based on his finding that it had failed to undertake a good faith effort to develop its medical evidence while the claim was pending at the district director level pursuant to Section 725.414(e)(2). The administrative law judge noted that Section 725.414(e)(2) provides in part that a notified operator which does not undertake a good faith effort to develop its evidence before the district director shall be considered to have waived its right to have either the claimant examined by a physician of its choosing or to have claimant's evidence submitted for review by a physician of its choosing. The administrative law judge found that as employer made no effort to develop its evidence at the district director level, it had not undertaken a good faith effort to develop its evidence while the claim was pending at the district director level; hence, the administrative law judge imposed the sanction of excluding Employer's Exhibits 1-2 and 9-12, which were obtained after the case was forwarded to the Office of Administrative Law Judges. Decision and Order at 12. Employer asserts that it did not fail to undertake a good faith effort to develop medical evidence while the case was pending with the district director, but instead concluded that the evidentiary record as it stood contained insufficient evidence upon which claimant could prevail.

A review of the record indicates that the only comprehensive medical opinion obtained in conjunction with the instant claim was by Dr. Vasudevan, who did not

diagnose pneumoconiosis or a respiratory impairment. Director's Exhibit 8. Consequently, under the unique facts of this case, we agree with both the Director and employer that employer justifiably relied on the evidence obtained by the district director and reasonably concluded that the it did not need to develop additional medical evidence while the claim was pending at the district director level. As such, we hold that employer's reliance on the medical evidence already obtained by the district director did not constitute a failure to make a good faith effort to develop its own evidence. Consequently, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to admit employer's rejected evidence into the record and we instruct the administrative law judge to reconsider the merits of claimant's entitlement in light of this evidence. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Employer also asserts that the administrative law judge erred in accepting Dr. Aycoth's x-ray readings and curriculum vitae contained in Claimant's Exhibits 8-10, which were submitted by claimant in violation of the "twenty-day rule," without making a specific "good cause" determination. Employer's brief at 6-7. In rendering his Decision and Order, the administrative law judge must base his findings solely on the record before him. 20 C.F.R. §725.477(b). Section 725.456(b)(2) allows the administrative law judge to admit documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged timely. 20 C.F.R. §725.456(b)(2). If the administrative law judge permits the late evidence into the record, Section 725.456(b)(3) requires that the record be left open for thirty days thereafter to permit the parties to take such action as each considers appropriate in response to such evidence. *See Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984).

In the instant case, although the administrative law judge left the record open for the submission of rebuttal evidence by employer with respect to the x-ray evidence, employer did not waive the untimely submission. The administrative law judge, however, failed to make a specific determination of whether claimant established good cause for his untimely submissions.[3] The administrative law judge is therefore instructed, on remand, to make a specific finding of whether claimant established good cause for his violation of Section 725.456(b)(1). If the administrative law judge determines that this evidence was not properly submitted under Section 725.456(b), the administrative law judge must either exclude it from the record or remand the case to the district director for further development of the

[3]Employer did not submit any post-hearing evidence with respect to the x-ray readings of Dr. Aycoth. Decision and Order at 2-3.

evidence. 20 C.F.R. §725.456(b)(2); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984); *Trull v. Director, OWCP*, 7 BLR 1-615 (1984).

Finally, employer contends that the administrative law judge erred in excluding its own physicians' rereadings of the the October 6, 1993 x-ray, which was apparently misplaced and unavailable to claimant for reading. Employer's Exhibits 3-8. The Director also contends the administrative law judge erred in excluding his rereadings of this x-ray, Director's Exhibits 11-12, as well as employers rereadings, while allowing the original reading by Dr. Ranavaya, Director's Exhibit 10, into evidence. Employer's contention is without merit and the Director's argument is misplaced. At the hearing, the administrative law judge admitted Dr. Ranavaya's original reading of the October 6, 1993 x-ray, Director's Exhibit 10, and excluded the Director's rereadings by Drs. Francke and Gaziano, Director's Exhibits 11-12, as well as employer's evidence related to this x-ray, Employer's Exhibits 3-8. Hearing Transcript at 18, 46. However, in his consideration of the evidence in his Decision and Order, the administrative law judge rationally determined that the original x-ray reading by Dr. Ranavaya, Director's Exhibit 10, as well as the Director's rereadings by Drs. Franke and Gaziano, Director's Exhibits 11-12, should be excluded from evidence on the basis that the original film on which all of the readings were based could not be provided to claimant for rereading. *See* 20 C.F.R. §718.102(d); Decision and Order at 16-17. We, therefore, affirm the administrative law judge's determination to reject all of the readings of the October 6, 1993 x-ray from consideration, *see* 20 C.F.R. §718.102(d), and instruct the administrative law judge on remand to reopen the record and provide the parties with an opportunity to obtain and submit additional x-ray evidence. As the evidentiary record is incomplete and we remand this case for further consideration, we decline to address employer's arguments with respect to the merits.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge