BRB No. 05-0124 BLA

PAUL D. PAULEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANNING COAL CORPORATION	)	DATE ISSUED: 01/30/2006
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (03-BLA-5600) of Administrative Law Judge Joseph E. Kane 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 filed a claim for benefits on April 16, 2001. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on October 28, 2003. Director's Exhibit 30. Claimant requested a hearing, which was held on September 24, 2003.[1] In his Decision and Order dated September 28, 2004, the administrative law judge initially determined that claimant's claim was timely filed. After accepting the parties' stipulation that claimant worked eleven years in coal mine employment, the administrative law judge found that claimant was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in his consideration of whether claimant's claim was time barred. Employer's Brief in Support of Petition for Review (Employer's Brief) at 10-12. Employer asserts that the administrative law judge erred when he refused to strike Dr. Alexander's reading of a November 17, 2000 x-ray. Employer's Brief at 13-15. Employer also argues that the administrative law judge erred when he excluded several of employer's proffered exhibits from the record, including medical reports and deposition testimony provided by Dr. Broudy. Employer's Brief at 15-20. As to the merits of entitlement, employer challenges

[1] On September 18, 2003, within six days of the September 24, 2003 scheduled hearing, claimant submitted several x-ray readings by Dr. Alexander, a Board-certified radiologist and B-reader, which were marked as Claimant's Exhibits 3-6. Claimant also submitted Dr. Alexander's curriculum vitae marked as Claimant's Exhibit 7. Among these readings, there was a positive reading of an x-ray dated November 17, 2000. Claimant's Exhibit 3. At the hearing, employer requested the opportunity to obtain a rebuttal reading in response to this positive reading. Based upon the agreement of the parties, the administrative law judge granted employer's request to have the record held open sixty days post-hearing in order to obtain the November 17, 2000 x-ray for rereading and to undertake further medical development. Hearing Transcript at 6-8. On November 21, 2003, employer filed a request for an extension of time to obtain the film, noting that claimant had not yet provided the film to employer for re-reading. In the alternative, employer requested that the administrative law judge issue an order compelling claimant to produce the x-ray. In response to employer's motion, claimant replied that the x-ray was located at the Department of Labor (DOL) office in Pikeville, Kentucky. The administrative law judge subsequently issued, on December 12, 2003, an Order granting employer's request for an extension. Additional evidence was received but nothing with respect to the November 17, 2000 x-ray. In its post-hearing brief, employer argued that Dr. Alexander's positive reading of the November 17, 2000 should be excluded because the x-ray was "not provided as required under the rules and regulations of the [DOL]." Employer's Post-Hearing Brief at 2.

the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c). Employer's Brief at 20-30.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a brief, arguing that the administrative law judge properly found claimant's subsequent claim to have been timely filed. Director's Brief at 1-2. The Director also maintains that the administrative law judge erred in excluding the written report and depositions of Dr. Broudy without first considering whether his opinion relevant to the issues of entitlement was irrevocably tainted by his review of inadmissible evidence. Director's Brief at 4. The Director urges the Board to vacate the administrative law judge's Decision and Order and to remand the case for further consideration of the weight to attach to Dr. Boudy's opinion at Sections 718.202(a)(1), (4) and 718.204(c). Claimant filed a reply brief, challenging the Director's position with respect to Dr. Broudy's opinion. Employer also filed a combined reply brief.

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 first argues that the administrative law judge erred in finding that claimant's subsequent claim was timely filed. Employer maintains that this claim must be dismissed as time barred based on claimant's testimony at the hearing that "back eight or nine years ago, something like that," he was told by Dr. Baker that he had pneumoconiosis and that he was "disabled due to black lung and his nerves." Hearing Transcript at 21; Employer's Brief at 10-12. Employer asserts that "Dr. Baker's diagnosis, which obviously was communicated to [claimant], sufficed to start the ticking of the three-year limitation period" set forth at 20 C.F.R. §725.308. Employer's Brief at 11.

Employer's argument is without merit. In his Decision and Order, the administrative law judge specifically addressed the issue of timeliness, noting that the only evidence of Dr. Baker's alleged diagnosis of total disability was claimant's testimony, which the administrative law judge found insufficient to rebut the presumption of timeliness "because according to [c]laimant's testimony, Dr. Baker's determination of total disability was based on both respiratory and non-respiratory impairment...[the latter of which] have no bearing on a finding of total disability." Decision and Order at 3-4. Contrary to employer's assertion, the administrative law judge acted within his discretion in finding that the claim was timely filed since he was unable to determine from the

record evidence whether Dr. Baker actually communicated to claimant that he was disabled by a respiratory impairment alone. *Id*.

Notwithstanding, we agree with employer that the administrative law judge erred in excluding, *in their entirety*, the medical reports and deposition testimony of Dr. Broudy because the physician reviewed evidence which was inadmissible based on the evidentiary limitations.[2] *See* 20 C.F.R. §725.414(a)(3)(i). Citing Section 725.414(a)(3)(i), the administrative law judge excluded Dr. Broudy's initial report of October 4, 2001 because the doctor attached and referenced reports of two prior examinations he made of claimant in conjunction with a state workers' compensation claim. He further excluded Dr. Broudy's subsequent reports and deposition testimony because they referenced the "inadmissible" October 4, 2001 report.[3]

Contrary to the administrative law judge's ruling in this case, when presented with a situation where an otherwise admissible medial opinion reviews or discusses evidence that is deemed inadmissible under Section 725.414, the administrative law should attempt to ascertain the degree to which the physician's opinion is tainted by his review of that evidence. If the opinion is tainted, the administrative law judge has options available to him, which include exclusion of the report, redacting the objectionable content, asking the physician to submit a new report addressing only the admissible evidence, or factoring in the physician's reliance upon the inadmissible evidence when deciding what

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[2] Dr. Broudy examined claimant on October 4, 2001. Director's Exhibit 28. Attached to his October 4, 2001 report, Dr. Broudy included copies of additional examination reports he had conducted of claimant in conjunction with a state workers' compensation claim. Director's Exhibit 28. The prior medical reports were not previously of record and, absent a finding of good cause or other basis for their admission, would have been excluded as excessive evidence if proffered separately by employer based on the evidentiary limitation that employer is entitled to submit only two affirmative medical reports, *see* 20 C.F.R. §725.414(a)(3)(i). Dr. Broudy was deposed on January 31, 2002. Director's Exhibit 28. He prepared another report on August 25, 2003, reviewing Dr. Baker's examination report and records from claimant's treating physician, Dr. Caudill. Employer's Exhibit 4. Dr. Broudy was deposed again on September 11, 2003. Unmarked Employer's Exhibit.

[3] Section 725.414(a)(3)(i) provides that each x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report referenced in a medical report must either be admissible under the Section 725.414(a) limits, or be admissible as a hospitalization or treatment record under Section 725.414(a)(4). *See* 20 C.F.R. §725.414(a)(3)(i).

weight if any to accord the opinion. *See Harris v. Old Ben Coal Company*, BRR No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery and Hall, J.J., concurring and dissenting)(complete exclusion of relevant evidence is disfavored). We therefore vacate the administrative law judge's award of benefits and remand the case for further consideration as to whether Dr. Broudy's reports and deposition testimony were tainted by his review of inadmissible evidence. *Id.* The administrative law judge may consider whether any portion of Dr. Broudy's opinion, relevant to the existence of pneumoconiosis and disability causation, may be untainted despite Dr. Broudy's reference to his prior examination reports. *Id*.

Employer also correctly asserts that the administrative law judge erred when he failed to consider Dr. Baker's negative reading (0/1) of the November 17, 2000 x-ray, which was admitted into the record as Claimant's Exhibit 1. The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). The failure of an administrative law judge to address all relevant evidence, explain his or her rationale, or clearly indicate the specific statutory or regulatory provisions involved in the decision requires remand. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Based on these evidentiary errors, we vacate the administrative law judge's award of benefits and his finding that claimant established the existence of pneumoconiosis. We direct the administrative law judge on remand to further address the admissibility of Dr. Broudy's opinion and also to reweigh the x-ray evidence at 20 C.F.R. §718.202(a)(1) taking Dr. Baker's reading into consideration. Depending on whether Dr. Broudy's opinion is admitted into the record on remand, the administrative law judge must also reconsider his findings relevant to the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4).

Furthermore, in light of this remand order, we direct the administrative law judge to clarify the basis for his denial of employer's motion to strike Dr. Alexander's positive reading of the November 17, 2001 x-ray. The relevant regulation at Section 718.201, which governs this living miner's claim, provides that "the original film on which [an] x-ray report is based shall be supplied to the Office, unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties."[4] *See* 20 C.F.R. §718.102(d). In this case, the

[4] In his Decision and Order the administrative law judge cites to *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846, 1-848 (1985) and states that employer's motion "should only be granted if it is established that (1) the x-ray film itself is unavailable for

administrative law judge has not addressed whether the original x-ray of November 17, 2000 was provided to the Office and made available to employer.[5] On remand, if the November 17, 2001 x-ray was not made available to employer and its motion to strike is granted, then the administrative law judge should reevaluate the x-ray evidence at Section 718.202(a)(1).

Lastly, to the extent that the administrative law judge's finding at Section 718.202(a) influenced his finding as to disability causation, we vacate the administrative law judge's finding at Section 718.204(c). We therefore direct the administrative law judge to consider on remand whether claimant established both the existence of pneumoconiosis and total disability due to pneumoconiosis following resolution of the evidentiary matters discussed herein.

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meaningful interpretation, and (2) the interpreting physician was no longer available" (presumably for cross-examination). Decision and Order at 5. The administrative law judge found that "[b]ecause the employer in this case claims only that the film was not provided, the employer's motion to exclude the interpretation of this film from evidence is denied." Decision and Order at 5. We note, however, that *Pulliam* involved a miner's claim filed prior to the effective date of the Part 718 regulations, *i.e.*, April 1, 1980. The instant claim was filed under the Part 718 regulations and is subject to 20 C.F. R §718.102(d).

[5] The Director alleges that employer has offered no proof that it attempted to obtain the x-ray from the Pikeville DOL office. Counsel for the Director further alleges that she contacted the Pikeville office and spoke to a DOL claims examiner who reviewed the file and found "no indication that employer had ever requested the x-ray from the Pikeville office." Director's Brief at 3, n. 2.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed in part, and vacated in part, and the case is remanded for further consideration 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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JUDITH S. BOGGS
Administrative Appeals Judge