BRB No. 05-0397 BLA

RILEY COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 01/27/2006
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Rita Roppolo (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 – Award of Benefits (03-BLA-5208) of Administrative Law Judge Thomas F. Phalen, Jr., with respect to 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 initially filed an application for benefits on July 31, 2000. The district director made a determination, dated November

10, 2000, that claimant did not establish the necessary elements of entitlement. On November 22, 2000, claimant requested withdrawal of this claim. The district director granted claimant's request in an order dated February 9, 2001. Claimant signed his second application for benefits on the same date.[1] Director's Exhibit 2.

The administrative law judge credited claimant with nineteen years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish that claimant has pneumoconiosis arising out of coal mine employment and is totally disabled by the disease. Accordingly, benefits were awarded.

Employer argues on appeal that the administrative law judge erred in treating claimant's applications for federal black lung benefits as timely filed. Employer further alleges that the administrative law judge erred in failing to vacate the district director's order permitting withdrawal of a claim that the miner filed on July 31, 2000. Employer also contends that the administrative law judge erred in excluding certain items of evidence under 20 C.F.R. §725.414 and did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(c). Claimant responds and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that employer's arguments on the issues of timeliness and the administrative law judge's application of the evidentiary limitations are without merit.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Employer argues first that the administrative law judge erred in treating claimant's application for federal black lung benefits as timely filed under 20 C.F.R. §725.308. Claimant filed a claim for state benefits in 1994. In conjunction with this claim, Drs. Myers and Sundaram submitted reports, dated April 12, 1994 and June 16, 1995 respectively, in which they opined that claimant had pneumoconiosis and was totally disabled by it. Director's Exhibit 11, 12. Employer maintains that receipt of these reports by the attorney who represented claimant in the state proceedings constituted communications to claimant in 1994 or 1995 that he was totally disabled due to pneumoconiosis, such that his claims for federal black lung benefits filed more than three

[1] Claimant's second application was received in the Office of Workers' Compensation Programs on February 12, 2001 and is considered filed as of that date. 20 C.F.R. §725.503(a)(1); Director's Exhibit 2 at 1.

years later were not timely filed under Section 725.308. The administrative law judge made no specific reference to the issue of timeliness, but indicated in a footnote that "other issues" identified by the employer would be preserved for appeal rather than decided by the administrative law judge. Decision and Order at 2 n.3.

Claimant and the Director have both responded and urge the Board to hold that employer's arguments are without merit. We cannot assess whether employer is correct in maintaining that claimant's federal claim is untimely, as the Board is not empowered to render the factual findings necessary to resolve this issue. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Rinkes v. Consolidation Coal Co.*, 6 BLR 1-826 (1984). The administrative law judge possesses this authority but did not exercise it in this case. We must, therefore, vacate the award of benefits and remand this case to the administrative law judge for a determination of whether claimant's application for federal benefits was timely filed pursuant to Section 725.308.

We will address the remainder of employer's arguments on appeal in order to promote the efficient adjudication of this case on remand. Employer next challenges the administrative law judge's finding that claimant's first federal claim was properly withdrawn. Claimant initially filed a claim for benefits under the Act on July 31, 2000. The district director made an initial determination, dated November 10, 2000, that claimant was not entitled to benefits. On November 22, 2000, claimant requested withdrawal of this claim. The district director granted claimant's request in an order dated February 9, 2001. Claimant submitted his second application for benefits on the same date. Director's Exhibit 2.

The district director issued a Proposed Decision and Order on September 10, 2002, in which benefits were awarded to claimant. Director's Exhibit 29. In a letter dated September 20, 2002, employer objected to the Proposed Decision and Order and also challenged the district director's exclusion of the evidence developed in conjunction with claimant's July 31, 2000 filing and Dr. Broudy's report dated November 28, 2001. Employer requested that the case be transferred to the Office of Administrative Law Judges for a hearing. Director's Exhibit 31.

Employer subsequently filed a motion to remand the claim to the district director for consideration of the effectiveness of the withdrawal order and whether the new claim should be treated as a request for modification. The administrative law judge denied this motion on the ground that employer waived its right to contest the withdrawal order by failing to respond within thirty days of its issuance.

Employer alleges that the administrative law judge's finding is in error, as employer had no incentive to appeal the withdrawal order. Employer also contends that

claimant's filing of a second claim before he received notice that his request to withdraw had been granted indicated an intent to continue litigating the initial claim. Employer further urges the Board to hold that the evidence from the record of the withdrawn claim should have been admitted into the record. Claimant and the Director have both responded and maintain that employer's allegations of error have no merit.

We hold that the administrative law judge acted rationally in declining to overturn the district director's order granting withdrawal of the July 31, 2000 claim. There is no indication in the record, nor does employer argue, that the requirements set forth in 20 C.F.R. §725.306 were not met in this case.[2] Moreover, concerning employer's allegations of prejudice, Section 725.306 does not mandate consideration of the effect that granting a claimant's request for withdrawal will have upon another party. Claimant's completion of a claim form on the same date that the district director issued the order granting withdrawal also did not nullify claimant's request for withdrawal, particularly in light of the fact that claimant indicated that his initial claim had, in fact, been withdrawn. *See* Director's Exhibit 2.

Concerning the admissibility of the evidence submitted with the July 31, 2000 claim, Section 725.306(b) provides that "[w]hen a claim has been withdrawn . . . the claim will be considered not to have been filed." 20 C.F.R. §725.306(b); *see Bailey v. Dominion Coal Corp.*, --- BLR ---, BRB No. 05-0407 BLA (Dec. 19, 2005). We agree with the Director that the effect of treating the claim as if it had never been filed precludes the automatic inclusion of the evidence from that claim in the record of any subsequently filed claim. Employer alleges that the terms of Section 725.306 are not relevant, as the present case should be treated as a request for modification or a subsequent claim in light of the fact that claimant signed a second application for benefits

[2] The regulation concerning withdrawal of a claim provides in pertinent part that:

(a) A claimant…may withdraw a previously filed claim provided that:

(1) He or she files a written request with the appropriate adjudication officer indicating the reasons for seeking withdrawal of the claim;

(2) The appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant…and;

(3) Any payments made to the claimant in accordance with §725.522 are reimbursed.

20 C.F.R. §725.306(a).

on the same date that the district director granted claimant's withdrawal request. We disagree. Because the withdrawal order was valid, the letter in which the district director informed claimant that his July 31, 2000 claim was denied did not become a final order under the terms of 20 C.F.R. §§725.309 or 725.310. Thus, the evidence developed in conjunction with the first claim is not subject to the provisions allowing for the admission of the evidence submitted with a prior claim or a claim that is the subject of a request for modification.

Employer argues further that the evidence submitted with the July 31, 2000 claim should be admitted into the record because it is relevant. Employer also alleges that the evidentiary limitations set forth in Section 725.414 do not apply to this evidence because Section 725.414 is not valid. These contentions are without merit. In *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*), the Board held that revised Section 725.414 is a valid regulation. Relevant to employer's arguments in this case, specifically, the Board held that Section 725.414 does not conflict with the requirement at 30 U.S.C. §923(b) that all relevant evidence be considered, as other language in Section 923(b) incorporates a provision of the Social Security Act authorizing the agency to regulate "the nature and extent of the proofs and evidence . . . ." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a). *Dempsey*, 23 BLR at 1-58. Additionally, the Board held that Section 725.414 does not contravene the Administrative Procedure Act, which specifically empowers the agency to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy." 5 U.S.C. §556(d), 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); *Dempsey*, 23 BLR at 1-58.

Finally, employer maintains that the results of the complete pulmonary evaluation that the Department of Labor (DOL) was required, under 20 C.F.R. §725.406, to provide to claimant in conjunction with his withdrawn claim must be admitted into the record pursuant to 20 C.F.R. §725.421(b)(4).[3] We agree with the Director that under the facts of this case, the "examination" which must be made part of the record under Section 725.406 is the complete pulmonary evaluation that DOL provided to claimant in support of the claim filed on February 9, 2001. *See* Director's Exhibit 18. Thus, the administrative law judge did not err in declining to admit the results of the earlier examination performed at the request of DOL. We affirm, therefore, the administrative law judge's rejection of employer's request that the evidence from claimant's withdrawn claim be admitted into the record.

[3] The regulation states in pertinent part that the record "shall include the results of any medical examination or test conducted pursuant to §725.406." 20 C.F.R. §725.421(b)(4).

Employer next argues that the administrative law judge erred in admitting the positive x-ray readings of Drs. Myers and Sundaram as part of claimant's affirmative evidence under Section 725.414(a)(2)(i) because the original films were not submitted to DOL as required by 20 C.F.R. §718.102(c), (d). We affirm the administrative law judge's evidentiary ruling in this regard, as employer did not object to the admission of these x-ray readings at the hearing and, therefore, waived its right to oppose their admission. *See Collins v. Pond Creek Coal Co.*, 22 BLR 1-229, 1-233 n.3 (2003).

Employer further contends that the administrative law judge violated its right to due process when he rejected Dr. Dahhan's opinion in his Decision and Order after admitting Dr. Dahhan's medical report at the hearing. Employer also asserts that remand is required as the administrative law judge failed to identify precisely the objectionable evidence upon which Dr. Dahhan allegedly relied.

The administrative law judge determined that he could give no probative weight to the October 30, 2003 opinion in which Dr. Dahhan ruled out the presence of pneumoconiosis or any other dust related lung disease because Dr. Dahhan did not identify the pulmonary function studies that he relied upon, in part, in finding that claimant did not have legal pneumoconiosis. The administrative law judge also determined, pursuant to Section 725.414(a)(3)(i), that Dr. Dahhan referenced evidence that was not admitted into the record and "it is not possible to determine the amount of reliance Dr. Dahhan placed on the impermissible evidence . . . ." Decision and Order at 20-21; Employer's Exhibits 4, 10.

We find no merit in employer's due process argument, as employer has cited no support for its position that it should have been provided notice that the administrative law judge was going to reject Dr. Dahhan's opinion in his Decision and Order, and an opportunity to respond. In addition, in light of the terms of Section 725.414(a)(3)(i), employer was on notice that the tests described in each medical report must be admissible.[4] The administrative law judge did not prevent employer from recognizing

[4] The relevant language of 20 C.F.R. §725.414(a)(3)(i) provides that :

> Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section.

20 C.F.R. §725.414(a)(3)(i). Under paragraph (a)(4), which appears at 20 C.F.R. §725.414(a)(4), records of a miner's hospitalization or treatment for a respiratory or pulmonary or related disease are admissible "[n]otwithstanding the limitations" of Section 725.414.

that Dr. Dahhan referred to inadmissible evidence or from taking action to remedy the situation. In addition, contrary to employer's argument, the administrative law judge identified the inadmissible evidence to which Dr. Dahhan referred. Decision and Order at 20 n.11. Finally, because employer has not challenged the substance of the administrative law judge's finding that he could not ascertain the extent to which Dr. Dahhan relied upon the inadmissible evidence, it is affirmed. Decision and Order at 20; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We affirm, therefore, the administrative law judge's decision to reject Dr. Dahhan's medical opinion.

Employer also contends that the administrative law judge erred in failing to include Dr. Barrett's negative reading of a film dated May 29, 2001, in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Employer maintains that because this reading was obtained by the Director, the administrative law judge should have admitted it into the record pursuant to 20 C.F.R. §§725.421(b)(4) and 725.406, which provide that the record transmitted to the Office of Administrative Law Judges "shall include the results of any medical examination or test conducted pursuant to §725.406." 20 C.F.R. §725.421(b)(4).

The Director acknowledges that "for an unknown reason," DOL asked Dr. Barrett to perform the x-ray interpretation, but urges the Board to reject employer's argument. Director's Response Brief at 5. The Director asserts that the report of the examination performed by Dr. Baker on May 21, 2001, which included a reading of an x-ray dated May 21, 2001, constituted the complete pulmonary evaluation that the Director was required to provide to claimant pursuant to Section 725.406. Thus, according to the Director, the x-ray reading done by Dr. Barrett was not part of the evaluation and is, therefore, not automatically admissible under Sections 725.406(b) or 725.421(b)(4).

We agree with the Director's position, as the plain language of the regulations indicates that only those materials gathered in conjunction with the complete pulmonary evaluation are required to be admitted into the record. Dr. Barrett's reading was not part of the DOL evaluation nor was it procured to cure a defect in the x-ray reading done by Dr. Baker.[5] Employer could have designated Dr. Barrett's reading as part of its affirmative case pursuant to Section 725.414(a)(3)(i), but did not do so.

Regarding the merits of entitlement, employer argues that when weighing the x-ray evidence under Section 718.202(a)(1), the administrative law judge erred in treating the positive interpretations by Drs. Sundaram and Myers as equal in probative weight to the readings by physicians with superior radiological qualifications. This contention has

[5] Dr. Sargent read the film obtained by Dr. Baker for quality and found it acceptable. Director's Exhibit 18.

merit. The administrative law judge reviewed each x-ray that was interpreted for the presence of pneumoconiosis and concluded that three of the films were positive for pneumoconiosis, one negative for pneumoconiosis, and one inconclusive. Decision and Order at 17; Director's Exhibits 11, 12, 18, 22; Employer's Exhibits 3, 8, 9; Claimant's Exhibits 2, 4. The administrative law judge addressed the qualifications of the readers, noting that Dr. Alexander, a dually qualified physician, provided two positive readings, Drs. Sundaram and Myers, who have no special qualifications, provided a total of two positive readings, while Dr. Dahhan, a B reader, submitted one positive reading for a total of five positive readings. The administrative law judge determined that the record contained four negative readings by Board-certified radiologists, B readers, or both. The administrative law judge found that there was no ground upon which to favor the more recent evidence and concluded that claimant had established the existence of pneumoconiosis by a preponderance of the x-ray evidence. *Id*.

Therefore, the administrative law judge based his ultimate finding upon the fact that there were five positive readings compared to four negative interpretations and did not explain why he apparently found that the readings by Drs. Sundaram and Myers were entitled to weight equal to those performed by readers with special qualifications. Because the administrative law judge did not set forth the rationale underlying his finding, as is required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), we must vacate the administrative law judge's finding under Section 718.202(a)(1) and remand the case to the administrative law judge for reconsideration of the x-ray evidence. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Employer argues next that the administrative law judge mischaracterized Dr. Broudy's opinion and erred in determining that Dr. Baker's opinion was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis under Section 718.204(c). Employer also alleges that Dr. Baker's opinion is not reasoned and that Dr. Baker did not adequately explain his conclusions. Employer further maintains that the administrative law judge erred in failing to weigh Dr. Rosenberg's opinion at Sections 718.202(a)(4) and 718.204(c). These allegations of error have merit, in part.

As employer contends, the administrative law judge did not accurately characterize Dr. Broudy's opinion when he stated that the physician relied solely upon the absence of complicated pneumoconiosis on the November 28, 2001 x-ray and that Dr. Broudy did not explain why claimant's coal dust exposure did not contribute to his totally disabling impairment. Decision and Order at 20; Employer's Exhibit 1. In fact, Dr. Broudy noted that the x-ray did not show advanced pneumoconiosis and discussed why claimant's pulmonary function study results were not consistent with a dust related pulmonary impairment. Employer's Exhibits 1, 3.

In addition, employer is correct in noting that it is not clear from the record that the administrative law judge's determination that Dr. Baker provided a better explanation of his findings than Dr. Broudy is correct. When Dr. Baker diagnosed pneumoconiosis and total disability due to pneumoconiosis, he identified an abnormal x-ray reading and claimant's history of coal dust exposure as the bases of his opinion. Director's Exhibit 18. Unlike Dr. Broudy, Dr. Baker did not set forth a narrative explanation of how these factors supported his diagnoses. We vacate, therefore, the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c) and remand the case to the administrative law judge for reconsideration. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co*., 7 BLR 1-295 (1984).

The Director argues that the administrative law judge's decision to discredit Dr. Broudy's opinion is supported by substantial evidence, as Dr. Broudy's comments on the significance of the pulmonary function test results indicate a hostility to the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201. Because the administrative law judge did not address this issue, we decline to consider it for the first time on appeal. *Anderson*, 12 BLR 1-at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23; *Rinkes*, 6 BLR 1-826, 1-828. When reconsidering the evidence relevant to the existence of pneumoconiosis and total disability due to pneumoconiosis, the administrative law judge should address this aspect of Dr. Broudy's opinion.

Finally, we deny employer's request to instruct the administrative law judge to consider Dr. Rosenberg's opinion under Section 718.202(a)(4) and 718.204(c) on remand, as Dr. Rosenberg offered conclusions relevant to these issues based upon a review of the evidence of record. In his Decision and Order, the administrative law judge noted correctly that employer submitted Dr. Rosenberg's medical report solely for the purpose of rebutting the pulmonary function study and blood gas study evidence obtained on claimant's behalf by the Director on May 21, 2001. Decision and Order at 6; Director's Exhibit 18. The evidence summary form submitted by employer confirms this designation. Employer's Exhibit 11. In his medical report and at his deposition, however, Dr. Rosenberg did not specifically address either objective test, but rather rendered his opinion based upon a review of the bulk of the evidence of record. Employer's Exhibits 2, 6. Because employer advocates that the administrative law judge consider Dr. Rosenberg's opinion for a purpose beyond which employer designated it, we reject employer's argument that the administrative law judge is required to consider Dr. Rosenberg's opinion under Sections 718.202(a)(4) and 718.204(c) on remand.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part and vacated in part, and this 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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JUDITH S. BOGGS
Administrative Appeals Judge