BRB No. 05-0678 BLA

THOMAS A. JASPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	DATE ISSUED: 01/30/2006
	)	
	)	
Employer-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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

George H. Thompson, Pittsburgh, Pennsylvania, 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (04-BLA-5622) of Administrative Law Judge Daniel L. Leland 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).[1] The administrative law judge credited claimant with twenty-two years of coal mine employment[2] and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and further established the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal.[3]

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).

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The administrative law judge's findings of twenty-two years of coal mine employment and approximately seventeen to thirty-five pack-years of smoking, as well as his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii), but successfully established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer initially contends the administrative law judge erred in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Petition for Review at 5-6. We disagree.

In finding the x-ray evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of nine readings of four x-rays.[4] Decision and Order at 3, 6. A November 14, 2002 x-ray was read once as positive by Dr. Brandon, a dually qualified B reader and Board-certified radiologist, once as positive by Dr. Schaaf, a physician with no specialized qualifications for the reading of x-rays, and once as negative by Dr. Hayes, also a dually qualified reader. Claimant's Exhibit 3; Director's Exhibit 10; Employer's Exhibit 9; Decision and Order at 5-6. The administrative law judge permissibly found this x-ray to be positive based on the preponderance of the positive readings, which included one dually qualified reading. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); *see generally Soubik v. Director, OWCP*, 366 F.3d 226, 230 n.7, 23 BLR 2-82, 2-91 n.7 (3d Cir. 2004); Decision and Order at 6. A February 4, 2003 x-ray was read twice as positive by Drs. Harron and Hayes, both dually qualified readers, and once as positive by Dr. Boron, a physician with no specialized qualifications for the reading of x-rays, and, thus, was found to be positive by the administrative law judge. Claimant's Exhibit 2; Director's Exhibit 14; Employer's Exhibit 10; Decision and Order at 6. An April 8, 2004 x-ray was read once as positive by Dr. Harron, a dually qualified B reader and Board-certified radiologist, and once as negative by Dr. Fino, a B reader. Claimant's Exhibit 6; Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be positive based on Dr. Harron's superior qualifications. *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; *see generally Soubik*, 366 F.3d at 230 n.7, 23 BLR at 2-91 n.7; Decision and Order at 6. Finally, a November 9, 2004 x-ray was read once as negative by Dr. Pendergrass, a dually qualified B reader and Board-certified radiologist. Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be negative based on Dr. Pendergrass's uncontradicted reading. *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 12. Contrary

[4] The February 4, 2003 x-ray was also read for quality only (Quality 1) by Dr. Barrett. Director's Exhibit 14.

to employer's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that, when taken as a whole, the preponderance of positive x-rays outweighs the negative x-ray reading of record. Dempsey, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see generally Soubik*, 366 F.3d at 230 n.7, 23 BLR at 2-91 n.7; Decision and Order at 6. Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence.

Employer also challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer specifically asserts that the administrative law judge erred in considering the opinion of Dr. Begley because the physician relied in part on an x-ray reading which had not been properly admitted into evidence pursuant to 20 C.F.R. §725.414(a). The Director also submits that the administrative law judge erred in his consideration of Dr. Begley's report. We agree.

As employer correctly asserts, the evidence admitted into the record pursuant to Section 725.414[5] did not include Dr. Begley's interpretation of an x-ray taken on August 30, 2004. Decision and Order at 2, 3. However, Dr. Begley referred to this reading in his report in which he concluded that claimant suffers from coal workers' pneumoconiosis. Claimant's Exhibit 8. In addition, we note that Dr. Renn not only referenced his own reading of the November 9, 2002 x-ray, previously withdrawn from the record, but also reviewed Dr. Begley's report and x-ray reading in concluding that claimant does not suffer from pneumoconiosis. Employer's Exhibit 2. The regulation at 20 C.F.R. §725.414(a)(2)(i) provides:

> 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….

[5] Pursuant to revised 20 C.F.R. §725.414, a claimant and the responsible operator are each permitted to submit two x-ray readings in support of their affirmative case and one reading in rebuttal of each reading submitted in the opposing party's affirmative case. 20 C.F.R. §§725.414(a)(2)(i), (a)(3)(i), 725.414(a)(2)(ii), (a)(3)(ii). If rebuttal evidence is submitted, the party that proffered the affirmative evidence may submit one piece of rehabilitative evidence. *Id.*

20 C.F.R. §725.414(a)(2)(i).[6] Thus, if any of the medical reports is based on evidence that was not properly admitted into the record, the administrative law judge is required to address the implication of Section 725.414(a)(2)(i).

In this case, the administrative law judge's analysis of the medical opinion evidence did not take into consideration Section 725.414(a)(2)(i). Therefore, we must vacate the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), and consequently, must further vacate the administrative law judge's related finding that the miner's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge must reconsider all of the medical opinions of record in light of Section 725.414(a)(2)(i), (a)(3)(i), and determine whether to redact the objectionable content, ask the physicians to submit new reports, factor in the physicians' reliance upon the inadmissible evidence when deciding the weight to which their opinions are entitled, or, as a last resort, exclude the reports from the record. *See Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery and Hall, J.J., concurring and dissenting). In addition, on remand, in evaluating the medical opinions of record pursuant to Section 718.202(a)(4), the administrative law judge should specifically consider whether the physicians' opinions as to the existence of pneumoconiosis are based on more than just an x-ray reading and coal mine employment history, and, thus are sufficiently reasoned to constitute probative evidence. *Anderson*, 12 BLR at 1-111; *see generally Taylor*, 9 BLR at 1-22. Finally, the administrative law judge should separately consider whether the miner suffers from either clinical or legal pneumoconiosis. 20 C.F.R. §718.201(a); *see Soubik*, 366 F.3d at 227 n.2, 23 BLR at 2-87 n.2.

[6] We note that 20 C.F.R. §725.414(a)(3)(i) contains an identical provision applicable to employer's evidence.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge