

BRB No. 00-0708 BLA

ALICE D. NAHODIL)
(Widow of DANIEL F. NAHODIL))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Upon Remand Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Edward Waldman (Judith E. Kramer, Acting Solicitor of Labor; 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand Denying Benefits (97-BLA-0621) of Administrative Law Judge Ainsworth H. Brown 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 This case is before the

¹ The Department of Labor has amended the regulations implementing the Federal

Board for the second time. The procedural history of this case is as follows. The miner's applications for benefits filed on April 22, 1974 and February 27, 1989 were denied. Director's Exhibit 23. The miner again filed for benefits on June 3, 1991, and on November 13, 1991, the district director awarded benefits. Director's Exhibit 23. The miner died on June 13, 1996, Director's Exhibit 8, and on June 27, 1996, claimant filed her application for survivor's benefits, Director's Exhibit 1. The claims examiner denied benefits, Director's Exhibit 20, and claimant requested a formal hearing, Director's Exhibit 21. The case was transferred to the Office of Administrative Law Judges on January 23, 1997. Director's Exhibit 24.

After holding a hearing on January 7, 1998, the administrative law judge issued his Decision and Order - Denying Benefits on September 11, 1998. The administrative law judge found that the miner's death was not caused by pneumoconiosis. Accordingly, the administrative law judge denied benefits. 1998 Decision and Order.

On claimant's appeal, the Board rejected claimant's assertion that she was entitled to the irrebuttable presumption of death due to pneumoconiosis based on the miner's award of benefits. The Board held that collateral estoppel did not apply to the issue of complicated pneumoconiosis because it was not actually litigated in the miner's claim. The Board affirmed the administrative law judge's weighing of the medical evidence and his finding that the miner's death was not due to pneumoconiosis. However, the Board agreed with claimant's contention that the administrative law judge failed to properly consider whether the evidence was sufficient to establish the existence of complicated pneumoconiosis, and remanded the case for the administrative law judge to consider this issue. *Nahodil v. Director, OWCP*, BRB No. 98-1657 BLA (Sept. 28, 1999)(unpub.).

On remand, the administrative law judge found the evidence insufficient to establish the existence of complicated pneumoconiosis. Accordingly, he denied benefits.

On appeal, claimant asserts that the administrative law judge erred by finding the evidence insufficient to establish the existence of complicated pneumoconiosis, and urges

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

that the Director should be bound by her concession of complicated pneumoconiosis. Further, claimant asserts that it is a denial of her right to due process for the administrative law judge to find that the miner did not have complicated pneumoconiosis after the administrative law judge stated that the existence of the disease is not an issue. Claimant maintains that if it is deemed appropriate for the administrative law judge to consider this issue, claimant's outstanding discovery request to the Director, made in 1997, must be considered. Regarding the administrative law judge's weighing of the evidence, claimant asserts that the pre-1980 evidence has little impact on the issue of complicated pneumoconiosis, and that the x-ray interpretations from this evidence were not read for ILO classifications. Claimant also asserts that the administrative law judge failed to provide an adequate rationale for his findings. Claimant maintains that the administrative law judge erred by rejecting the opinions of Drs. Wagner and Kraynak, and asserts that the opinions of Drs. Michos and Spagnolo are lacking regarding the role that pneumoconiosis played in the miner's death because these physicians failed to diagnose pneumoconiosis. Finally, claimant asserts that the administrative law judge erred by not addressing the miner's length of coal mine employment as ordered by the Board.

The Director responds, urging affirmance of the administrative law judge's denial of benefits.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which all of the parties have responded. Claimant and the Director indicate that the instant case is not affected by application of the revised regulations. Based on the briefs submitted by claimant and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 this 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'Keefe v. Smith, Hinchman &*

Grylls Associates, Inc., 380 U.S. 359 (1965).

As a preliminary matter, we reject claimant's assertion that the Director is bound by her concession of complicated pneumoconiosis in the miner's case. This issue, which claimant raised in her prior appeal to the Board, was settled when the Board held that "[i]nasmuch as the issue of complicated pneumoconiosis was not actually litigated in the miner's claim, the administrative law judge was not bound by the award of benefits in the survivor's claim." *Nahodil*, slip op. at 3. The doctrine of the law of the case provides that when a case is before a tribunal for the second time, the tribunal will adhere to its prior decision. Consequently, we hold that claimant's allegation of error lacks merit, inasmuch as the Board's prior holding on this issue constitutes the law of the case, and claimant has not argued that any of the exceptions to the law of the case doctrine apply in this instance. See *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting); see also *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Claimant also asserts that it is a denial of her right to due process for the administrative law judge to determine that the miner did not have complicated pneumoconiosis after stating that the existence of the disease was not an issue. We hold that claimant's right to due process has not been violated in this case. The issue to be determined in this case has consistently been identified as whether the miner's death was due to pneumoconiosis. See Order Granting Motion to Strike; 1998 Decision and Order. The regulations state:

death will be considered due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications or pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.

* * * *

- (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

Inasmuch as the regulations provide that a finding of complicated pneumoconiosis, made pursuant to Section 718.304, is one of the methods of establishing death due to

pneumoconiosis, it was appropriate for the administrative law judge to consider whether the evidence established the existence of complicated pneumoconiosis. An inquiry into the cause of the miner's death pursuant to Section 718.205(c), necessarily involves consideration of the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.205(c).

In addition, we reject claimant's allegation regarding her outstanding discovery request. By failing to raise the issue of the outstanding discovery request before the administrative law judge or in the prior appeal, claimant waived her right to raise this issue at this point in the proceedings. *See Bernardo v. Director, OWCP*, 9 BLR 1-97 (1986); *Taylor v. 3D Coal Corp.*, 3 BLR 1-350 (1981); *see generally Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986).

Claimant asserts that the administrative law judge erred in his weighing of the evidence concerning complicated pneumoconiosis. We disagree. The administrative law judge must consider all of the evidence of record, *see* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The administrative law judge is charged with determining the weight to accord each piece of evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In weighing the x-ray evidence pursuant to Section 718.304(a), the administrative law judge considered the x-ray interpretations of record.² Decision and

² The record contains interpretations of seven x-rays. The April 3, 1975 film was read by Dr. Peralta as positive for pneumoconiosis, and by Dr. Sargent as negative for pneumoconiosis. Director's Exhibit 25. The May 23, 1980 film was interpreted by Dr. Conrad as showing complicated pneumoconiosis, and as unreadable by Dr. Dessen. Director's Exhibits 23, 25. The July 3, 1991 x-ray was read as negative by Dr. Sedlovsky, as positive for complicated pneumoconiosis by Dr. Navani, and as showing a nodular density greater than one centimeter by Dr. Green. Director's Exhibits 23, 25. As the administrative law judge noted, Dr. Green indicated some doubt about a diagnosis of complicated pneumoconiosis. Director's Exhibits 23, 25. In addition, as the administrative law judge noted, Dr. Navani later reviewed a CT scan of the miner's chest and found that it did not show pneumoconiosis. Director's Exhibits 18, 25. The May 22, 1996 film was interpreted by Drs. Funkhouser and Cole as negative for coal workers' pneumoconiosis, and by Dr. Smith as showing complicated pneumoconiosis. Director's Exhibits 10, 13, 25; Claimant's Exhibit 5. The film taken on May 30, 1996 was read by Drs. Wilkinson and Cole as negative for pneumoconiosis, and by Dr. Smith as positive for complicated pneumoconiosis. Director's Exhibits 12, 15, 25; Claimant's Exhibit 6. The May 31, 1996 film was interpreted by Dr. Funkhouser as negative for pneumoconiosis, by Dr. Smith as positive for complicated pneumoconiosis, and deemed

Order at 2-3. The administrative law judge stated:

Upon weighing the conflicting x-ray evidence, and considering the qualifications of the physicians who render[ed] the readings, I find that evidence insufficient to meet Claimant's burden of proof....[t]he preponderance of the x-ray readings was negative for complicated pneumoconiosis....I do not find that the x-ray readings affirmatively establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Decision and Order at 3. Inasmuch as the administrative law judge has properly considered both the quality and the quantity of the x-ray evidence of record in finding it insufficient to establish the existence of complicated pneumoconiosis, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Dixon v. Director, OWCP*, 8 BLR 1-150 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985), we affirm this finding as it is supported by substantial evidence.

Inasmuch as claimant makes no other assertions concerning the administrative law judge's findings on the merits of the existence of complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant has not established the existence of complicated pneumoconiosis pursuant to Section 718.304.³ *See Skrack v. Island Creek*

unreadable by Dr. Cole. Director's Exhibits 12, 16, 25; Claimant's Exhibit 7. The June 3, 1996 film was interpreted by Dr. Puthawala as negative for pneumoconiosis. Director's Exhibit 25. The administrative law judge noted that Drs. Cole, Dessen, Smith and Sargent are B-readers and Board-certified radiologists.

³ We reject claimant's assertions regarding the opinions of Drs. Wagner, Kraynak, Michos and Spagnolo. Claimant's allegations do not relate to the administrative law judge's findings on remand, which were limited to the issue of the existence of

Coal Co., 6 BLR 1-710 (1983).

Finally, we turn to claimant's allegation that the administrative law judge erred by failing to consider the miner's length of coal mine employment. In our prior decision in this case, we instructed the administrative law judge to make a length of coal mine employment finding before considering the cause of pneumoconiosis pursuant to 20 C.F.R. §718.203(b)(2000). Inasmuch as the administrative law judge found the evidence insufficient to establish the existence of complicated pneumoconiosis, a finding we have affirmed, the administrative law judge did not need to reach the issue of the cause of the miner's pneumoconiosis pursuant to Section 718.203 in the instant case. *See Nahodil*, slip op. at 4, n.4; *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Upon Remand Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

complicated pneumoconiosis. *See Nahodil*, slip op. at 4. Accordingly, these contentions lack merit.