BRB No. 01-0502 BLA

HEARLD D. BEARFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: _____
	)	
PEABODY COAL COMPANY	)	
	)	
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (99-BLA-0860) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) 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 found

[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 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive

that the evidence is sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[2] The administrative law judge therefore awarded benefits.

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relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). On May 3, 2001, the Board order the parties to submit briefs regarding the impact of the amended regulations. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]We note that the most recent amendments to the Black Lung regulations which became effective on January 19, 2000, did not including any revisions to 20 C.F.R. §718.304.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Claimant[3] has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not file a response brief.[4]

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'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, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer initially asserts that the administrative law judge erred in finding that the x-ray evidence is sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304(a). Employer argues that the administrative

[3]Claimant is Hearld D. Bearfield, the miner, who has filed two applications for benefits with the Department of Labor. The first claim was administratively withdrawn by claimant by letter dated March 17, 1980. Director's Exhibit 30. The second claim, the instant claim, was filed on May 19, 1998. Directors Exhibit 1.

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings of thirty-one years of qualifying coal mine employment based upon the stipulation of the parties, and that employer is the putative responsible operator. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law judge erred by rejecting the x-ray interpretations of Drs. Wheeler, Scott and Fino, who found that claimant did not suffer from complicated pneumoconiosis, without adequate explanation. Employer also contends that the administrative law judge failed to consider Dr. Wheeler's superior credentials and the fact that his explanation for his diagnosis was the best explained and the most thorough. We disagree. The administrative law judge permissibly weighed the x-ray evidence of record at Section 718.304(a). She correctly noted that Drs. Ahmed and Patel, who opined that claimant suffered from complicated pneumoconiosis, were both dually-qualified readers. Director's Exhibits 15, 17; Claimant's Exhibits 1-3, 10; Decision and Order at 11. She also relied upon the x-ray interpretations of Drs. Pathak, Aycoth and Zaldivar, whom the administrative law judge correctly found were B-readers. Claimant's Exhibits 2-9, 13; Decision and Order at 11. The administrative law judge then permissibly found that these five x-ray interpretations of complicated pneumoconiosis outweighed the three contrary x-ray interpretations, including the interpretations of Drs. Wheeler and Scott, who the administrative law judge noted were dually qualified, and of Dr. Fino, a B-reader, on the basis of a preponderance of the evidence, giving consideration to the relative qualifications of the doctors. *See Slayton v. Pyro Mining* Co., 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Consolidation Coal Co.*, 7 BLR 1-128 (1984).

Employer next asserts that the CT scan evidence of record is insufficient as a matter of law to support a finding of complicated pneumoconiosis, as the administrative law judge failed to conduct an equivalency determination, as required by the Board's holdings in *Reilly v. Director, OWCP*, 7 BLR 1-139 (1984) and *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984). In *Reilly* and *Lohr*, cases involving the opacities viewed on biopsy and autopsy, respectively, the Board held that with regard to opacity size, the record must contain evidence of equivalency when compared to size on x-ray, in order to determine that the opacities present are, in fact, sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304(a). *Id.* The United States Court of Appeals for the Fourth Circuit has held that 30 U.S.C. §921(c)(3) sets forth in prongs (A), (B) and (C), three different ways to establish statutory complicated pneumoconiosis. While the court held that one prong could satisfy the statutory requirement for establishing complicated pneumoconiosis, it further held that all of the relevant evidence must be weighed before reaching a determination as to whether the evidence establishes complicated pneumoconiosis. *Eastern Associated Coal Corp. v. Scarbro*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Further, the Court stated that "one must perform an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. ....[a]nd, because prong (A) sets out an entirely objective scientific standard [i.e. opacities which are greater than 1 cm in diameter]....[it] provides the benchmark for determining what under ...prong (C) is an equivalent diagnostic result reached by other means." *Scarbro, supra*, at 256, 2-100*; citing Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999). As she did not

apply *Scarbro* in the instant case, we vacate the administrative law judge's finding at Section 718.304(c), and remand for her to render equivalency determinations, where possible, and to reweigh the CT scan evidence of record pursuant to Section 718.304(c), consistent with the holding in *Scarbro.*[5]

Employer additionally argues that the administrative law judge improperly considered CT scan evidence as a separate category of evidence. We disagree. The administrative law judge weighed the CT scan evidence separately as "other evidence" in accordance with Section 718.304(c), and then considered all of the evidence relevant to Section 718.304, as required. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc).* Further, employer's contentions that the administrative law judge failed to consider Dr. Wheeler's superior qualifications and that Dr. Wheeler's opinion was more thorough and better explained constitute requests to reweigh the evidence, which the Board is not permitted to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Moreover, employer fails to indicate how Dr. Wheeler's credentials are superior or how his opinion is more thorough and better explained. We, therefore, reject employer's contentions.

[5]20 C.F.R. §718.304 implements the statutory provision found at 30 U.S.C. §921(c)(3).

Finally, employer contends that the administrative law judge improperly considered evidence outside of the record to find invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Employer asserts that the administrative law judge prejudicially discounted the opinions of Drs. Wheeler and Scott on the basis that they read x-rays as negative for simple pneumoconiosis in another case where the x-rays were ultimately found to be positive for complicated pneumoconiosis. Employer further points out that the administrative law judge noted parenthetically that Drs. Wheeler and Scott were associates.[6] In relying on evidence outside the record, the administrative law judge erred. Each case, must be decided by the facts, evidence and arguments presented in that case, without reference to material outside the record. On remand, the administrative law judge is instructed to make her findings and conclusions based solely upon the evidence in the record.

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[6]The fact that the administrative law judge included facts and evidence outside the record is apparent from footnote 9 of the administrative law judge's Decision and Order, which reads as follows:

> While not necessary to my ruling, I note that in another case before me in which Drs. Scott and Wheeler (who are associates) read x-rays as negative for pneumoconiosis, more than twenty other readers unanimously interpreted the claimant's x-rays as positive for at least simple pneumoconiosis and some found complicated pneumoconiosis. *See Lane Harman Mining Corporation*, Case No. 1996-BLA-1273 (ALJ, July 29, 1998) (appeal filed).

Decision and Order at 11, n.9.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, and vacated in part and the case is remanded for further consideration of the evidence at 20 C.F.R. §718.304 consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge