BRB No. 03-0434 BLA

SUSAN M. DUGGER (Widow of CHESLEY L. DUGGER)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 04/29/2004
OLD BEN COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2001-BLA-0336) of Administrative Law Judge Robert L. Hillyard denying benefits 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] Based on the date of filing, the

[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

administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge accepted the parties' stipulation that employer is the responsible operator and that claimant worked as a miner for forty years and nine months. The administrative law judge further found that the evidence of record was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (2), (4), 718.203(b) (2000), but insufficient to demonstrate the presence of complicated pneumoconiosis pursuant to Section 718.202(a)(3) (2000), or invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304 (2000). The administrative law judge also found that claimant failed to establish that pneumoconiosis caused or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000), the presence of legal pneumoconiosis pursuant to Section 718.202(a)(4) (2000), or that pneumoconiosis contributed to the miner's death under Section 718.205(c) (2000). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

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

---

effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The record indicates that the miner, Chesley L. Dugger, filed an application for benefits on July 2, 1984, which was denied on September 30, 1988. Director's Exhibit 36. The miner took no further action with respect to this claim. The miner died on August 8, 1999, and claimant, Susan M. Dugger, the miner's widow, filed a claim for survivor's benefits on October 7, 1999. Director's Exhibits 1, 33. The district director found claimant entitled to benefits on August 22, 2000, and employer subsequently requested a formal hearing. Director's Exhibits 25, 26, 28.

[3]We affirm the findings of the administrative law judge with respect to the length of coal mine employment, the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(1), (2), and 718.203(b), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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 survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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)(2); s*ee Peabody Coal Co v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).[4]

Claimant initially contends that when determining whether the irrebuttable presumption of death due to pneumoconiosis had been invoked under Section 718.304, the administrative law judge erred in omitting from consideration Dr. Alexander's reading of an x-ray dated July 18, 1999 and the medical reports of Drs. Green, Cohen, Naeye, Caffrey and Oesterling. This contention has merit. When addressing the issue of invocation of the irrebuttable presumption pursuant to Section 718.304, the administrative law judge weighed only the opinions of Dr. Heidingsfelder, the autopsy prosector, and Dr. Wiot, a physician who reviewed the medical evidence of record. Decision and Order at 23.

In an x-ray reading that was not addressed by the administrative law judge under Section 718.304(a), Dr. Alexander determined that the film dated July 18, 1999 was positive for complicated pneumoconiosis, Category A.[5] Claimant's Exhibit 3. In

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's last coal mine employment took place in the State of Illinois. Director's Exhibit 36; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] Although the administrative law judge did not recognize that Dr. Alexander had read the July 18, 1999 x-ray as showing a Category A large opacity, he credited Dr. Alexander's positive reading of this x-ray for simple pneumoconiosis. Decision and Order at 6, 22; Claimant's Exhibit 3. He also appears to have credited Dr. Wiot's statement that two x-rays were unreadable, without realizing that the July 18, 1999 x-ray was one of these two. Decision and Order at 22; Director's Exhibit 33. On remand, the administrative law judge should address all of this evidence, including the conflict between Dr. Alexander and Dr. Wiot on the intelligibility of the July 18, 1999 x-ray.

addition, Drs. Green, Cohen, Naeye, Caffrey, Tuteur, Renn, Fino and Oesterling offered opinions, based upon a review of the medical evidence of record, as to whether the miner had complicated pneumoconiosis at the time of his death. Because the administrative law judge did not address all of the evidence relevant to the issue of whether the miner had complicated pneumoconiosis, we must vacate the administrative law judge's finding that claimant did not establish invocation of the irrebuttable presumption pursuant to Section 718.304. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Claimant also argues that the administrative law judge erred in finding that Dr. Heidingsfelder's opinion on complicated pneumoconiosis was equivocal and entitled to less weight than Dr. Wiot's opinion. Dr. Heidingsfelder submitted an autopsy report dated August 8, 1999, which contained sections labeled "Macroscopic Findings" and "Microscopic Impression," but did not include an enumeration of microscopic findings. Director's Exhibit 7. In a letter dated April 13, 2000, senior claims examiner David Marchand posed two questions to Dr. Heidingsfelder:

> 1. Has a detailed microscopic report been completed?
>
> 2. In your macroscopic findings you refer to the left lung revealing a 3-1/2 cm bullous lesion. You further refer to the upper lobe region in which there are smaller anthracotic lesions measuring 0.4 to 0.7 cm. You also found focal anthracotic lesions of up to 2 cm. Diameter and multiple smaller anthracotic lesions of 0.4 to 0.7 cm diameter. Would any of these lesions in the lung be considered "massive" per the enclosed Regulatory Section 718.304(b)?

Director's Exhibit 18.

In reply, Mr. Marchand received Dr. Heidingsfelder's microscopic report, dated August 8, 1999, on August 21, 2000. The following day, Mr. Marchand wrote to Dr. Heidingsfelder stating:

> See the enclosed copy of my April 13, 2000 letter regarding finding "massive" lesions. It is not clear to me from the microscopic exam. Your impression #3 was focal massive pulmonary fibrosis but I don't know if this equates to "massive lesions" as defined in our regulations. Would you kindly specifically comment on that issue?

Director's Exhibit 24. Dr. Heidingsfelder responded by letter dated September 21, 2000, and stated that "[i]n response to your question asked in your letter of April 13, 2000, my answer is 'yes.' See Microscopic report." Director's Exhibit 30.

In his Decision and Order, the administrative law judge referred only to Mr. Marchand's April 13, 2000 letter and found that in Dr. Heidingsfelder's reply:

> [He] does not identify which question in Mr. Marchand's letter he is answering as "yes." Dr. Heidingsfelder's microscopic autopsy report, dated August 8, 1999, to which he refers in the letter, does not state that there are massive lesions in the lung….Because Dr. Heidingsfelder is equivocal regarding a diagnosis of complicated pneumoconiosis, I find his opinion is entitled to less weight.

Decision and Order at 23. Although the administrative law judge found that Dr. Heidingsfelder's response was to the claims examiner's April 13, 2000 letter, claimant argues that consideration of the letters in their appropriate sequence supports a finding that Dr. Heidingsfelder, in fact, addressed the question posed by Mr. Marchand in his August 22, 2000 letter concerning whether the focal massive pulmonary fibrosis observed microscopically constituted massive lesions under Section 718.304(b). Because the administrative law judge did not address all of the correspondence between Dr. Heidingsfelder and Mr. Marchand in the correct sequence, we must vacate the administrative law judge's finding that Dr. Heidingsfelder's opinion as to the presence of complicated pneumoconiosis pursuant to Section 718.304(b) was equivocal. *See* Director's Exhibits 18, 24, 30; Decision and Order at 23; *Tackett*, 7 BLR 1-703.

We reject, however, claimant's argument that the administrative law judge erred in considering Dr. Wiot's interpretation of the miner's May 17, 1996, CT scan pursuant to Section 718.304.[6] Although Dr. Wiot's October 10, 2000 report regarding this evidence was not admitted into the record, Dr. Wiot reread this CT scan in a report dated October 30, 2000 and reviewed his interpretation in his August 21, 2002 deposition, both of which were admitted into the record without objection. 20 C.F.R. §725.456(a); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987). Employer's Exhibits 1, 7; Director's Exhibit 33; Hearing Transcript at 5, 7. The administrative law judge did not err, therefore, in addressing whether Dr. Wiot's reading of the May 17, 1996 CT scan provided evidence contrary to a finding of complicated pneumoconiosis.

[6] Contrary to the contention in claimant's brief, the administrative law judge did not exclude Dr. Wiot's reading of the x-ray dated July 18, 1999 from the record. *See* Decision and Order at 6; Director's Exhibit 33.

In light of the meritorious allegations of error that claimant has raised with respect to the administrative law judge's consideration of the evidence pursuant to Section 718.304, we must remand this case to the administrative law judge for reconsideration of whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. When addressing this issue on remand, the administrative law judge must first consider whether the presence of complicated pneumoconiosis has been established at Section 718.304(a) by x-ray evidence yielding one or more large opacities greater than one centimeter in diameter classified in Category A, B, or C. Dr. Alexander's interpretation of the x-ray dated July 18, 1999 must be included in the administrative law judge's weighing of the evidence relevant to Section 718.304(a). The administrative law judge must then determine whether the autopsy evidence yielded massive lesions in the lung under Section 718.304(b). When weighing Dr. Heidingsfelder's opinion under Section 718.304(b), the administrative law judge must determine whether Dr. Heidingsfelder's reports establish the existence of complicated pneumoconiosis in light of the sequence of his correspondence with the claims examiner. Director's Exhibits 7, 18, 23, 30; *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

If a medical report contains diagnoses of conditions based on means other than x-rays or autopsy evidence, the administrative law judge must then consider, pursuant to Section 718.304(c), whether the physician has identified "a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section." 20 C.F.R. §718.304(c); *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, BLR (7th Cir. 2003). Regarding opinions like those of Drs. Green, Cohen, Naeye, Caffrey, Fino, Tuteur, and Oesterling, in which the physician does not use the term "massive lesions," the administrative law judge must determine whether the diagnosed condition would produce an opacity of larger than one centimeter in size if x-rayed, as this is the objective measure of complicated pneumoconiosis set forth in the Act and the regulations. 20 C.F.R. §718.304(a); *see Smith v. Island Creek Coal Co.*, 7 BLR 1-734 (1985); *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999)(Doctor's finding on autopsy of a lesion larger than one centimeter in diameter may support invocation of the irrebuttable presumption even if the doctor indicates that the lesion is not consistent with the medical definition of complicated pneumoconiosis). This equivalency determination must be based upon relevant medical evidence. *Smith*, 7 BLR 1-734. Finally, if the administrative law judge finds that the existence of complicated pneumoconiosis has been established under Section 718.304(a), (b), or (c), he must then weigh all of the relevant evidence together to determine if claimant has established invocation of the irrebuttable presumption of death

due to pneumoconiosis by a preponderance of the evidence. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Turning to the administrative law judge's consideration of the issue of death due to pneumoconiosis under Section 718.205(c), claimant argues that the administrative law judge did not properly weigh the opinions in which Drs. Hall, Green, and Cohen identified pneumoconiosis as a contributing cause of the miner's death. Dr. Hall, the miner's treating physician, prepared the death certificate on which he identified pneumoconiosis as a contributing cause of death. Director's Exhibit 6. In a subsequent letter to the district director, Dr. Hall indicated that the miner had pneumoconiosis and that it was "likely connected" to the miner's death. Director's Exhibit 14. The administrative law judge determined that:

> Dr. Hall's diagnosis of pneumoconiosis following the miner's death is merely a bald assertion with no documentation or reasoning. As such, I accord less weight to his indication on the death certificate that pneumoconiosis contributed to the miner's death, because it is not well reasoned, documented, or supported by the evidence of record.

Decision and Order at 27. We affirm the administrative law judge's finding that the death certificate was insufficient to establish death due to pneumoconiosis on the ground that Dr. Hall's identification of pneumoconiosis as a contributing cause of death was neither documented nor explained. *See Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). In addition, although it is not clear whether the administrative law judge actually considered Dr. Hall's letter to the claims examiner, error, if any, is harmless, as the defects that the administrative law judge found in the death certificate are also present in Dr. Hall's statement that pneumoconiosis was "likely connected" to the miner's death. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant alleges that the administrative law judge erred in finding that Dr. Green's opinion, that pneumoconiosis, both clinical and legal, contributed to the miner's death, was entitled to little weight. This contention is without merit. The administrative law judge acted rationally in discrediting Dr. Green's opinion because the doctor "did not give the reasoning for his conclusion." Decision and Order at 29; Claimant's Exhibit 4; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Although claimant is correct in maintaining that Dr. Green clearly identified emphysema, progressive massive fibrosis, and coal workers' pneumoconiosis as conditions related to coal dust exposure and as respiratory diseases that played a role in the miner's death, Dr. Green did not explain the mechanism by which these diseases caused, contributed to, or hastened the miner's death. We affirm, therefore, the administrative law judge's determination that Dr. Green's opinion is insufficient to establish death due to pneumoconiosis pursuant

to Section 718.205(c). *See Railey*, 972 F.2d 178, 16 BLR 2-121; *Neeley*, 11 BLR 1-85.

With respect to Dr. Cohen's opinion, Dr. Cohen reviewed the medical records and the autopsy slides and diagnosed both simple and complicated pneumoconiosis, lung cancer, and chronic obstructive pulmonary disease caused by smoking and coal dust exposure. He concluded that the miner died "as a result of his pulmonary condition." Claimant's Exhibit 5. Dr. Cohen further indicated that the miner's "coal mine dust exposure was a primary cause or contribution to the development of his severe diffusion impairment and simple and advanced pneumoconiosis which significantly contributed to his respiratory death." *Id*. The administrative law judge reviewed Dr. Cohen's opinion and stated that:

> I accord Dr. Cohen's opinion less weight because he does not acknowledge the miner's metastatic cancer. Instead, he attributes the miner's death to his pulmonary condition. The weight of the medical evidence of record, including the miner's death certificate, shows that the primary cause of death was cancer. As such, I accord Dr. Cohen's opinion less weight.

Decision and Order at 29; Claimant's Exhibits 5, 6. Claimant argues that the administrative law judge erred in determining that Dr. Cohen did not adequately address the miner's lung cancer and in neglecting to address whether legal pneumoconiosis contributed to the miner's death. These contentions have merit.

Dr. Cohen indicated several times that the miner had lung cancer and stated that the lung cancer was in remission, but had presented other risk factors including the development of deep venous thrombosis and general weakness due to radiation and chemotherapy treatments. Thus, contrary to the administrative law judge's finding, Dr. Cohen acknowledged the miner's lung cancer. With respect to the metastases in the miner's brain, although Dr. Cohen did not address their significance, claimant is correct in arguing that the administrative law judge did not identify the opinions upon which he relied in apparently finding that the miner's death was primarily due to "metastatic cancer." Decision and Order at 29. In addition, the administrative law judge did not resolve the conflict between the determination of Drs. Green and Cohen that the miner's lung cancer was in remission at the time of his death and contrary statements made by Drs. Renn, Repsher, Fino, Tuteur, Caffrey, Naeye, and Oesterling.

Claimant further maintains that the administrative law judge's finding that death due to pneumoconiosis was not established pursuant to Section 718.205(c) must be vacated, as the administrative law judge did not consider whether legal pneumoconiosis was a contributing cause of the miner's death. This contention has merit. When addressing the issue of the existence of pneumoconiosis under Section 718.202(a), the administrative law judge considered only whether the miner suffered from clinical

pneumoconiosis and did not weigh the evidence relevant to legal pneumoconiosis as defined in 20 C.F.R. §718.201. In addition, when discrediting Dr. Cohen's opinion, the administrative law judge did not determine whether the "pulmonary condition" to which Dr. Cohen referred was legal pneumoconiosis and did not consider whether this condition caused, contributed to, or hastened the miner's death in accordance with Section 718.205(c) and the Seventh Circuit's decision in *Railey*. *See also Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002)(The proposition that persons weakened by pneumoconiosis may expire quicker from other diseases is a medical point with some empirical support).

We vacate, therefore, the administrative law judge's findings regarding Dr. Cohen's opinion and the administrative law judge's determination that claimant has failed to prove that pneumoconiosis was a cause of the miner's death pursuant to Section 718.205(c). On remand, if the administrative law judge does not find that claimant is entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304, he must reconsider whether claimant has met her burden of proof under Section 718.205(c) with respect to either clinical or legal pneumoconiosis. The administrative law judge must consider, therefore, the medical opinions in which the physicians discuss whether the miner's chronic obstructive lung disease is related to dust exposure in coal mine employment or cigarette smoking or a combination of the two and must resolve the conflict in these opinions.[7] If the administrative law judge finds that claimant has established the existence of legal pneumoconiosis, he must address whether claimant has proven that this condition, or clinical pneumoconiosis, caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c). In rendering his findings, the administrative law judge must identify the evidence he has considered, set forth his conclusions regarding the probative weight to which the evidence is entitled, and provide the rationale underlying these conclusions. *Peabody Coal Co. v. Hale*, 771 F.2d 246, 8 BLR 2-34 (7th Cir. 1985); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Thus, if the administrative law judge determines that the medical opinion evidence establishes

[7] If the administrative law judge determines that the smoking history relied upon by these physicians is a relevant factor in weighing their opinions, he must reconsider his finding regarding the length of the miner's smoking history. Claimant states correctly that the administrative law judge did not set forth the method of calculation he used to find that the miner smoked one and one-half packages of cigarettes per day for forty years. Decision and Order at 4. The administrative law judge indicated that he averaged the histories reported by the miner and the examining physicians of record, but it is not clear which figures he used or how he resolved ambiguities in the histories recorded by Drs. Crabtree, Hall, and Oza. In addition, the administrative law judge did not address the smoking histories recorded by Drs. Rao and Selby, both of whom examined claimant. Director's Exhibits 33, 36.

that the miner's death is attributable to a particular condition or conditions, he must provide the bases for finding this evidence reasoned and documented. *Hale*, 771 F.2d 246, 8 BLR 2-34; *Hall*, 12 BLR 1-80.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the denial of benefits in this case. In his Decision and Order – Denying Benefits, the administrative law judge addressed the evidence of record in detail and rendered credibility determinations with respect to each element of entitlement that are rational and supported by substantial evidence. Although reasonable minds may differ as to the particular manner in which the administrative law judge resolved the issues in this case, that does not provide an adequate basis for vacating findings that were within the administrative law judge's discretion as trier-of-fact. Thus, the Board has long held that the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom and the Board may not reweigh the evidence or substitute its own opinion or draw its own inferences on appeal. *See Anderson v. Valley of Utah, Inc.*, 12 BLR 1-111 (1989); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Accordingly, I believe that the administrative law judge's Decision and Order is consistent with law and supported by substantial evidence in the record and, therefore, must be affirmed. 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).

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge