BRB No. 04-0547 BLA

GARY BURCHETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PONTIKI COAL CORPORATION	)	DATE ISSUED: 04/29/2005
	)	
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 and Order Denying Motion to Reconsider of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Motion to Reconsider (03-BLA-5518) of Administrative Law Judge Linda S. Chapman rendered on a claim[1] 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). The parties stipulated to, and the administrative law judge found, at least nineteen years of coal mine employment. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2), and (a)(4), but was insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge then found that the evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304, and that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge thus found that claimant was entitled to benefits. The administrative law judge ordered employer to pay benefits commencing February 1, 2000, the month in which the first x-ray was interpreted as showing Category A large opacities. The administrative law judge subsequently denied the Motion to Reconsider filed by the Director, Office of Workers' Compensation Programs (the Director), determining that jurisdiction over the Director's efforts to recover from employer benefits paid to claimant from the Black Lung Disability Trust Fund, lies with the appropriate federal district court.

On appeal, employer contends that the administrative law judge committed reversible error in finding that the x-ray evidence established invocation of the irrebuttable presumption provided at 20 C.F.R. §718.304. In the event that the Board affirms the administrative law judge's award of benefits, employer urges the Board to modify the administrative law judge's finding that benefits properly commence on February 1, 2000. The Director responds, urging affirmance of the administrative law judge's award of benefits based on her findings at 20 C.F.R. §718.304. The Director also argues that any error by the administrative law judge in considering evidence submitted by claimant and employer, in excess of the evidentiary limitations set forth in 20 C.F.R. §725.414, is harmless. In the event that the Board remands the case, the Director argues that the Board should instruct the administrative law judge to apply the evidentiary limitations provided at 20 C.F.R. §725.414, directing both parties to select their medical evidence consistent

[1] Claimant filed the claim on June 11, 2001. Director's Exhibit 2. The district director awarded benefits on November 5, 2002. Director's Exhibit 27. Pursuant to employer's request for a hearing, the case was transferred to the Office of Administrative Law Judges. A hearing was held on October 16, 2003.

with 20 C.F.R. §725.456(b)(1), and to consider any good cause arguments from any party seeking to admit into the record evidence that is in excess of the regulatory limitations. Claimant has not filed a brief in the 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 rational, supported by substantial evidence, and in accordance with 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).

Section 411(c)(3) of the Act provides an irrebuttable presumption of total disability due to pneumoconiosis, if the miner is suffering from a chronic dust disease of the lung. 30 U.S.C. §921(c)(3). A chronic dust disease of the lung may be established by any one of three methods enumerated in the statutory provision and in the regulation at 20 C.F.R. §718.304: (1) when diagnosed by chest x-ray, yields one or more large opacities classified as category A, B, or C under any one of three classification systems; (2) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (3) when diagnosis by means other than the previous two methods, would be a condition which could reasonably be expected to yield the same result. *See* 20 C.F.R. §718.304(a)-(c). All relevant evidence must be weighed prior to invocation; where the record contains evidence in more than one category, the various categories of evidence must be weighed against each other before the presumption can be invoked. 20 C.F.R. §718.304; *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Corp.*, 16 BLR 1-31 (1992).

Employer contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the presence of Category A large opacities. Employer specifically argues that Dr. Branscomb's opinion, that the x-ray evidence does not show that claimant has complicated pneumoconiosis, outweighs the x-ray readings of Category A large opacities rendered by Drs. Binns, Broudy, Joyce, and Wicker.[2] *See* Director's Exhibits 12, 14; Claimant's Exhibit 1. Dr.

[2] Contrary to employer's contention, the administrative law judge did not mischaracterize Dr. Powell's interpretation of the November 29, 2000 x-ray. Employer's Brief at 6. Dr. Powell stated, *inter alia*, "There are some nodules that are just at 1.0 cm in greatest diameter," Director's Exhibit 15. The administrative law judge rationally found that Dr. Powell's statement "does not contradict findings by Dr. Binns, Dr. Broudy, Dr. Joyce, and Dr. Wicker, but tends to support a finding that the Claimant has a condition of such severity that it would produce

Branscomb testified that the July 10, 2001 x-ray, which he read as positive for simple pneumoconiosis with no large opacities, *see* Director's Exhibits 17, 18, showed a condition that was not pneumoconiosis, but was another disease. Director's Exhibit 19. Dr. Branscomb explained that the lesion seen on this x-ray did not measure one centimeter, was located in the upper right apex where tuberculosis and granulomatous disease, not pneumoconiosis, form a pleural thickening, and the nodule was not solid like those associated with pneumoconiosis, but rather was a conglomerate of small opacities. *Id.* at 9. Dr. Branscomb further opined that claimant did not have complicated pneumoconiosis because none of the physicians who found Category A large opacities on x-ray diagnosed complicated pneumoconiosis. *Id.* at 13-16. Dr. Branscomb also opined that the condition seen on claimant's x-rays "developed too rapidly" to be coal workers' pneumoconiosis. *Id.* at 16.

Employer's contention lacks merit. The administrative law judge permissibly accorded less weight to Dr. Branscomb's opinion that the x-ray evidence does not show complicated pneumoconiosis because, *inter alia*, he did not offer any supporting documentation for his findings that the lesions seen on the July 10, 2001 x-ray were due to tuberculosis,[3] histoplasmosis, or granulomatous disease "based on the location of the lesions, and the presence of calcification." Decision and Order at 15-16. The administrative law judge rationally found that Dr. Branscomb's opinion was speculative and not well documented or reasoned. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Further, the administrative law judge properly found that Dr. Branscomb's opinion, that claimant does not have complicated pneumoconiosis because none of the physicians who found the presence of Category A large opacities diagnosed complicated pneumoconiosis, was contrary to the statutory presumption and the regulation at 20 C.F.R. §718.304. Specifically, the administrative law judge stated that a finding of complicated pneumoconiosis was not synonymous with a medical diagnosis of complicated pneumoconiosis; that the irrebuttable presumption at 20 C.F.R. §718.304 "does not turn on a medical definition, but is satisfied by evidence that meets the definitions in the statute, regardless of the presence or absence of a medical diagnosis of complicated pneumoconiosis. Thus, it is not

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opacities greater than one centimeter in diameter on an x-ray." Decision and Order at 15; *see Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991).

[3] Claimant's skin test for tuberculosis in March of 2000 was negative. Director's Exhibit 14.

necessary that the claimant be diagnosed with complicated pneumoconiosis; the statutory presumption is triggered by findings of Category A, B, or C opacities, in the absence of affirmative evidence that they are not there, or are due to another disease process." Decision and Order at 16; *Gray*, 176 F.3d at 382, 21 BLR at 2-615. The administrative law judge thus rationally determined that Dr. Branscomb's opinion was not affirmative evidence that claimant did not have Category A large opacities as established by the x-ray evidence, or that these large opacities are caused by another disease process. *Id.*; Decision and Order at 16. Moreover, the administrative law judge acted within his discretion by relying, at 20 C.F.R. §718.304, on the x-ray findings of Category A large opacities rendered by Drs. Binns, Wicker, Joyce, and Broudy, as he found that they were reasoned and documented. *See Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988); *see also Gray*, 176 F.3d at 382, 21 BLR at 2-615.

We next address the Director's argument that any error by the administrative law judge in considering evidence submitted by claimant and employer in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414 was harmless, as it cannot affect the outcome of the case. The regulation at 20 C.F.R. §725.414(a)(3)(i) permits a responsible operator, employer in the instant case, to submit "in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). Similar restrictions are imposed upon claimants. *See* 20 C.F.R. §725.414(a)(2)(i). These evidentiary limitations may be exceeded only for good cause. 20 C.F.R. §725.456(b)(1).

Claimant submitted the following x-ray readings: Dr. Binns read the February 17, 2000 x-ray as positive for pneumoconiosis, with Category A large opacities, Director's Exhibit 14; Dr. Broudy read the December 7, 2000 x-ray as positive, with Category A large opacities, *Id.*; and Dr. Joyce read the March 28, 2001 x-ray as positive, with Category A large opacities, *Id.* [4] Employer submitted the following x-ray readings: Dr. Rabushka's negative reading of the February 12, 1979 x-ray, Director's Exhibit 16; Dr. Cole's negative reading of the April 20, 1989 x-ray, *Id.*; Dr. Vuskovich's negative reading of the September 4, 1992 x-ray, Director's Exhibit 15; and Dr. Branscomb's negative reading the July 10, 2001 x-ray, Director's Exhibit 19. Dr. Powell's negative reading of the November 29,

[4] Dr. Wicker read the July 10, 2001 x-ray as positive, with Category A large opacities. This x-ray was part of the pulmonary evaluation provided claimant by the Director under 20 C.F.R. §725.406 and is not counted against claimant for evidentiary limitation purposes. 20 C.F.R. §725.406(b); Director's Exhibit 12.

2000 x-ray, developed by both employer, was apparently submitted by both employer and claimant. Director's Exhibits 14, 15.

Based on the facts herein, we agree with the Director's argument that the administrative law judge's error, in failing to apply the evidentiary limitations at 20 C.F.R. §725.414 and admitting excess evidence because no party objected thereto, *see* Decision and Order at 2 n.1, *see Smith v. Martin Coal Corp.,* BLR , BRB No. 04-0126 BLA (Oct. 27, 2004), was harmless as it cannot affect the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Specifically, the administrative law judge, in finding that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, properly accorded less weight to Dr. Branscomb's opinion that claimant did not have pneumoconiosis, *see* discussion, *supra*, and permissibly based his finding on the more recent x-ray evidence of record, namely the readings of the five x-ray films taken between 2000 and 2001, *see* Decision and Order at 15, 17; *see also id.* at 10. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see also Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). The administrative law judge thereby discounted the negative interpretations of 1979, 1989, and 1992 x-rays submitted by employer. *See* Director's Exhibit 15, 16. Based on the foregoing facts, we decline to remand the case for the administrative law judge to apply the evidentiary limitations at 20 C.F.R. §725.414. Moreover, given the extent of the x-ray evidence in *this* record that is supportive of a finding of invocation at 20 C.F.R. §718.304, we hold that the administrative law judge's reliance on excess evidence does not defeat her finding of entitlement. We thus affirm the administrative law judge's findings at 20 C.F.R. §718.304 and the award of benefits.

Finally, employer summarily asserts that "benefits should not have been initiated until June 11, 2001, the date the Claimant filed this claim." Employer's Brief at 7. The administrative law judge, however, properly ordered benefits to commence February 1, 2000, the month in which Category A large opacities were first diagnosed by x-ray. 20 C.F.R. §725.503; *see* Director's Exhibit 14. We thus reject employer's assertion.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion to Reconsider are affirmed.

SO ORDERED.

ROY P. SMITH

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 affirm the administrative law judge's findings at 20 C.F.R. §718.304. The regulation at 20 C.F.R. §725.414, in conjunction with the regulation at 20 C.F.R. §725.456(b)(1), provides mandatory numerical limitations on the evidence submitted by each of the parties. 20 C.F.R. §§725.414(a), 725.456(b)(1). The Board has held that evidence submitted in excess of these limitations shall only be admitted into the record pursuant to a finding by the administrative law judge that the submitting party has established "good cause" for the admission of the excess evidence, *see* 20 C.F.R. §725.456(b)(1). *Smith v. Martin Coal Corp.,* BLR , BRB No. 04-0126 BLA (Oct. 27, 2004). As the administrative law judge relied on excess x-ray evidence to find invocation of the irrebuttable presumption provided at 20 C.F.R. §718.304 and did not render a "good cause" determination for the admission of such evidence, I would vacate her finding at 20 C.F.R. §718.304 and the award of benefits pursuant thereto. I would remand the case for further consideration, instructing the administrative law judge (1) to apply to both claimant and employer, the evidentiary limitations at 20 C.F.R. §725.414, as required in *Smith*; (2) to direct the parties to select their medical evidence consistent with 20 C.F.R. §725.456(b)(1); and (3) to consider any good cause arguments from either party that seek to justify admittance of medical evidence in excess of the regulatory limitations. Moreover, I would instruct the administrative law judge to make complete findings at 20 C.F.R. §718.304 to determine whether the relevant evidence of record, considered together, is sufficient to establish invocation at 20 C.F.R. §718.304. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Corp.*, 16 BLR 1-31 (1992).

NANCY S. DOLDER, Chief
Administrative Appeals Judge