BRB No. 06-0607 BLA

BILL D. GERMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP OF UTAH, INCORPORATED	)	DATE ISSUED: 04/26/2007
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer No. 1/Carrier-Petitioners	)	
	)	
SOLDIER CREEK COAL COMPANY	)	
	)	
Employer No. 2-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer Valley Camp of Utah, Inc. and carrier.

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

PER CURIAM:

Employer, Valley Camp of Utah, Inc. (VCU), appeals the Decision and Order on

Remand-Awarding Benefits (2003-BLA-0021) of Administrative Law Judge Thomas F. Phalen, Jr., 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). This case is before the Board for a second time.

In his initial Decision and Order, the administrative law judge determined, *inter alia*, that claimant had eight years of qualifying coal mine employment and that employer was the properly designated responsible operator because claimant's subsequent work with Soldier Creek Coal Company (SCCC) did not constitute covered coal mine employment. The administrative law judge found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, 30 U.S.C. §921(c), as the weight of the relevant evidence established that claimant suffered from complicated pneumoconiosis. Accordingly, benefits were awarded.

Subsequent to an appeal by employer, the Board vacated the award of benefits. *German v. Valley Camp of Utah, Inc.*, BRB No. 04-0522 BLA (Mar. 16, 2005)(unpub.). The Board initially affirmed the administrative law judge's determination that claimant's employment with SCCC did not constitute the work of the miner because claimant's work for that employer was not integral to coal production. *German*, BRB No. 04-0522 BLA, *slip op.* at 3-4. The Board thus concluded that VCU was the properly designated responsible operator liable for benefits, if any. *Id.* Turning to the merits of entitlement, the Board affirmed the administrative law judge's finding of eight years of covered coal mine employment, and agreed with employer's assertion that the administrative law judge's failure to determine the etiology of claimant's complicated pneumoconiosis required remand. *German*, BRB No. 04-0522 BLA, *slip op.* at 4. Accordingly, the Board vacated the award of benefits. Because claimant established a covered coal mine employment history of less than ten years, the Board held that, on remand, the administrative law judge had to determine whether competent medical evidence established that claimant's complicated pneumoconiosis arose out of coal mine employment. *Id*; *see* 20 C.F.R. §718.203(c).[1] The

[1] Section 718.203 provides:

> (a) In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. The provisions in this section set forth the criteria to be applied in making such a determination.
>
> (b) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

Board further instructed the administrative law judge to consider whether any of claimant's other exposures could have accounted for claimant's respiratory condition. *German*, BRB No. 04-0522 BLA, *slip op.* at 4-5.

On remand, the administrative law judge found that the evidence of record affirmatively established that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in relying upon the opinion of Dr. Tuteur as support for a finding that claimant's complicated pneumoconiosis arose out of coal mine employment. Employer additionally argues that the Board should reconsider its prior decision that claimant's work for SCCC did not constitute covered coal mine employment. In response, claimant urges that the award of benefits be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Employer contends that the administrative law judge erred in finding that claimant established that his complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c).[3] Employer argues that in crediting the opinion of Dr. Tuteur

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> (c) If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

20 C.F.R. §718.203.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, as the miner was last employed in the coal mine industry in Utah. *See Shupe v. Director,* OWCP, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 40, 41.

[3] At no point throughout these proceedings has the existence of complicated pneumoconiosis, 20 C.F.R. §718.304, been challenged by employer. The administrative law judge's prior determination that claimant has established the existence of complicated pneumoconiosis is, therefore, affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

as support for a finding that claimant's complicated pneumoconiosis arose out of coal mine employment, the administrative law judge impermissibly substituted his opinion for that of the physician. Employer argues that Dr. Tuteur only opined that claimant's simple pneumoconiosis arose out of coal mine employment and that by extending the physician's analysis to support a finding that claimant's complicated pneumoconiosis arose out of coal mine employment, the administrative law judge mischaracterized the conclusion of the physician. We agree with employer's assertions and for the reasons discussed, *infra*, we reverse the award of benefits.

In considering Section 718.203(c), the administrative law judge initially determined that only one physician of record, Dr. James, specifically found that claimant's complicated pneumoconiosis arose out of coal mine employment. The administrative law judge properly concluded, however, that Dr. James's opinion, as to the cause of claimant's complicated pneumoconiosis, was entitled to no weight because the physician relied upon a covered coal mine employment history of fifteen years, when the evidence had established only eight years of covered coal mine employment.[4] *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307-308 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985); *see also Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988). After rejecting Dr. James's opinion, as to the cause of complicated pneumoconiosis, the administrative law judge noted that Dr. Tuteur provided an opinion as to the etiology of claimant's simple pneumoconiosis. The administrative law judge noted that Dr. Tuteur, unlike Dr. James, based his finding on an eight-year history of covered coal mine employment. The administrative law judge further noted that Dr. Tuteur found that there was x-ray evidence of simple pneumoconiosis and he attributed the simple pneumoconiosis to coal mine employment. The administrative law judge also concluded that Dr. Tuteur's opinion as to the etiology of claimant's simple pneumoconiosis was well-reasoned and well-documented. Decision and Order on Remand at 4. The administrative law judge found, however, that two of the x-ray films upon which Dr. Tuteur based his finding of simple pneumoconiosis were later re-read as demonstrating complicated pneumoconiosis by Dr. Preger, a B reader and Board-certified radiologist.[5] The administrative law judge concluded,

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[4] The finding of eight years of covered coal mine employment has not been challenged.

[5] A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a

therefore, based on these re-readings by Dr. Preger that "what Dr. Tuteur saw on these films was not, in fact, simple pneumoconiosis, but instead, was actually complicated pneumoconiosis." Decision and Order on Remand at 5. In light of Dr. Preger's rereadings, therefore, the administrative law judge concluded that "when Dr. Tuteur opined that [c]laimant's simple pneumoconiosis was caused, in part, by his eight years of exposure to coal dust, he was actually concluding that [c]laimant's complicated pneumoconiosis was caused, in part, by the eight years of coal dust exposure." *Id*. In addition, the administrative law judge found that Dr. Tuteur's failure to specifically diagnose complicated pneumoconiosis did not diminish the weight of the physician's etiology determination. *Id*. The administrative law judge thus found that based on Dr. Tuteur's conclusions and his credentials, his medical opinion established that claimant's complicated pneumoconiosis was due to coal mine employment pursuant to Section 718.203(c).

It is well-settled that, while the weighing of the evidence is within the purview of the administrative law judge, the interpretation of medical data is the sole province of medical experts, and it is error for an administrative law judge to substitute his conclusions for those of a qualified physician. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998).

In the instant case, the administrative law judge clearly substituted his own opinion for that of Dr. Tuteur, when the administrative law judge used Dr. Tuteur's finding that claimant's simple pneumoconiosis arose out of coal mine employment, to find that the opinion also established that claimant's complicated pneumoconiosis arose out of coal mine employment, a finding Dr. Tuteur did not make. Review of Dr. Tuteur's opinion demonstrates that the physician limited his diagnosis to that of simple pneumoconiosis arising out of coal mine employment and made no determination that could be construed as a determination that claimant had complicated pneumoconiosis, which arose out of coal mine employment. Employer's Exhibit 3. We, therefore, vacate the administrative law judge's determination that Dr. Tuteur's report, opining that claimant's simple pneumoconiosis arose out of coal mine employment, provides support for a determination that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c).

While Section 718.304 presumes that a miner with complicated pneumoconiosis is totally disabled due to the disease, the regulation does not provide a presumption that the complicated pneumoconiosis arose out of coal mine employment. In order to establish entitlement to benefits, claimant must, if he has fewer than ten years of coal mine employment, establish by competent evidence that his pneumoconiosis, including

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physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

complicated pneumoconiosis, arose out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.304; *Daniels Co., Inc. v. Mitchell*, 479 F.3d 321, 338, BLR 2- (4th Cir. 2007); *Anderson v. Valley Camp of Utah Inc.*, 12 BLR 1-111 (1989); *Perry v. Director*, 9 BLR 1-1 (1986). Thus, since the administrative law judge properly discredited the opinion of Dr. James, the only opinion linking complicated pneumoconiosis to coal mine employment, we hold that there is insufficient evidence to establish that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). We must, therefore, reverse the award of benefits.[6]

[6] In view of our disposition of the case we need not address employer's contention that it is not the responsible operator. Moreover, we note that this issue was addressed in our prior Decision and Order and will not be revisited *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *rev'd on other grounds, Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).

Accordingly, the administrative law judge's Decision and Order on Remand–Awarding Benefits is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge