BRB No. 98-1063 BLA

CHARLES S. ESTES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASH RIDGE COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Arter & Hadden, LLP), Washington, D.C., for employer.

Gary K. Stearman (Henry L. Solano, 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1598) of Administrative Law Judge Daniel J. Roketenetz awarding 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). The administrative law judge credited claimant with ten years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits. In addition, the administrative law judge found employer to be the properly designated responsible operator, and ordered benefits to commence as of September 1, 1994.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Employer also contends that the administrative law judge erred in finding it to be the properly designated responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order. Claimant has not filed a brief in this appeal.[1]

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).

[1]Claimant was represented before the administrative law judge by Edward Byrd, a lay representative.

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, as set forth in the Act at 30 U.S.C. §921(c)(3). Specifically, employer asserts that the administrative law judge erred by ignoring relevant medical evidence. Contrary to employer's assertion, the administrative law judge considered all of the relevant medical evidence of record.[2] The administrative law judge observed that Dr. Wheeler "read a December 10, 1996 CT scan as showing no evidence of pneumoconiosis." Decision and Order at 5. The administrative law judge also observed that "Dr. Dahhan opined that there were insufficient objective findings to justify a diagnosis of coal workers' pneumoconiosis."[3] *Id*. With regard to the x-ray evidence, the administrative law judge observed that "[w]hile Dr. Sargent expresses an equivocal opinion [with respect to the presence of complicated pneumoconiosis], and Dr. Wheeler finds the x-ray to be negative [for the existence of pneumoconiosis], Drs. Leef, Dahhan and

[2]We reject employer's assertion that the administrative law judge erred by ignoring the non-qualifying pulmonary function and arterial blood gas studies of record since objective studies without an accompanying explanation are not relevant to an administrative law judge's determination under 20 C.F.R. §718.304(c). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987). Similarly, we reject employer's assertion that the administrative law judge erred by ignoring Dr. Mettu's opinion that claimant had only a moderate impairment and Dr. Dahhan's opinion that the objective evidence failed to indicate a respiratory or pulmonary impairment due to coal dust, since the opinions of Drs. Dahhan and Mettu are not relevant to an administrative law judge's determination under 20 C.F.R. §718.304. *See generally Trent, supra*. In addition, employer asserts that the administrative law judge erred by ignoring claimant's extensive cigarette smoking habit and claimant's complaint of a dry cough. Contrary to employer's assertions, smoking histories and symptoms are not relevant to an administrative law judge's determination under 20 C.F.R. §718.304. *See generally Trent, supra*. Further, since the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is not rebutted by the fact that claimant continued to work after being diagnosed with complicated pneumoconiosis, we reject employer's assertion that the administrative law judge erred by failing to consider the fact that claimant worked for over a year after being diagnosed with complicated pneumoconiosis by x-ray. *See Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

[3]The administrative law judge observed that "[t]here is no biopsy or autopsy evidence." Decision and Order at 4.

West find x-ray evidence of complicated pneumoconiosis."[4] *Id*. The administrative law judge properly discredited the x-ray interpretations of Drs. Dahhan and Sargent because he found them to be equivocal.[5] *See Justice v. Island Creek Coal Co.*, 11

[4]The administrative law judge observed that "Dr. Mettu read the [January 26, 1995] x-ray as 1/1 q/q, and classified opacities, both upper joints." Decision and Order at 5. An examination of the record indicates that Dr. Mettu also found the classification of the January 26, 1995 x-ray to be consistent with complicated pneumoconiosis. Director's Exhibit 10. Inasmuch as the administrative law judge found the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, we hold that any error by the administrative law judge with regard to his consideration of Dr. Mettu's finding is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5]The administrative law judge stated that "Dr. Sargent, a B-reader and [B]oard-certified radiologist, read the January 26, 1995, x-ray as s/s 1/0, B,

BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Further, the administrative law judge properly discredited Dr. Dahhan's medical opinion that claimant does not suffer from simple or complicated pneumoconiosis because he found it to be not well reasoned.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

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indicating, however, that the 'B' classification was '**uncertain**.'" Decision and Order at 4 (emphasis added). Further, the administrative law judge stated that "Dr. Dahhan also diagnoses complicated pneumoconiosis initially, however, upon review of Dr. Wheeler's negative CT scan reading, changes his mind, finding insufficient objective evidence to make a diagnosis of pneumoconiosis, simple or complicated." *Id*. In a report dated January 10, 1997, Dr. Dahhan found that the "[f]inal ILO classification is P/Q, 1/0, question B large opacity, emphysema, ??tuberculosis." Employer's Exhibit 1.

[6]The administrative law judge stated that Dr. Dahhan "did not...explain why his finding of simple pneumoconiosis was no longer valid, merely referring to Dr. Wheeler's opinion that the mass seen in the Claimant's CT scan was more consistent with tuberculosis than complicated occupational pneumoconiosis." Decision and Order at 5.

Moreover, in addition to noting the numerical superiority of the credible medical evidence which demonstrates the presence of complicated pneumoconiosis,[7] the administrative law judge also considered the qualifications of the various physicians.[8] *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Thus, we reject employer's assertions that the administrative law judge erred by failing to provide an explanation for his weighing of the conflicting medical evidence, and that the administrative law judge erred by failing to consider the qualifications of the physicians.[9] The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *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). Therefore, since the administrative law judge permissibly accorded greater weight to the findings of complicated pneumoconiosis by Drs. Leef and West than to Dr. Wheeler's contrary finding of no simple or complicated pneumoconiosis,[10] we hold that substantial

[7]The administrative law judge stated that he did "not find the negative reading by Dr. Wheeler to be persuasive, when weighed against the positive readings rendered by Drs. Leef and West." Decision and Order at 5.

[8]The administrative law judge observed that Drs. Sargent, West and Wheeler are B-readers and Board-certified radiologists. Decision and Order at 4-5. The administrative law judge also observed that Drs. Dahhan and Leef are B-readers. *Id*.

[9]We reject employer's assertion that the administrative law judge erred in failing to explain why he accorded greater weight to the findings of Drs. Leef and West than to the contrary findings of Drs. Sargent and Wheeler, in view of the superior qualifications of Drs. Sargent and Wheeler. Moreover, Dr. West's credentials are equal to the credentials of Drs. Sargent and Wheeler. An administrative law judge is not required to defer to a doctor with superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

[10]Employer asserts that since the irrebuttable presumption at 20 C.F.R. §718.304 is established by evidence of complicated pneumoconiosis, the administrative law judge irrationally discredited Dr. Wheeler's finding of no pneumoconiosis based on contrary x-ray readings of simple pneumoconiosis. Contrary to employer's assertion, the administrative law judge rationally discredited "Dr. Wheeler's finding of no pneumoconiosis, simple or complicated,...in light of the otherwise unanimous finding of simple pneumoconiosis." Decision and Order at 5-6; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-

evidence supports the administrative law judge's finding that the evidence is sufficient to establish the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[11] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

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1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Of the six x-ray interpretations of record, five readings are positive for pneumoconiosis, Director's Exhibits 10, 12, 13, 15; Employer's Exhibit 1, and one reading provided by Dr. Wheeler is negative for pneumoconiosis, Employer's Exhibit 1. Furthermore, four of the six readings were classified as category B large opacities. Director's Exhibits 12, 13, 15; Employer's Exhibit 1. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

[11]Since the administrative law judge considered all of the relevant conflicting medical evidence of record pursuant to 20 C.F.R. §718.304, we reject employer's assertion that the administrative law judge erred by failing to consider the absence of treatment notes or reports indicating symptoms of complicated pneumoconiosis, or treatments for complaints relating to the disease, as affirmative evidence of the non-existence of the disease.

Next, employer contends that the administrative law judge erred in finding it to be the properly designated responsible operator. We disagree. The administrative law judge initially determined that complicated pneumoconiosis was first established in September 1994.[12] Decision and Order at 6. Further, the administrative law judge, citing *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), and *Swanson v. R. G. Johnson Co.*, 15 BLR 1-49 (1991), stated that "in a case involving invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304, the responsible operator is the last employer with whom Claimant was employed at the time his complicated pneumoconiosis was established."[13] Decision and Order at 6. In *Truit*, the Board held that a claimant is eligible for benefits beginning with the first month in which complicated pneumoconiosis is found to have existed regardless of when the miner actually discovers the disease. Further, in *Swanson*, the Board held that liability for benefits is established as of the date of a determination of complicated pneumoconiosis. In the instant case, the administrative law judge observed that "[t]he Social Security records show coal mine employment for Brownies Creek Collieries from 1978 to 1986,[14] employment with E G & R Coal Corp. in 1987..., and employment with [employer] from 1987 to 1988." *Id*. at 7. We note that all of this

[12]The administrative law judge correctly stated that "[t]he diagnosis of complicated pneumoconiosis was first made in September of 1994, by Dr. Leef, and confirmed by Dr. West in 1995." Decision and Order at 6.

[13]Where an administrative law judge finds the existence of complicated pneumoconiosis demonstrated, the onset date is the month during which complicated pneumoconiosis was first diagnosed. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt, supra.*

[14]The district director issued a Notice of Initial Determination on August 7, 1995, which listed Brownies Creek Collieries as the responsible operator in this case. Director's Exhibit 18. On April 14, 1995, Brownies Creek Collieries requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 19. While the case was pending before the OALJ, the Director moved to remand the case to the district director for further consideration of the responsible operator issue in light of evidence which indicated that employer may be the appropriate responsible operator. Director's Exhibit 32. Administrative Law Judge Frank D. Marden issued an Order on April 4, 1997, which remanded the case to the district director for further consideration of the responsible operator issue. *Id*. On May 6, 1996, the district director issued a Revised Notice of Initial Determination, which listed employer as the responsible operator. *Id*. The district director's revised decision did not list Brownies Creek Collieries as a potential responsible operator. *Id*.

employment pre-dates claimant's first diagnosis of complicated pneumoconiosis in September of 1994. Although claimant testified at the hearing that he worked for Arch Minerals from September 1994 to December 1995,[15] the administrative law judge acted within his discretion in discrediting claimant's hearing testimony in this regard because the administrative law judge found it to be in conflict with claimant's deposition testimony.[16] *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

[15]The administrative law judge stated that "there is no other evidence of record to confirm that the Claimant was employed by Arch Minerals in September of 1994." Decision and Order at 6. Moreover, the administrative law judge stated that "[t]he Social Security records show no employment in 1994 and 1995." *Id*. at 7.

[16]The administrative law judge stated that "[t]he Claimant testified [at the hearing] that he last worked for a coal mine employer from September of 1994 to December of 1995, that employer being Arch Minerals in West Virginia." Decision and Order at 6. The administrative law judge also stated that "[i]n a deposition taken on June 29, 1995, however, the Claimant testified that he started working for Arch Minerals on October 7, 1994." *Id*. The administrative law judge further stated that "[t]his is testimony [claimant] repeated when his deposition was again taken on December 1, 1995." *Id*.

Employer asserts that the administrative law judge erred in failing to provide an explanation for rejecting claimant's testimony that he worked at least one year of coal mine employment for Chambers Trucking after claimant worked for employer and before the first diagnosis of complicated pneumoconiosis.[17] The administrative law judge, within a proper exercise of his discretion, relied on the Social Security records to find that claimant worked for employer for at least one year in coal mine employment. The Social Security records, however, do not indicate that claimant worked for Chambers Trucking. Further, the Employment History form dated November 9, 1996 indicates that claimant was employed by Chambers Trucking from March 1987 to January 1988. Director's Exhibit 2. Moreover, claimant did not provide precise testimony with respect to his employment with Chambers Trucking.[18]

[17]In the June 29, 1995 deposition, claimant testified that he worked for Chambers Trucking after he worked for Brownies Creek Collieries. Director's Exhibit 32 (June 29, 1995 Deposition at 16). Claimant was asked, "How long do you think you worked for Chambers all together?" *Id*. Claimant responded, "Oh, about a year." *Id*. When asked again if he worked one year for Chambers Trucking, claimant responded, "I guess. I couldn't tell you the truth. That's close, pretty close." *Id*. Additionally, when asked if he was exposed to coal dust when he worked for Chambers Trucking, claimant responded, "Yeah. Oh, yeah." *Id*. at 17. Claimant also testified that he drove a grease truck for Chambers Trucking, and was in the pit all of the time. *Id*.

[18]Although claimant testified that he worked for Chambers Trucking until about December 18, 1988, Director's Exhibit 32 (June 29, 1995 Deposition at 17), claimant

Thus, since the administrative law judge permissibly found that employer is the properly designated responsible operator based exclusively on the Social Security records, *see Brumley v. Clay Coal Corp.*, 6 BLR 1-956 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984), we hold that any error by the administrative law judge in failing to explicitly address claimant's testimony that he worked a year of coal mine employment for Chambers Trucking is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Additionally, we reject employer's assertion that the administrative law judge erred by failing to determine whether claimant worked for employer for an entire year. Contrary to employer's assertion, the administrative law judge found that "[t]he evidence of record reveals that [employer] was the coal mine employer for which the Claimant last worked a period of at least one year at the time that he was diagnosed with complicated pneumoconiosis." Decision and Order at 7. The record contains an employment letter dated March 22, 1996 from employer, which indicates that it employed claimant from November 12, 1987 to December 21, 1988. Director's Exhibit 32. Further, as previously noted, the administrative law judge stated that "[t]he Social Security records show coal mine employment...with [employer] from 1987 to 1988." *Id*. Contrary to employer's assertion that the evidence is insufficient to establish that claimant worked continuously for employer for a period of one year, there is no indication from the record that claimant's work for employer was interrupted employment.

Therefore, since the administrative law judge rationally determined that employer is the last coal mine operator to employ claimant for at least one year before the first diagnosis of complicated pneumoconiosis, we hold that substantial evidence supports the administrative law judge's finding that employer is the properly designated responsible operator. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt, supra*.

Accordingly, the administrative law judge's Decision and Order awarding

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did not provide a specific date of when he began his employment with Chambers Trucking. Further, as previously noted, when asked if he worked one year for Chambers Trucking, claimant responded, "I guess. I couldn't tell you the truth. That's close, pretty close." Director's Exhibit 32 (June 29, 1995 Deposition at 16).

benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge