

BRB No. 99-1147 BLA

DRAPER L. WOODARD	)	
(Widow of NOBLE H. WOODARD)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED:
	)	
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 on Remand-Awarding Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (97-BLA-1611) of Administrative Law Judge Lawrence P. Donnelly on both a miner's claim and a survivor's 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).<sup>1</sup> The administrative

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<sup>1</sup> Claimant, Draper L. Woodard, is the widow of the miner, Noble H. Woodard, who died on August 21, 1996. The death certificate lists the immediate cause of death as thalamic hemorrhage due to hypertension. Director's Exhibit 5. The miner established entitlement to benefits on a claim filed on October 11, 1983, Director's Exhibit 22, but claimant is not entitled to derivative benefits pursuant to the award of benefits on that claim, because of the filing date of the miner's claim. *See Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf. Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). This case is before the Board

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for the second time. Pursuant to the claim filed on October 11, 1983, the miner was awarded benefits in a Decision and Order issued by Administrative Law Judge Joel A. Harmatz on September 17, 1987. Director's Exhibit 22. Judge Harmatz concluded that the miner established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), and also found that the miner established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Subsequent to the miner's death, claimant filed a survivor's claim. Director's Exhibit 1. While the survivor's claim was pending, employer filed a request for modification of the miner's award on June 13, 1997. Director's Exhibit 20. On March 9, 1998, Judge Donnelly issued a Decision and Order awarding benefits on the survivor's claim. The administrative law judge found that as the evidence established the presence of complicated pneumoconiosis, claimant was entitled to the irrebutable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also denied employer's petition to modify the award of benefits on the miner's claim. Subsequent to an appeal by employer, the Board vacated the administrative law judge's Decision and Order awarding benefits on the survivor's claim and remanded the case for the administrative to again consider the relevant evidence of record. The Board further vacated the administrative

law judge found that the evidence of record established that the miner suffered from complicated pneumoconiosis and that invocation of the irrebutable presumption at 20 C.F.R. §718.304 of death and total disability due to pneumoconiosis was established. Accordingly, the administrative law judge awarded benefits on the miner's and survivor's claims and denied employer's request for modification of the award of benefits on the miner's claim.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis and concluding that claimant was therefore entitled to the irrebutable presumption found at Section 718.304. Employer also contends that the administrative law judge erred in finding that the evidence established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this 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 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).

Employer contends that the administrative law judge erred in selectively analyzing the evidence by relying exclusively on the February 28, 1985 x-ray interpretation of complicated pneumoconiosis by Dr. Byers as support for a finding that the miner suffered from complicated pneumoconiosis; in failing to account for the superior qualifications of Drs. Wheeler and Scott who concluded that claimant did not suffer from complicated pneumoconiosis; in providing no rational basis for crediting Dr. Byers' x-ray interpretation over that of Dr. Bassali, a physician with equal qualifications, who diagnosed an April 1985

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law judge's finding that employer failed to establish modification of the miner's claim pursuant to Section 725.310 and instructed the administrative law judge, on remand, to reconsider the merits of the miner's claim. *Woodward v. Dominion Coal Co.*, BRB No. 98-0857 BLA (Mar. 18, 1999)(unpub.). On July 15, 1999, the administrative law judge issued the Decision and Order on Remand-Awarding Benefits in both the miner's and survivor's claims from which employer now appeals.

x-ray negative for complicated pneumoconiosis, but positive for simple pneumoconiosis; in relying on Dr. Sargent's medical opinion for a finding of complicated pneumoconiosis when it merely recited Dr. Byers' x-ray diagnosis; and in failing to make any findings regarding Dr. Berry's opinion.

The record contains numerous x-ray interpretations, both positive and negative, by Board-certified and/or B-readers. Director's Exhibits 8, 9, 22; Employer's Exhibits 1, 3. Drs. Navani, Gale, Sutherland and Penman interpreted x-rays taken in 1982 and 1983 as positive for simple pneumoconiosis. Dr. Byers, a B-reader,<sup>2</sup> interpreted an x-ray dated February 28, 1985, as showing pneumoconiosis category 3/3, p/q with coalescence and category A conglomerate lesions, and further opined that such lesions appeared to be progressive based on a review of earlier x-ray films. Director's Exhibit 22. Dr. Bassali, a B-reader, interpreted April 1985 x-ray as showing simple pneumoconiosis, but no changes consistent with complicated pneumoconiosis. Director's Exhibit 22. Drs. Wheeler and Scott, Board-certified, B-readers, interpreted x-rays dated August 25, 1983, March 30, 1988, and June 18, 1991 as negative for pneumoconiosis, but possibly compatible with tuberculosis. Employer's Exhibits 1, 3.

The medical opinion evidence consists of a report by Dr. Berry, who examined the miner February 4, 1982 and opined that the miner suffered from moderate to severe chronic obstructive pulmonary disease, bronchitis and asthma, all of which he related to coal mine employment, Director's Exhibit 22; a report by Dr. Sargent, who examined the miner in March of 1985, conducted objective tests, reviewed Dr. Byers' x-ray and diagnosed coal workers' pneumoconiosis, Director's Exhibit 22; reports from the Sutherland Clinic, and hospital notes which indicate that the miner suffered from pneumoconiosis and chronic obstructive pulmonary disease, but do not diagnose the presence of tuberculosis, Director's Exhibits 7, 22; Employer's Exhibit 5.

When this case was previously before the Board, the Board held that "[a]lthough the administrative law judge provides reasons for assigning less weight to x-ray interpretations diagnosing tuberculosis, he does not discuss the numerous x-rays and medical opinions of record which are positive for simple pneumoconiosis instead of complicated pneumoconiosis or the remainder of the evidence of record which is negative for pneumoconiosis." *Woodard*

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<sup>2</sup> 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 Company, Inc. of Virginia 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).

*v. Dominion Coal Co.*, BRB No. 98-0857 BLA (Mar. 18, 1999)(unpub.). The Board further held that “the administrative law judge failed to provide sufficient reasons for his reliance upon the evidence supportive of complicated pneumoconiosis over the evidence of simple pneumoconiosis or the evidence which is negative for the existence of pneumoconiosis.” *Id.* Accordingly, the Board vacated “the administrative law judge’s finding that claimant established that the miner had complicated pneumoconiosis pursuant to Section 718.304,” *Id.*, and remanded the case in order for the administrative law judge to weigh all of the evidence of record relevant to the existence of complicated pneumoconiosis. *Id.*

On remand, the administrative law judge again concluded that the x-ray evidence established complicated pneumoconiosis pursuant to Section 718.304(a). The administrative law judge also found that the x-ray evidence demonstrated “a progression in the miner’s condition” and that while the x-rays taken in 1982 only demonstrated the presence of simple pneumoconiosis, the x-ray taken by Dr. Byers in 1985 demonstrated Category A conglomerate lesions, *i.e.*, complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a). The administrative law judge found that Dr. Sargent, who examined the miner in 1985, provided support for Dr. Byers’ x-ray finding as he “accepted Dr. Byers’ reading as showing progression and complicated pneumoconiosis.” Decision and Order on Remand at 3. The administrative law judge also found that the x-ray readings of Drs. Wheeler and Scott, which only diagnosed the possibility of tuberculosis, Employer’s Exhibits 1, 3, were entitled to less weight than the x-ray interpretations of Drs. Byers and Sargent as the opinions of Drs. Wheeler and Scott were speculative and “not confirmed by the records and reports of any examining physician.” Decision and Order on Remand at 3. The administrative law judge also concluded that Dr. Bassali’s reading of the April, 1985 x-ray, Director’s Exhibit 22, in which he diagnosed simple pneumoconiosis, but found no changes consistent with complicated pneumoconiosis, was outweighed by the other readings which showed that masses or large opacities had developed in the miner’s lungs. Decision and Order at 3.

In order to establish invocation of the irrebutable presumption at Section 718.304, an administrative law judge must consider all the relevant evidence found at each subsection pursuant to Section 718.304(a)-(c), and then weigh together such evidence prior to finding the presumption invoked. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir.1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*).

The administrative law judge erred in concluding that Dr. Sargent “diagnosed complicated coal workers’ pneumoconiosis simply because he related the x-ray changes to coal workers’ pneumoconiosis, and the x-ray reading he relied on, that of Dr. Byers, was positive for complicated pneumoconiosis.” Decision and Order on Remand at 3-4. A review of Dr. Sargent’s opinion reveals that, while Dr. Sargent diagnosed the existence of coal workers’ pneumoconiosis based on Dr. Byers’ x-ray “reading and [the miner’s] lack of any

other appropriate industrial exposure[,]”<sup>3</sup> Dr. Sargent did not make a specific diagnosis of complicated pneumoconiosis. Director’s Exhibit 1. This mischaracterization of the evidence requires remand. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Further, while we recognize that the administrative law judge has proffered other reasons for crediting Dr. Byers’s x-ray reading of complicated pneumoconiosis, since this case must be remanded, the administrative law judge must also specifically address the qualifications of the physicians rendering findings contrary to Dr. Byers’s x-ray reading, the documentation underlying contrary opinions, and address Dr. Berry’s opinion. In addressing the evidence of complicated pneumoconiosis, the administrative law judge must explain adequately his reasons for crediting certain evidence and discrediting other evidence as well as failing to decide if the physicians addressed all of the miner’s medical problems in a meaningful way. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

If, on remand, the administrative law judge determines that the evidence is insufficient to establish the existence of complicated pneumoconiosis, the administrative law judge must then determine whether the evidence of record is sufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (2). *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-290 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Additionally, inasmuch as this case must be remanded, the administrative law judge must also consider whether employer failed to establish modification of the miner’s claim pursuant to Section 725.310, and reconsider the merits of the miner’s claim to determine if employer established a mistake in the determination of fact pursuant to Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see generally Hicks, supra; Akers, supra*.

Accordingly, the administrative law judge’s Decision and Order on Remand-Awarding Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief

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<sup>3</sup> Dr. Sargent further opined that, “[o]n the basis of arterial blood gases and ventilatory studies alone, then I would expect him to be mildly impaired due to his coal dust exposure.” Director’s Exhibit 22.

Administrative Appeals Judge

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**ROY P. SMITH**

Administrative Appeals Judge

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**MALCOLM D. NELSON, Acting**

Administrative Appeals Judge