BRB No. 04-0973 BLA

BOBBY L. TILLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAPLE MEADOW MINING COMPANY	)	DATE ISSUED: 08/11/2005
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Mary Rich Malloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-0175) of Administrative Law Judge Daniel L. Leland 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] In a Decision and Order dated March 24, 1999, Administrative Law Judge

[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 effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All

Daniel F. Sutton noted that because there was no evidence supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(c) (2000), the sole issue before him was whether the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption set out at 20 C.F.R. §718.304. Because Judge Sutton found that the evidence was insufficient to establish the existence of complicated pneumoconiosis, he found that claimant was not entitled to invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, Judge Sutton denied benefits. By Decision and Order dated September 18, 2000, the Board affirmed Judge Sutton's denial of benefits. *Tilley v. Maple Meadow Mining Co.*, BRB No. 99-0755 BLA (Sept. 18, 2000)(unpub.).

Claimant subsequently filed a timely request for modification. Administrative Law Judge Daniel L. Leland (the administrative law judge) credited claimant with twenty-nine years and ten months 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 that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).[2] He also found that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge, therefore, found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] Accordingly, he denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

[3]The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001, and thus do not apply to this claim filed on June 24, 1997. *See* 20 C.F.R. §725.2.

[4]Since the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's length of coal mine employment finding. *Id.*

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).

Claimant contends that the administrative law judge erred in finding that claimant is not entitled to the irrebuttable presumption set out at 20 C.F.R. §718.304. In considering whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000),[5] the administrative law judge considered whether the evidence was sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Claimant initially contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The previously submitted x-ray evidence consists of twenty-two interpretations of five x-rays. Of these twenty-two x-ray interpretations, only eight are positive for complicated pneumoconiosis. The record also contains thirty-nine newly submitted interpretations of nine x-rays. Of these thirty-nine x-ray interpretations, only six are positive for complicated pneumoconiosis. Director's Exhibits 57, 68, 70, 72; Claimant's Exhibits 2, 3. Based on his weighing of all of the x-ray interpretations of record, the administrative law judge found that claimant failed to establish invocation at 20 C.F.R. §718.304(a). The administrative law judge specifically stated:

> As Judge Sutton noted, a preponderance of the x-ray readings in the

[5]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

> claim at the time he issued his decision did not show large opacities. Of the x-ray readings submitted since claimant requested modification[,] complicated pneumoconiosis was diagnosed by Drs. Miller, Deponte, and Patel, all [B]oard certified radiologists and B readers, and by Drs. Ranavaya and Gaziano, B readers. Drs. Wheeler, Scott, Kim, and Scatarige, [B]oard certified radiologists/B readers, and B readers Drs. Hippensteel and Repsher, interpreted the chest x-rays as showing at most simple pneumoconiosis. A preponderance of the x-ray evidence does not indicate the presence of large opacities pursuant to §718.304(a).

2004 Decision and Order at 6.

Claimant asserts that Dr. Wheeler's x-ray readings should be discredited because his views about the ILO classification system are hostile to the Act and the regulations. During a June 25, 1998 deposition, employer's counsel asked Dr. Wheeler if x-ray interpretations were completely subjective or if there was an objective method of interpreting them. In response, Dr. Wheeler stated:

> It's not totally subjective. There is a set of standards that can be used and there's also pretty well-known science with regard to the patterns of distribution. For example, silica, silicosis typically begins as round nodules, very small one in the central portion of the mid and upper lung zones. If you have scars that are off in the periphery or not symmetrical, that can be again silicosis or pneumoconiosis.
>
> So the silicosis, it isn't all subjective. There are standards. My complaint about the standards is that a number of them are quality-wise. We would consider - - at least I would consider and I know a number of other B readers who would consider them too light, and if you're dealing with light films and scars, it's a combination of, of difficult to interpret and shadows.
>
> The other feature about the standards that I find disturbing is that I don't know that, how many of them were actually proven to be a specific pneumoconiosis and as a result, I think there's going to have to be a change in the future so that the standards are brought up to the technical levels that we like nowadays, and I personally would prefer to see the standards have some form of proof either in the form of high resolution CT scans or pathology or something to indicate that the standards are really what they do represent or are felt to represent.

Director's Exhibit 34 (Dr. Wheeler's June 25, 1998 Deposition at 20-21). While Dr. Wheeler

noted his dislike for certain aspects of the ILO classification system, nothing in his testimony indicates that he disregarded it when he rendered interpretations of claimant's x-rays. To the contrary, each of Dr. Wheeler's x-ray interpretations is classified in accordance with the requirements of the ILO classification system. *See* Director's Exhibits 34, 43, 45, 59, 74, 76-78; Employer's Exhibits 5, 6. Thus, we reject claimant's assertion that Dr. Wheeler's x-ray readings should be discredited because his views about the ILO classification system are hostile to the Act and the regulations. Further, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish invocation pursuant to 20 C.F.R. §718.304(a).

Next, claimant contends that the administrative law judge erred in finding the biopsy evidence insufficient to establish invocation at 20 C.F.R. §718.304(b). The record does not contain any newly submitted biopsy evidence. The administrative law judge considered the prior biopsy reports of Drs. Hutchins, Kleinerman, and Rasheed. In a biopsy report dated September 25, 1997, Dr. Rasheed opined that a lung mass showed a fibrotic mass over-ladened with coal dust and no malignant changes. Director's Exhibit 14. In a report dated July 11, 1998, Dr. Hutchins reviewed histological slides from the September 25, 1997 lung biopsy and opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 32. Dr. Hutchins specifically stated:

> There is a moderate amount of perivascular, peribronchial, and perifibrotic coal dust pigment with associated birefringent silicate-type particles. The typical features of coal macules, coal dust deposition within reticular fibrosis with perimacular emphysema located within the respiratory units of the lung, cannot be discerned in this material. Micronodules, macronodules, and lesions of progressive massive fibrosis are absent. Thus, coal workers' pneumoconiosis is not present. There is pulmonary fibrosis within the biopsy material but its cause cannot be determined.

Id. In a report dated July 30, 1998, Dr. Kleinerman reviewed histological slides from the September 25, 1997 lung biopsy and opined that claimant did not suffer from complicated pneumoconiosis. Director's Exhibit 35. Dr. Kleinerman specifically stated:

> This lung biopsy demonstrates the finding of a single discrete macule of Coal Workers' Pneumoconiosis. I find no evidence of the histologic changes characteristic of complicated pneumoconiosis. There is no large area of hylinized, collagenous, or necrotizing tissue with black pigment. There is no evidence of the obliterative endarteritis and thick-walled or partially obliterated bronchi and bronchioles. The pathologic findings are those of a macule of simple CWP.

Id.

Based on his weighing of the reports of Drs. Hutchins, Kleinerman, and Rasheed, the administrative law judge found that "the biopsy evidence does not show massive lesions in the lungs under §718.304(b)."[6] 2004 Decision and Order at 6. In finding Dr. Rasheed's opinion insufficient to establish the existence of complicated pneumoconiosis, the administrative law judge rationally found that, "[a]s Judge Sutton concluded, [Dr. Rasheed's] findings are at best ambiguous as to whether there was a massive lesion in claimant's lungs." 2004 Decision and Order at 6; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). In addition, the administrative law judge rationally found that the opinions of Drs. Hutchins and Kleinerman, that the biopsy slides did not show complicated pneumoconiosis, further undermined Dr. Rasheed's opinion. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985).

Claimant asserts that Dr. Kleinerman's opinion that claimant does not suffer from complicated pneumoconiosis is not reasoned. Claimant's assertion is based on the premise that a biopsy finding of pneumoconiosis, coupled with large opacities identified by x-ray, supports a finding of complicated pneumoconiosis. In his report, Dr. Kleinerman explained why he determined that the 2.6 centimeter nodule in claimant's lung was not, in fact, biopsied. Dr. Kleinerman specifically stated:

> Since the nodular mass 2.6 cm in diameter was observed by x-ray, I must assume that the 2.6 cm nodule was not biopsied by the biopsy needle. The nature of that nodule remains undetermined. There is evidence in the biopsy of simple CWP. The 2.6 cm nodule may represent a solitary granuloma or even a carcinoma. There is no reliable pathologic evidence however that the biopsied nodule represents complicated pneumoconiosis. Microscopic study reveals the needle biopsy material is a macule of simple Coal Workers' Pneumoconiosis. The large 2.6 cm nodule observed in the right upper lobe by chest films may represent a lesion of conglomerate healed granuloma such as tuberculosis or histoplasmosis which was not biopsied. The other possible occurrence is that the observed nodule by x-ray represents a primary lung cancer that was not biopsied by the diagnostic needle biopsy.

Director's Exhibit 35. As an operative report was not submitted for the record, Dr.

[6]Although Drs. Hutchins and Kleinerman disagree about whether the biopsy slides show simple pneumoconiosis, both physicians agree that the slides do not show complicated pneumoconiosis, the relevant issue in this case. Director's Exhibits 32, 35.

Kleinerman's conclusion that the 2.6 cm nodule in the lung was not biopsied is uncontradicted. Thus, we reject claimant's assertion that Dr. Kleinerman's opinion is not reasoned. Furthermore, we reject claimant's assertion that Dr. Kleinerman is biased against him because there is no evidence in the record to support this assertion. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the biopsy evidence is insufficient to establish invocation pursuant to 20 C.F.R. §718.304(b).

Finally, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish invocation pursuant to 20 C.F.R. §718.304(c). In his consideration of whether the evidence was sufficient to establish invocation pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered a purified protein derivative tuberculin test (P.P.D. test), CT scan interpretations rendered by Drs. Dehgan and Doyle, and depositions and medical reports by Drs. Castle, Crisalli, Hippensteel, Repsher, and Wheeler. Claimant tested negative for tuberculosis in an April 16, 2004 P.P.D. test. Claimant's Exhibit 1. Considering a July 29, 1997 CT scan, Dr. Doyle opined that "[t]here is a large mass in the right upper lobe measuring 26 x 26 mm. with an irregular border and some stranding extending to the lateral pleura." Director's Exhibit 14. Considering an April 14, 1999 CT scan, Dr. Dehgan opined that the "change very likely represents anthracosilicosis with pseudotumor and progressive massive fibrosis." Director's Exhibit 67. Drs. Castle, Crisalli, Hippensteel, Repsher, and Wheeler opined that claimant does not suffer from complicated pneumoconiosis. Director's Exhibits 33, 34, 73, 79; Employer's Exhibits 1-4, 7, 9-11. Based on his weighing of the evidence, the administrative law judge found that the opinions of Drs. Castle and Wheeler outweighed the interpretations of the July 29, 1997 and April 16, 1999 CT scans and the negative P.P.D. test. The administrative law judge specifically stated:

> Dr. Doyle stated that a July 29, 1997 CT scan of the chest showed a right upper lobe mass measuring 26 by 26 mm, but Dr. Wheeler reviewed the CT scan and determined that the lung mass represented conglomerate tuberculosis. Although Dr. Wheeler did not interpret the April 16, 1999 CT scan, his deposition testimony clearly indicates that he believed that the x-ray and CT scans showed tuberculosis or some other granulomatous disease rather than complicated pneumoconiosis.

2004 Decision and Order at 6. The administrative law judge further stated:

> Although claimant was given a PPD test that was negative, Dr. Hippensteel stated that a negative skin test for tuberculosis does not rule out the presence of a granulomatous disease causing the x-ray abnormalities. The

> negative tuberculosis test, standing alone, does not contradict the conclusions of Dr. Wheeler and Dr. Castle and does not show that claimant has complicated pneumoconiosis.

Id.

The administrative law judge acted within his discretion in according greater weight to Dr. Wheeler's opinion, that claimant does not suffer from complicated pneumoconiosis, based upon his superior qualifications.[7] *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge properly accorded additional weight to Dr. Wheeler's opinion because it is corroborated by Dr. Castle's opinion.[8] *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). We reject claimant's assertion that the administrative law judge should have found the evidence sufficient to establish invocation pursuant to 20 C.F.R. §718.304(c). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *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). We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish invocation pursuant to 20 C.F.R. §718.304(c).

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c), we affirm the administrative law judge's finding that claimant is not entitled to invocation of the irrebuttable presumption set out at 20 C.F.R. §718.304. We, therefore, affirm the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

[7]The administrative law judge stated, "Dr. Wheeler is an expert radiologist and I accord his opinion considerable deference." 2004 Decision and Order at 6. Dr. Wheeler is a B reader and a Board-certified radiologist. Director's Exhibit 34; Employer's Exhibit 5. The radiological qualifications of Drs. Doyle and Dehgan are not found in the record.

[8]The administrative law judge stated that "Dr. Castle, a [B]oard certified pulmonologist, agreed with Dr. Wheeler's conclusions." 2004 Decision and Order at 6.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge