BRB No. 06-0861 BLA

C.T.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 08/22/2007
MARTIN COUNTY COAL CORPORATION	)	
	)	
	)	
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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Martin E. Hall (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (05-BLA-05665) of Administrative Law Judge Paul H. Teitler rendered 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 accepted the parties' stipulation to twenty-seven years of coal mine employment and considered the claim, filed on March 8, 2004, under the regulations set forth in 20 C.F.R. Part 718.[1] The

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 202 (1989)(*en banc*); Director's Exhibit 3.

administrative law judge determined that the medical evidence established the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the presumption that claimant's pneumoconiosis arose out of coal mine employment, set forth in 20 C.F.R. §718.203(b), was invoked and was not rebutted. With respect to the issue of total disability, the administrative law judge found that the x-ray and CT scan evidence was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, he awarded benefits.[2]

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(1), (4), and that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Claimant responds, urging affirmance of the award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief in this appeal.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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, 363 (1965).

Employer argues on appeal that the administrative law judge did not properly weigh the x-ray, CT scan, and medical opinion evidence relevant to the existence of both simple and complicated pneumoconiosis. With respect to the x-ray evidence, the record contains twelve interpretations of four films. Drs. West and Baker each read an x-ray as positive for simple pneumoconiosis.[4] Director's Exhibit 11; Employer's Exhibit 11. Drs. Wiot, Halbert, Kendall, and Jarboe each read an x-ray as positive for both simple and

[2] Having found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(1) based upon claimant's invocation of the irrebuttable presumption at 20 C.F.R. §718.304, the administrative law judge did not address the pulmonary function study, arterial blood gas study, and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 10.

[3] The parties do not challenge the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). This finding is affirmed, therefore, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Dr. Baker is a B reader. Employer's Exhibit 11. Dr. West is dually qualified as a Board-certified radiologist and a B reader. Director's Exhibit 11.

complicated pneumoconiosis.[5] Claimant's Exhibits 1, 3, 6, 8. Drs. Wheeler, Repsher, and Scott, who provided the six remaining interpretations of record, indicated that the x-rays were negative for both simple and complicated pneumoconiosis.[6] Employer's Exhibits 1, 3, 4, 12, 15.

Without specifically addressing the issue of complicated pneumoconiosis, the administrative law judge found that Dr. West's positive x-ray interpretation was "particularly persuasive" because it was performed at the request of the Department of Labor, an "unbiased party." Decision and Order at 4. The administrative law judge determined that the x-ray readings of Drs. Wiot and Jarboe were also "particularly persuasive," because they were performed for employer. *Id.* The administrative law judge found that these positive readings added "determinative weight" to the other positive readings of record and concluded, therefore, that the evidence was "sufficient to establish the presence of pneumoconiosis under the provisions of subsection 718.202(a)(1)." *Id.*

The administrative law judge then considered the CT scan interpretations and medical opinion evidence under Section 718.202(a)(4). The CT scan evidence consists of fourteen interpretations of three scans performed between May 24, 2002 and January 27, 2005. There were seven negative CT scan interpretations, in which the physicians opined that the changes in claimant's lungs were probably due to tuberculosis. Employer's Exhibits 1, 2, 3, 5, 8. The remaining seven interpretations included two diagnoses of simple pneumoconiosis, four diagnoses of complicated pneumoconiosis, and a diagnosis of parenchymal scarring caused by silicosis or old granulomatous disease. Director's Exhibit 33; Claimant's Exhibits 1, 2, 3, 7, 8; Employer's Exhibits 5, 10.

Upon reviewing the CT scans, the administrative law judge observed that the physicians agreed that there were changes present in claimant's lungs, but disagreed as to whether they were caused by pneumoconiosis or tuberculosis. Decision and Order at 8. The administrative law judge noted that Drs. Wiot and Jarboe both diagnosed complicated pneumoconiosis, despite the fact that they reviewed the scans at employer's request, and that the physicians had reached conclusions that were contrary to employer's interest. Decision and Order at 8. For this reason, the administrative law judge accorded

[5] Drs. Wiot and Halbert are dually qualified as Board-certified radiologists and B readers. Claimant's Exhibit 6; Employer's Exhibit 3. Dr. Jarboe is a B reader. Claimant's Exhibit 1. There is no indication in the record that Dr. Kendall has any special radiological qualifications. Claimant's Exhibit 2.

[6] Drs. Wheeler and Scott are dually qualified as Board-certified radiologists and B readers. Director's Exhibit 11; Claimant's Exhibits 1, 6. Dr. Repsher is a B reader. Employer's Exhibit 3.

the opinions of Drs. Wiot and Jarboe greater weight, finding that their diagnoses lent strong support to the other positive CT scans of record. *Id*.

Regarding the medical opinion evidence, Drs. Jarboe, Jurich, Ammisetty, Ghio, Baker, Repsher, and Fino submitted reports relevant to Section 718.202(a)(4). Based on an examination of claimant and a review of his medical records, Dr. Jarboe diagnosed complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Jurich, claimant's treating physician, noted that there was radiological evidence of simple and complicated pneumoconiosis. Dr. Jurich also diagnosed totally disabling pulmonary disease caused, at least in part, by claimant's coal mine employment. Director's Exhibit 27; Claimant's Exhibits 3, 5; Employer's Exhibit 7. Dr. Ammisetty examined claimant, at the request of the Department of Labor, and diagnosed chronic bronchitis and coal workers' pneumoconiosis caused primarily by coal dust exposure. Director's Exhibits 11, 24. Dr. Ghio reviewed claimant's medical records and indicated that any breathing problems that claimant experiences are due to healed tuberculosis or old granulomatous disease. Employer's Exhibit 6. Dr. Baker examined claimant and diagnosed simple pneumoconiosis. Employer's Exhibit 11. Dr. Repsher examined claimant and reviewed his medical records. Dr. Repsher indicated that claimant is not suffering from coal workers' pneumoconiosis or any other dust induced lung disease. Employer's Exhibits 1, 3, 14, 16. Dr. Fino reviewed claimant's medical records and determined that there is x-ray evidence supportive of a diagnosis of simple pneumoconiosis. Dr. Fino noted that there was disagreement as to whether claimant's CT scans showed changes consistent with complicated pneumoconiosis or tuberculosis. Employer's Exhibit 13.

Upon weighing the medical opinions under Section 718.202(a)(4), the administrative law judge found that the positive CT scans lent strong support to Dr. Jarboe's diagnosis of complicated pneumoconiosis, and the medical opinions of Drs. Jurich, Ammissetty, and Baker, all of whom concluded that claimant has coal workers' pneumoconiosis. Decision and Order at 9. The administrative law judge also indicated that Dr. Jurich's opinion was entitled to some additional weight based upon his status as claimant's treating physician. *Id*. The administrative law judge stated that he accorded less weight to the opinions of Drs. Ghio, Repsher, and Fino, because they attributed the changes observed in claimant's lungs to tuberculosis. *Id.* The administrative law judge concluded, based upon his consideration of the CT scan readings and the medical opinion evidence, that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge further found that, when considered together, the x-ray and CT scan interpretations and the medical opinion evidence of record were sufficient to establish the existence of pneumoconiosis under Section 718.202(a). Decision and Order at 9.

The administrative law judge also determined that:

> For reasons similar to those set forth above, I accord greater weight to the x-ray readings of Drs. Wiot and Jarboe and the CT readings of Drs. Wiot and Jarboe. While I note that there are disagreements in the record as to whether or not the changes in [c]laimant's lungs are due to complicated pneumoconiosis or to inactive tuberculosis, I find the positive readings obtained by these physicians on behalf of the [e]mployer lend strong and determinative support to the other positive readings of record including those by Drs. Halbert, Kendall, and Bakow.

Decision and Order at 10. Consequently, the administrative law judge found the evidence was sufficient to establish that claimant has complicated pneumoconiosis, and therefore, claimant established total disability under Section 718.204(b)(1) by invoking the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304. Decision and Order at 10.

Employer contends that the administrative law judge erred in according more weight to the opinions of Drs. West, Wiot, and Jarboe regarding the x-ray and CT scan evidence of record based solely upon their party affiliation. This contention has merit. With respect to the administrative law judge's treatment of Dr. West's positive x-ray reading for simple pneumoconiosis, the Board has held that the opinions of the Department of Labor physicians cannot be accorded greater weight due to their impartiality, absent conclusive evidence that the other physicians of record are biased and that the Department of Labor's expert is independent. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991)(*en banc*). Because administrative law judge did not identify any evidence in the record supporting his determination that Dr. West is an impartial expert, we must vacate the administrative law judge's finding that Dr. West's positive x-ray reading was entitled to additional weight because he performed the reading at the request of the Department of Labor.

The administrative law judge's rationale for according greater weight to the x-ray and CT scan interpretations of Drs. Wiot and Jarboe and to Dr. Jarboe's medical opinion is also not valid. The administrative law judge's finding is based upon the premise that a physician who is paid by an employer to prepare a medical report typically crafts his conclusions to serve the employer's interest. Thus, according to the administrative law judge's reasoning, if the physician expresses an opinion that is contrary to the employer's interest, the physician must have found the evidence so convincing that he or she felt compelled to state his or her opinion despite its possible deleterious effect upon the employer's case. However, because the administrative law judge did not identify any evidence establishing this premise as fact, the administrative law judge did not provide a valid basis for according determinative weight to the opinions of Drs. Wiot and Jarboe regarding the x-ray and CT scan evidence of record. *Melnick*, 16

BLR at 1-35-36. We must vacate, therefore, the administrative law judge's finding with respect to these opinions.[7]

Employer further argues that the administrative law judge erred in mechanically according Dr. Jurich's opinion, diagnosing pneumoconiosis, additional weight based upon his status as claimant's treating physician. Pursuant to 20 C.F.R. §718.104(d), the administrative law judge "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). The regulation also provides that the administrative law judge can give a treating physician's opinion controlling weight, provided that the weight given to this opinion is also "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). However, a review of the record reflects that the administrative law judge credited Dr. Jurich's opinion because he is claimant's treating physician and because his diagnosis of pneumoconiosis was consistent with what the administrative law judge had determined was the more persuasive evidence. In light of the fact that the administrative law judge's finding that the evidence supportive of a diagnosis of pneumoconiosis was more persuasive based solely on party affiliation, we must vacate the administrative law judge's finding with respect to Dr. Jurich's opinion.[8] *Melnick*, 16 BLR at 1-35-36.

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[7] Employer suggests that the decision of the Sixth Circuit in *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993), provides some support for the proposition that party affiliation is a factor that may be considered when weighing conflicting x-ray interpretations. In *Woodward*, the court held that it was error to rely upon numerical superiority to resolve the conflicts in a vast amount of x-ray evidence. The court also indicated that when confronted with weighing a very large number of x-ray readings, an administrative law judge may consider the affiliation of the party that has submitted each reading in determining whether the existence of pneumoconiosis has been established by such evidence. *Woodward*, 991 F.2d at 321, 17 BLR at 87.

[8] The administrative law judge also stated incorrectly that under 20 C.F.R. §718.104(d), "in the absence of contrary probative evidence, the adjudication officer shall accept the statement of a treating physician with regard to the issue of whether the miner suffers from pneumoconiosis." Decision and Order at 9. The regulation actually provides that "[i]n the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section." 20 C.F.R. §718.104(d)(5). Section 718.104(d)(1)-(4) refers to the nature and extent of the physician's relationship with the miner and the frequency and extent of the physician's treatment of the miner. 20 C.F.R. §718.104(d)(1)-(5).

In light of our determination that the administrative law judge did not provide a proper rationale for according greater weight to the evidence provided by Drs. West, Jarboe, Wiot, and Jurich, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4), and invoked the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304. This case is remanded to the administrative law judge, therefore, for reconsideration of the x-ray evidence, CT scan interpretations, and medical opinions of record pursuant to Sections 718.202(a)(1), (3), (4), 718.203(b), 718.204(b), (c), and 718.304.[9]

When considering on remand whether claimant has established the existence of complicated pneumoconiosis, the administrative law judge must consider the evidence in accordance with Section 718.304. If the administrative law judge determines on remand that claimant has proven that he has complicated pneumoconiosis and, therefore, is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge need not address the evidence under Section 718.204(b), (c). If he finds that claimant is not entitled to this presumption, he

must consider whether claimant has established the presence of a totally disabling respiratory or pulmonary impairment pursuant to the criteria set forth in Section 718.204(b)(2). If the administrative law judge determines that claimant has met his burden of proof under Section 718.204(b)(2), he must determine whether claimant has demonstrated that pneumoconiosis is a contributing cause of his totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(1); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997)(claimant must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory or pulmonary impairment).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

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[9] The administrative law judge weighed all of the evidence relevant to 20 C.F.R. §718.202(a) together in determining whether claimant had established the existence of pneumoconiosis. Decision and Order at 9. We note that the Sixth Circuit has not adopted the interpretation of Section 718.202(a) applied by the administrative law judge. *Cf. Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-170 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25, 21 BLR 2-104, 2-111 (3d Cir. 1997). Thus, on remand, the administrative law judge is not required to consider whether the evidence, when weighed together as a whole, is sufficient to establish the existence of pneumoconiosis.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge