BRB No. 03-0262 BLA

LARRY RAY DENHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOSANNA LLC	)	
	)	DATE ISSUED: 12/15/2003
and	)	
	)	
NATIONAL UNION FIRE 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 and Order Denying Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Sarah Y.M. Kirby (Sands Anderson Marks & Miller), Radford, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (01-BLA-0614) and Order Denying Reconsideration (01-BLA-0614) of Administrative Law Judge Thomas M. Burke 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).[1] After crediting claimant with twenty years of coal mine employment, the administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits. Employer subsequently filed a request for reconsideration. Employer requested the administrative law judge to take judicial notice of the fact that, on the dates that Drs. Wheeler and Scott rendered their respective x-ray interpretations, they were qualified, not only as Board-certified radiologists, but also as B readers. Employer further requested that the administrative law judge reconsider the medical evidence in light of those qualifications. The administrative law judge declined to take judicial notice of the fact that Drs. Wheeler and Scott were qualified as B readers on the dates that they rendered their respective x-ray interpretations. The administrative law judge also denied employer's request to supplement the record with updated B reader certifications for Drs. Wheeler and Scott. The administrative law judge further held that even if he reevaluated the evidence, assuming valid B reader status for Drs. Wheeler and Scott, it would not change the ultimate outcome of the case. The administrative law judge, therefore, denied employer's motion for reconsideration. On appeal, employer contends that the administrative law judge erred in failing to take judicial notice of the dual qualifications of Drs. Wheeler and Scott. Employer also contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of complicated pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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 (1965).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 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; (B) a biopsy or autopsy shows massive lesions in the

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

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.[2]

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 any conflict, and make a finding of fact. *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).

Employer argues that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to

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[2] Section 718.304 has not been revised. Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis...if such miner is suffering...from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray...yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

20 C.F.R. §718.304(a).[3] Employer specifically contends that the administrative law judge erred in failing to take judicial notice of the dual qualifications of Drs. Wheeler and Scott. In the instant case, employer initially submitted expired B-reader certificates for Drs. Wheeler and Scott. While an administrative law judge *may* take judicial notice of the qualifications of physicians, provided he does so in accord with the general principles concerning judicial notice, *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), an administrative law judge is under no obligation to develop a party's case to determine the credentials or qualifications of a party's physicians. *Maddaleni*, 14 BLR at 1-40; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *McFarland v. Peabody Coal Co.*, 8 BLR 1-163 (1985). We, therefore, reject employer's contention that the administrative law judge erred in failing to take judicial notice of the qualifications of Drs. Wheeler and Scott.

Employer also contends that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis. In considering whether the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis, the administrative law judge acted within his discretion in according the greatest weight to the x-ray interpretations rendered by physicians that the record properly reflected were dually qualified as B readers and Board-certified radiologists (Drs. DePonte, Navani[4] and Patel). *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 10-12. Because all of the x-rays interpretations rendered by the best qualified physicians (*i.e.*, physicians which the record properly reflected were dually qualified as B readers and Board-certified radiologists) are positive for complicated pneumoconiosis, the administrative law judge properly found that the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[5]

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[3] Because there is no evidence relevant to 20 C.F.R. §718.304(b) and (c), the administrative law judge limited his inquiry to whether the evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

[4] The administrative law judge mistakenly identified Dr. Navani as Dr. "Namani." *See* Decision and Order at 9-12; Order Denying Reconsideration at 4.

[5] Dr. Deponte, a B reader and Board-certified radiologist, interpreted claimant's April 22, 2000 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 15. Dr. Navani, a B reader and Board-certified radiologist, interpreted claimant's June 13, 2000 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 13. Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's July 25, 2001 x-ray as positive for complicated pneumoconiosis. Claimant's Exhibit 7.

Employer contends that the administrative law judge mischaracterized the conclusions of Drs. Wheeler, Scott and Fino. Employer also contends that the administrative law judge impermissibly substituted his own conclusions for those of Drs. Wheeler and Scott. Inasmuch as the administrative law judge provided a proper basis for crediting the x-ray interpretations of Drs. DePonte, Navani and Patel over the x-ray interpretations of Drs. Wheeler, Scott and Fino, namely the fact that the record reflected that Drs. Deponte, Navani and Patel possessed superior radiological qualifications, any error made by the administrative law judge in his consideration of the x-ray interpretations of Drs. Wheeler, Scott and Fino is harmless. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304.

Accordingly, the administrative law judge's Decision and Order awarding benefits and Order Denying Reconsideration are affirmed.

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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PETER A. GABAUER, JR.
Administrative Appeals Judge