BRB No. 04-0388 BLA

WILLIAM E. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/23/2004
	)	
RAY TODD COAL COMPANY	)	
	)	
and	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard Radzely, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-0206) of Administrative Law Judge Richard A. Morgan 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] Based on the date of filing,[2] the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718, and credited claimant with at least twenty-four years of coal mine employment. The administrative law judge further found the evidence of record insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b) and also insufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. The administrative law judge additionally found that claimant failed to demonstrate the existence of complicated pneumoconiosis, and was therefore ineligible for the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. 30 U.S.C. §921(c)(3). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge erred in his weighing of the x-ray evidence of record relevant to the existence of complicated pneumoconiosis.[3]

---

[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.

[2] The record indicates that claimant filed an application for benefits on February 18, 1999, which was denied by the district director on June 2, 1999, as claimant failed to establish any required element of entitlement. Director's Exhibits 1, 31. Claimant requested modification on May 12, 2000, and on December 8, 2000, the district director found claimant entitled to benefits as claimant established totally disabling complicated coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.203, 718.204 and 718.304 (2000). Director's Exhibits 32, 54. Employer subsequently requested a formal hearing. Director's Exhibits 56, 57.

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has at least twenty four years of coal mine employment, and did not establish that he is totally disabled by a respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement.[4] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the administrative law judge's weighing of the x-ray evidence of record, none of the parties challenge the administrative law judge's finding that the x-ray evidence does not establish the presence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by Section 718.304, both claimant and the Director contend that the administrative law judge erred in his consideration of the evidence relevant to the existence of complicated pneumoconiosis. Specifically, the Director asserts that the administrative law judge failed to consider the narrative evidence which accompanied the doctors' interpretations of whether the films indicated the presence of complicated pneumoconiosis. The Director argues that the administrative law judge erred by considering the number of x-ray readings which were classified as positive or negative for the presence of complicated pneumoconiosis, without also evaluating the doctors' narrative statements explaining why the large opacities seen on the x-rays either were, or were not, indicative of complicated pneumoconiosis. Claimant, in turn, contends that the administrative law judge relied on flawed x-ray readings, merely counted the number of positive and negative x-ray readings, and mechanically relied on the most recent readings.

Contrary to claimant's main contentions, review of the administrative law judge's Decision and Order reflects that he did not merely count heads or mechanically credit the most recent readings when he weighed the x-ray evidence. The administrative law judge specifically considered the physicians' radiological credentials, and did not rely solely on the most recent readings of record. Decision and Order at 5-6; Claimant's Exhibits 1-9, 12, 13; Employer's Exhibits 1, 3, 5-14, 16-18; Director's Exhibits 42-46, 50-52, 58, 59; *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16

[4] Since the miner's last coal mine employment took place in the State of West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 2; s*ee Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

(4th Cir. 1993); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Nevertheless, we hold that the administrative law judge erred in his analysis of the x-ray readings because he did not consider all relevant evidence concerning the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Specifically, review of the Decision and Order indicates that the administrative law judge considered the conflicting readings, virtually all of which revealed the presence of large opacities, noted the number of readings which were classified as positive or negative for complicated pneumoconiosis, considered the qualifications of each reader, and found that "the x-ray evidence neither precludes nor establishes the presence of either complicated or simple pneumoconiosis." Decision and Order at 5-6; Claimant's Exhibits 1-9, 12, 13; Employer's Exhibits 1, 3, 5-14, 16-18; Director's Exhibits 42-46, 50-52, 58, 59. The Decision and Order does not reflect, however, whether the administrative law judge considered the doctors' accompanying narrative statements explaining their respective diagnoses, or addressed how those statements may have affected the credibility of each interpretation before he found that the readings were in equipoise and thus did not establish the existence of complicated pneumoconiosis. We must therefore vacate the administrative law judge's findings pursuant to Section 718.304, and remand the case for him to consider all of the relevant evidence regarding the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *Lester,* 993 F.2d at 1145-46, 17 BLR at 2-117-18.

We reject however, claimant's additional contention that the administrative law judge erred by crediting the x-ray interpretations of physicians who relied on a medical definition of complicated pneumoconiosis, which requires a finding of a background of simple pneumoconiosis prior to diagnosing complicated pneumoconiosis, rather than the ILO-U/C International Classification of Radiographs of Pneumoconioses definition embodied in the regulations. The administrative law judge may, when exercising his discretion as fact-finder, consider whether this distinction affects the credibility of a physician's diagnosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). We similarly reject claimant's argument that the administrative law judge erred by failing to credit Dr. Patel's diagnosis of complicated pneumoconiosis on the March 31, 1999 x-ray, in light of this physician's failure to diagnose this condition on the June 5, 2001 film, as the Decision and Order indicates that although the administrative law judge noted Dr. Patel's differing interpretations of these two films, he neither credited not rejected them. Decision and Order at 6; Claimant's Exhibit 9; Director's Exhibit 50. On remand, the administrative law judge may reasonably consider such inconsistencies in weighing the evidence of record. Decision and Order at 6; Claimant's Exhibit 9; Director's Exhibit 50; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988) *aff'd* 865 F.2d 916 (7th Cir. 1989); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984).

Claimant also contends that the administrative law judge erred in his weighing of the

medical reports of record relevant to Section 718.304 based on his erroneous consideration of the x-ray evidence. Specifically, claimant contends that the administrative law judge erred by rejecting the medical reports of Drs. Rasmussen, Durham, and Gaziano diagnosing complicated pneumoconiosis, based on his finding that the diagnoses were based primarily on x-ray interpretations of complicated pneumoconiosis, when the administrative law judge found that the x-ray evidence neither established nor precluded a finding of complicated pneumoconiosis. Claimant further contends that the administrative law judge erroneously rejected the diagnoses of complicated pneumoconiosis of Drs. Rasmussen and Durham based on their opinions regarding the issue of disability, which is not a requirement to establish invocation of the presumption at Section 718.304.

The Decision and Order indicates that the administrative law judge accorded little weight to Dr. Gaziano's opinion diagnosing complicated pneumoconiosis since he found that it was "cursory" and neither well reasoned nor well documented. Decision and Order at 16; Director's Exhibit 50. With respect to Dr. Rasmussen's diagnosis of complicated pneumoconiosis, the administrative law judge found this opinion less persuasive as it was based "primarily" on claimant's work history and on Dr. Patel's questionable x-ray reading, and Dr. Rasmussen stated that claimant had only a minimal pulmonary impairment. Decision and Order at 16; Director's Exhibit 50. Dr. Durham's finding of complicated pneumoconiosis was also found unpersuasive, despite his status as claimant's treating physician, because the administrative law judge found that he relied primarily upon radiological evidence, and because his disability analysis was unreasoned. Decision and Order at 17; Director's Exhibits 51, 52.

Although it is within the administrative law judge's discretion to reject a medical report that he or she finds unreasoned or undocumented, the administrative law judge may not reject a doctor's opinion merely because it is based partly on an x-ray reading that is outweighed by the other interpretations of record, but must consider each report as a whole without selectively analyzing the supporting evidence. *Church v. Eastern Associated Coal Co.*, 21 BLR 1-51, 154 (1997); *see Trumbo*, 17 BLR at 1-89 n.4; *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984). Because we have vacated the administrative law judge's weighing of the x-ray evidence relevant to Section 718.304, and the record indicates that Drs. Rasmussen and Durham relied upon the results of their examinations, claimant's medical and work histories, and objective test results in addition to x-ray readings in reaching their diagnoses,[5] we must also vacate the administrative law judge's findings regarding the medical reports of record. Director's Exhibits 50-52.

---

5 Contrary to claimant's contentions, the administrative law judge did not reject Dr. Gaziano's opinion due to his reliance on positive x-ray readings, and was not required to credit Dr. Durham's opinion due to his status as a treating physician. *Consolidation Coal Co v. Held*, 314 F.3d 184, 187-88, 22 BLR 2-564, 2-571 (2002).

Thus, on remand the administrative law judge must reconsider the medical reports of record, and weigh them together with all the remaining relevant evidence of record prior to determining if claimant has established the presence of complicated pneumoconiosis and invocation of the Section 411(c)(3) presumption. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003). Claimant notes correctly that he is not required to establish the existence of a totally disabling respiratory or pulmonary impairment in order to invoke the irrebuttable presumption under Section 718.304 by evidence of complicated pneumoconiosis. However, we reject claimant's suggestion that on remand, medical opinions and objective tests detecting no disabling impairment are completely irrelevant to whether he has established invocation of the irrebuttable presumption under Section 718.304.[6]

Because we have affirmed the administrative law judge's finding that the evidence of record did not establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b), we need not address the administrative law judge's finding that claimant failed to establish the presence of simple pneumoconiosis pursuant to Section 718.202(a), as a finding of entitlement based on total disability due to simple pneumoconiosis is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

6 The Fourth Circuit court has explained that because Section 921(c)(3) provides an irrebuttable presumption only if "a chronic dust disease of the lung" is established, the totality of the evidence must be considered. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18 (holding that "[t]o make such a determination, the OWCP must necessarily look at all of the relevant evidence presented," and observing that "if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that the miner is entitled to benefits.")(citation omitted). The Fourth Circuit court has also instructed that other evidence may show that x-ray opacities "are not what they seem to be. . . ." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge