BRB No. 01-0454 BLA

IRA E. HAGERMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	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 Granting Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Modification (00-BLA-0495) of Administrative Law Judge Linda S. Chapman awarding benefits on a claim[1] 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).[2] This case, which was adjudicated pursuant to 20

[1] Claimant, Ira E. Hagerman, the miner, filed his claim for benefits on December 29, 1981. Director's Exhibit 1.

[2] 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

C.F.R. Part 718 (2000), is before the Board for the third time. The procedural history of this case is set forth in the Board's prior decision. *Hagerman v. Consolidation Coal Co.*, BRB No. 97-0784 BLA, *slip op*. at 1-2 n.1 (Mar. 20, 1998) (unpub.); Director's Exhibit 133 at 1-2 n.1. In that decision, the Board affirmed the determination of Administrative Law Judge Samuel J. Smith that because claimant had failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000), his petition for modification must be denied pursuant to 20 C.F.R. §725.310 (2000), and accordingly affirmed the administrative law judge's Decision and Order denying both claimant's request for modification and the denial of benefits.[3] Subsequently, claimant filed another petition for modification with supporting evidence on June 11, 1998 and July 20, 1998, which was denied by the district director on February 10, 2000. Director's Exhibits 134, 138, 150. Claimant requested a formal hearing which Administrative Law Judge Linda S. Chapman (administrative law judge) conducted on June 20, 2000. Pursuant to claimant's request for modification, the administrative law judge credited claimant with thirty-eight years of qualifying coal mine employment and found, after considering the new x-ray evidence as a whole, that claimant established the existence of complicated pneumoconiosis, and thus established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 30 U.S.C.

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on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot the argument made by the parties regarding the impact of the challenged regulations.

[3] In addition, the Board affirmed Judge Smith's findings that the parties stipulated to the existence of simple pneumoconiosis, that claimant did not allege that there was a mistake in a determination of fact in the previous administrative law judge's decision, only that there had been a change in conditions since the previous denial, and that claimant failed to establish total disability under 20 C.F.R. §718.204(c)(1)-(3) (2000) as these determinations were unchallenged on appeal. *See Hagerman*, *slip op*. at 2 n.2.

§921(c)(3), as implemented by 20 C.F.R. §718.304(a)-(c). This finding makes it unnecessary to determine whether the evidence established total disability and causation.[4] Therefore, the administrative law judge found that claimant established total disability, the element of entitlement which was previously adjudicated against him, and had, thus, established a change in conditions since the prior denial. Adjudicating the claim on the merits pursuant to Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis, total disability due to pneumoconiosis and, in light of claimant's thirty-eight years of coal mine employment, that his pneumoconiosis arose out of coal mine employment. Accordingly, the administrative law judge awarded benefits commencing May 8, 1998, the date on which claimant was first diagnosed with complicated pneumoconiosis.

On appeal, employer argues that the administrative law judge erred in finding that the

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[4] 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 or suffered 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 [emphasis in original], implementing 30 U.S.C. §921(c)(3); *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B. Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, BLR (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

evidence established the existence of complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. In response, claimant urges affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[5]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge irrationally rejected the x-ray interpretations of Drs. Wheeler, Scott, and Kim, finding no evidence of complicated pneumoconiosis, despite their demonstrated radiological expertise, because these physicians did not diagnose the existence of simple pneumoconiosis. Employer asserts that because Dr. Alexander was the only doctor to read claimant's x-rays as showing evidence of complicated pneumoconiosis, it was unreasonable for the administrative law judge to credit his interpretations over "the interpretations finding no large opacity [which] are corroborated by twenty-one readings by eight highly-qualified readers." Brief in Support of Employer's Petition for Review at 11 [emphasis omitted].

In determining whether the existence of complicated pneumoconiosis has been established, the administrative law judge must first determine whether the relevant evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b) and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

It is well established that a preponderance of the evidence is evidence which is of

[5] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Section 718.203(b) (2000) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 5, 19.

greater weight, or evidence which is more credible or convincing than the evidence which is offered in opposition to it, not necessarily evidence which is numerically superior. *See Allen v. Union Carbide Corp.*, 8 BLR 1-393, 1-395 (1985). In short, determining the preponderance of the evidence requires a qualitative, rather than a quantitative judgment. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *accord Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in addressing the issue of complicated pneumoconiosis held that:

> Evidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict. Yet, "a single piece of relevant evidence,"... can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs conflicting evidence in the record. ... Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid.

Eastern Associated Coal Corp. v. Director, OWCP [Scarbro], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).

In this case, the administrative law judge properly examined all of the interpretations of the three newly submitted x-ray films dated May 8, 1998, February 28, 2000, and April 24, 2000. The administrative law judge acknowledged the dual radiological qualifications of Drs. Wheeler, Scott, and Kim, but discounted these physicians' opinions that there was no evidence of complicated pneumoconiosis because they had consistently found no evidence of simple pneumoconiosis, a finding that the administrative law judge determined was antithetical to the overwhelming weight of both the previously submitted and the newly submitted x-ray evidence of record, the prior determination of Judge Smith that the parties had stipulated to the existence of pneumoconiosis, and the Board's affirmance of that determination. This was rational. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); *see also Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993)(physician's medical opinion regarding etiology of miner's total respiratory disability is deprived of probative value where underlying premise of medical opinion, *i.e.*, that there is insufficient evidence to establish coal workers' pneumoconiosis, runs contrary to established fact that miner did suffer from pneumoconiosis); Decision and Order at 16. Further, contrary to employer's argument, the

administrative law judge, within a proper exercise of her discretion, accorded dispositive weight to the x-ray interpretations of Dr. Alexander, who opined that the x-ray films dated May 8, 1998 and February 28, 2000[6] were sufficient to establish the presence of simple and complicated pneumoconiosis, because the opinion was consistent with the determination that simple pneumoconiosis was established, and was rendered by a physician with superior radiological expertise. *See Lester, supra*; *Melnick, supra*; *see also Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 16-17. Additionally, the administrative law judge properly found that the readings of complicated pneumoconiosis provided by Dr. Alexander, a dually qualified reader, outweighed the reading of Dr. Castle, a B-reader, who found the existence of simple coal workers' pneumoconiosis, but not complicated pneumoconiosis. *Id*. Thus, since the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers and reasonably determined which readings were more credible, it was not irrational for the administrative law judge to accord probative weight to the readings of complicated pneumoconiosis by Dr. Alexander, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Allen*, *supra*, and we affirm the administrative law judge's determination that the preponderance of the credible, newly submitted x-ray evidence established the existence of complicated pneumoconiosis under Section 718.304(a) (2000). *See Betty B Coal Company v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).[7]

Employer next asserts that the administrative law judge mechanically rejected the opinions of Drs. Wheeler, Scott, and Kim concerning the CT scan dated June 10, 1998 on the basis that these physicians did not diagnose the existence of simple pneumoconiosis. Employer further argues likewise that the administrative law judge impermissibly found that the sole opinion of Dr. Alexander was outweighed by the multiple highly-qualified

[6] Consistent with the administrative law judge's determination, a review of the record reveals that Dr. Alexander did not read the x-ray film dated April 24, 2000. Decision and Order at 17 n.9.

[7] A review of the record reveals that the record contains no biopsy evidence. *See* 20 C.F.R. §718.304(b).

radiologists and pulmonologists, who found that the CT scan evidence does not establish the existence of complicated pneumoconiosis. The administrative law judge, within a permissible exercise of her discretion, however, found the probative value of the opinions of Drs. Wheeler and Scott undermined because these physicians opined that the nodules present in claimant's upper lung zones represented evidence of tuberculosis, contrary to the evidence of record demonstrating that claimant had neither contracted nor been exposed to tuberculosis. *See Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Furthermore, the administrative law judge rationally discounted their opinions, in addition to that of Dr. Kim, because they did not diagnose the existence of simple pneumoconiosis, a finding that was at loggerheads with the "overwhelming evidence to the contrary." *See Bobick, supra*; *Trujillo, supra*; Decision and Order at 17. Moreover, contrary to employer's argument, the administrative law judge was not required to rely on the "multiple" radiologists and pulmonologists since the administrative law judge properly considered the multiple medical opinions and assessed "the qualifications of the experts, the ... reasoning [of their opinions], their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudices." *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997) (regarding unduly repetitious and cumulative evidence, the court held "...while four similar opinions ... may be more probative than two, it does not follow that four are twice as probative as two."). Accordingly, we reject employer's argument that the administrative law judge erred in not crediting the findings of Drs. Wheeler, Scott, and Kim, over the findings of Dr. Alexander's on the CT scan evidence.

Employer further contends that it was error for the administrative law judge to reject the opinions of Drs. Castle, Fino, Hippensteel, and Dahhan, because each physician had explained his opinion as to why the abnormalities found on x-ray and CT scan were not consistent with complicated pneumoconiosis. Employer argues that the administrative law judge erroneously weighed the medical opinion evidence by requiring Dr. Castle to cite to medical authority in support of his opinion while not requiring Dr. Alexander to provide such support. Contrary to employer's argument, however, the administrative law judge did not compel Dr. Castle to cite to medical authority, but rather, found that Dr. Castle failed to cite medical authority which would support his opinion or to otherwise explain his opinion that the location of the areas with abnormalities was not a location where large opacities occur. This was reasonable. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 17. We, therefore, reject employer's contention.

Employer finally argues that, in discrediting of the opinions of Drs. Hippensteel and Dahhan based upon their discussion of claimant's pulmonary status, the administrative law judge substituted her opinion for that of the physicians. Specifically, employer asserts that the administrative law judge improperly rejected the opinions of Drs. Hippensteel and

Dahhan because they relied on the absence of a pulmonary function impairment in claimant, when that was only one of the factors they had relied on in concluding that claimant did not have complicated pneumoconiosis.

The administrative law judge found that Dr. Hippensteel's opinion[8] was entitled to less weight because, instead of actually reviewing the new x-ray films and/or CT scans themselves, he merely reviewed other experts' interpretations of those tests, and therefore, based his disagreement with Dr. Alexander's finding of complicated pneumoconiosis on the opinions of those physicians who disagreed with Dr. Alexander, but whose opinions had been found to be unreliable. This was rational. *See 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); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Further, the administrative law judge noted that Dr. Hippensteel had opined that because complicated pneumoconiosis must result in a progression of impairment and claimant's pulmonary function remained normal, claimant could not have had complicated pneumoconiosis. The administrative law judge found, however, that Dr. Hippensteel's opinion was contrary to the standards set forth in the statute and regulations which do not require a showing of functional impairment in order to be entitled to the irrebuttable presumption of totally disabling pneumoconiosis premised on a showing of complicated pneumoconiosis. 20 C.F.R. §718.304. This was proper. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, BLR (4th Cir. 1999); *Underwood*, 105 F.3d at 951, 21 BLR at 2-32 (expert opinion antithetical to Black Lung Act is not probative), *citing Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993); *see also Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); Decision and Order at 17-18. Similarly, the administrative law judge rationally discredited Dr. Dahhan's opinion for the same reasons. *Id.* Consequently, the administrative law judge reasonably found that Dr. Alexander's opinion, that the x-rays and CT scan evidence establish the existence of complicated pneumoconiosis, category A opacity, was more persuasive, and therefore, entitled to dispositive weight. Accordingly, because the administrative law judge's determination that Dr. Alexander's opinion is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 718.304, is rational, it is affirmed. *See Lane*, *supra*; *Zbosnik*, *supra*; *Fagg*, *supra*; *Calfee*, *supra*.

[8] In his report dated May 30, 2000, Dr. Hippensteel reviewed medical records and opined that he had considered Dr. Alexander's opinion that complicated pneumoconiosis is present, but that "there was no progression of impairment as would be expected if complicated pneumoconiosis had developed, but in fact, [claimant's] function has remained normal." Employer's Exhibit 5.

Accordingly, the Decision and Order Granting Modification of the administrative law judge and awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge