BRB No. 02-0382 BLA

JAMES H. PERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DEL RIO, INCORPORATED	)	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 Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole & Anderson, PSC), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Granting Benefits (00-BLA-1066) of Administrative Law Judge John C. Holmes 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).[1] The administrative law judge found that claimant was employed as a coal miner for seventeen years, most recently with the employer until 1996.

[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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The administrative law judge further found that claimant, while working at the mine on September 4, 1996, suffered an injury to his back in a rock fall which caused him to have to stop working. Considering the medical evidence of record, the administrative law judge concluded that the x-ray evidence, with the ample support of biopsy evidence, established the existence of complicated pneumoconiosis. Hence, concluding that the existence of complicated pneumoconiosis was established, the administrative law judge found claimant entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304. *See* 30 U.S.C. §921(c)(3). The administrative law judge also found, in light of claimant's seventeen year history of coal mine employment, that he was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b).[2] Benefits were, accordingly, awarded. The administrative law judge further found that claimant was entitled to benefits beginning May 1, 1998, the month in which he was first diagnosed with complicated pneumoconiosis.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis and erred in his determination of the onset date. Claimant responds, urging affirmance of the award of benefits and affirmance of the onset date. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Section 718.304 provides an irrebuttable presumption that the miner is

[2] The administrative law judge's findings regarding the length of coal mine employment and at 20 C.F.R. §718.203(b) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabled due to pneumoconiosis if the 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) . . . ; 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 paragraph (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(a)-(c).

20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *see Director, OWCP v. Eastern Coal Corp. [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 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). The administrative law judge must, however, weigh together the evidence at subsections (a), (b) and (c) before determining whether invocation of the irrebuttable presumption has been established. *Gray*, *supra*; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Employer first contends that the administrative law judge erred in several respects: in relying on a minority of x-ray reports to find the existence of complicated pneumoconiosis; in failing to fully and accurately assess the radiological qualifications of the x-ray readers when he weighed the x-ray evidence; in finding that Dr. Wiot was the only physician to offer a negative x-ray interpretation when there were numerous x-rays and CT scans which did not indicate the existence of simple or complicated pneumoconiosis, including evidence from claimant's 1996 hospitalization for his rock fall injury which showed that claimant had a clear left lung; in finding that evidence, which merely showed the progression of the effect that claimant's chest injury had on his right lung and showed the scarring which subsequently developed on his x-rays after his 1996 injury was, in fact, evidence of complicated pneumoconiosis; and in mischaracterizing the report of Dr. Sargent as supportive of complicated pneumoconiosis, when Dr. Sargent diagnosed neither simple nor complicated pneumoconiosis by x-ray.

In finding that the x-ray evidence established the existence of pneumoconiosis, the administrative law judge noted that three physicians found large opacities on the x-rays: Dr.

Westerfield found a Category A opacity and described the condition as a "classic" example of complicated pneumoconiosis; a Board-certified physician (whose name is illegible) also found a Category A opacity on x-ray; and Dr. Sargent found an opacity greater than four centimeters. The administrative law judge further noted that Drs. Baron, Westerfield, Hudson and Broudy all concurred that the x-rays showed complicated pneumoconiosis. Considering the contrary evidence, the administrative law judge accorded little weight to Dr. Wiot's negative x-ray findings because Dr. Wiot consistently interpreted x-rays as negative, despite the fact that every other physician of record found the existence of at least simple, if not complicated pneumoconiosis. Further, while acknowledging that Dr. Wiot was a B-reader, the administrative law judge nonetheless noted that several of the physicians who found the existence of pneumoconiosis on x-ray were also B-readers and at least one was Board-certified. Thus, the administrative law judge concluded that because the finding of complicated pneumoconiosis was supported by several qualified physicians and the biopsy evidence, Dr. Wiot's negative x-ray findings were entitled to less weight, and the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis.

We agree with employer however, that the administrative law judge failed to sufficiently discuss the evidence and his reasons for crediting it pursuant to the requirement of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984). As employer contends, the administrative law judge failed to consider the fact that in addition to being a B-reader, Dr. Wiot was also a Board-certified radiologist as well as a professor of radiology. Director's Exhibit 29; *see* 20 C.F.R. §718.202(a)(1); *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick, supra*. Moreover, in this same vein, as employer contends, the administrative law judge should reconsider the qualifications of Dr. Westerfield, who employer asserts is not a radiologist, in comparison to the qualifications of the other physicians in determining the weight accorded to his x-ray report. *Id*.[3] Likewise, as employer contends, while the administrative law judge noted that several qualified physicians found the existence of simple and complicated pneumoconiosis, he failed to address the x-ray and CT scan readings which made no finding of simple or complicated pneumoconiosis. Director's Exhibits 25, 27; Employer's Exhibit 1; *see* 30 U.S.C. §923(b); *Congleton, supra*; *see also Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Moreover, as employer contends, although the administrative law judge treated Dr. Sargent's x-ray finding of a greater than four centimeter opacity as equivalent to a finding of complicated pneumoconiosis, Dr. Sargent never stated that the ill-defined right upper lobe

[3] Dr. Westerfield's reports indicate that he is a certified B-reader in addition to being Board-certified in internal and pulmonary medicine. Director's Exhibit 28.

opacity of greater than four centimeters he found was complicated pneumoconiosis, but instead indicated: it was necessary to rule out "neoplasm;" to compare the x-ray with old films; to have additional studies; and to "correlate clinically." Director's Exhibit 17. Thus, we agree with employer that this case must be remanded for the administrative law judge to reconsider all of the x-ray evidence and to provide an adequate discussion of his reasons for crediting and discrediting evidence. *See Congleton*, *supra*; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Employer next contends that the administrative law judge erred in finding that the biopsy evidence of record supported a finding of complicated pneumoconiosis by discounting the opinions of Drs. Powell, Naeye, and Jarboe, who found the biopsy inconsistent with complicated pneumoconiosis because the disease process had developed too rapidly. Employer contends that the administrative law judge had no reason to question the validity of these doctors' opinions, in light of the fact that the evidence from Dr. Wiot and hospital reports from claimant's 1996 injury, which resulted in a pneumothorax and embolism, showed no evidence of complicated or simple pneumoconiosis in 1996. Employer further contends that the fact that the claimant's chest x-ray obtained during 1996 hospitalization was normal, that x-ray evidence consistently showed that claimant had a clear left lung inconsistent with a finding of simple or complicated pneumoconiosis, and that the administrative law judge failed to consider that the scarring on x-rays demonstrated a progression in the effects of claimant's injury and the development of the embolism in his right lung. Employer further contends that the administrative law judge, impermissibly acted as a medical expert when he rejected Dr. Naeye's opinion that complicated pneumoconiosis would have resulted in damaged blood vessels and claimant's blood vessels appeared undamaged since the definition of complicated pneumoconiosis in the Act makes no reference to the appearance of blood vessels.

The administrative law judge found that the biopsy evidence provided ample support for a finding of complicated pneumoconiosis based on the opinions of Drs. Baron, Roberts, Ferguson, and Hudson, who believed that the biopsy showed complicated pneumoconiosis as the biopsy slide contained at least three separate nodules which measured up to one and one-half centimeters. The administrative law judge discounted the opinions of Drs. Powell, Naeye, and Jarboe that biopsy evidence was inconsistent with complicated pneumoconiosis because the disease process had been too rapid since there was no x-ray evidence to prove either the existence or nonexistence of pneumoconiosis before claimant's rock fall injury and it was, therefore, impossible to determine when the lesion seen after the fall had begun to develop. The administrative law judge rejected employer's assumption that because physicians would have examined claimant's chest immediately following his rock fall injury, the lack of a finding of pneumoconiosis from that incident implied that it did not exist at that time. The administrative law judge found that apart from employer's assumption, there was no evidence that physicians examined the area where the lesion presently exists.

We agree with employer, however, that the administrative law judge's reasoning for rejecting these opinions is not adequately presented. As employer asserts, Dr. Powell, based on a review of the record, opined that pneumoconiosis was not present and that he did not believe that claimant had complicated pneumoconiosis despite his x-ray classification of 1/1 q, P, T-A, Director's Exhibit 27, dep. at 5, 8. Dr. Broudy while noting that the large opacity on x-ray in the right upper zone was suggestive of coal workers' pneumoconiosis, the injury claimant suffered from complicates interpretation of the chest film and may also complicate interpretation of the biopsy. Director's Exhibit 25. Employer further notes that Dr. Broudy explained that "[i]f the large opacity was not present at the time [of the accident] then it would imply that the opacity resulted from the injury, rather than coal workers' pneumoconiosis." *Id*. Dr. Naeye, ruled out complicated pneumoconiosis, explaining that the lesion did not resemble a lesion of complicated pneumoconiosis because complicated pneumoconiosis results in the obliteration of blood vessels and because the lesion did not fit the description of complicated pneumoconiosis since it did not arise against the background of anthracotic macuals and micronodules which indicate that simple coal workers' pneumoconiosis long preceded the appearance of the lesion. *Id*. Dr. Jarboe also opined that claimant did not have complicated pneumoconiosis because the pathology evidence did not support such a finding, Employer's Exhibit 1, dep. at 10-12, and the fact that x-ray evidence at the time of the miner's injury reflected normal findings, "the mass seen in this man's apex was not conglomerate pneumoconiosis but represented the residuals of a scar from a pulmonary infarction." *Id* at 13. Moreover, we note that the administrative law judge's findings themselves appear inconsistent since he found that the first evidence of the existence of complicated pneumoconiosis was Dr. Westerfield's May 21, 1998 x-ray, while also finding that a physician found the existence of complicated pneumoconiosis at the time claimant was hospitalized for his injury in 1996. Decision and Order at 2, 10. Thus we agree with employer that the evidence requires further consideration and more specific analysis than the administrative law judge has provided. *See Congleton*, *supra*; *Tackett*, *supra*. Further, contrary to the administrative law judge's finding, evidence as to whether claimant's blood vessels appeared damaged may be relevant insofar as it was used by the physicians to support their findings as to whether claimant had complicated pneumoconiosis and could have been considered by the administrative law judge in assessing the credibility of the physicians' opinions as to the existence of complicated pneumoconiosis or pneumoconiosis as defined by the Act. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984). Likewise, the administrative law judge must reconsider the opinion of Dr. Roberts who did not, as employer contends, diagnose the existence of complicated pneumoconiosis, but only found multiple fibrohistiostiocytic nodules associated with anthracosilicotic material consistent with coal workers' pneumoconiosis. Director's Exhibits 13, 14; *see Tackett*, *supra*. Accordingly, the administrative law judge's finding of complicated pneumoconiosis is vacated and the case is remanded for reconsideration of the evidence regarding the existence of complicated pneumoconiosis pursuant to the standards set forth by the APA.

Further, as employer argues, the case must be remanded for reconsideration of the onset date in light of the conflicting evidence regarding the existence of complicated pneumoconiosis which the administrative law judge failed to resolve. *See* 20 C.F.R. §725.503; *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *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). Should the administrative law judge find that the existence of complicated pneumoconiosis was not established, he must then consider whether claimant established entitlement pursuant to 20 C.F.R. §718.202 and 718.204, *see Trent, supra*; *Gee, supra*; *Perry, supra*, and whether the onset date of disability due to pneumoconiosis has been established. 20 C.F.R. §725.503; *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Carney v. Director, OWCP*, 11 BLR 1-32 (1987).

Accordingly, the administrative law judge Decision and Order - Granting Benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge