BRB No. 03-0398 BLA

HERMAN W. WAGNER, DECEASED, BY FRED WAGNER, EXECUTOR	)	
Claimant-Petitioner	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/23/2004
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order on Modification Request-Denying Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Katy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification Request-Denying Benefits (2002-BLA-261) of Administrative Law Judge Robert J. Lesnick 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] This case involved employer's request for modification on a duplicate claim.[2] The administrative law judge considered whether a basis for modification exists regarding the prior Decision and Order by Administrative Law Judge Gerald M. Tierney, dated April 16, 2001, awarding benefits on the basis that the evidence establishes that claimant suffers from complicated pneumoconiosis. *See* 20 C.F.R. §718.304. Considering all of the relevant evidence, including the evidence submitted by employer on modification, the administrative law judge concluded that there was mistake in fact in the prior decision because the evidence failed to establish complicated pneumoconiosis. Thus, the administrative law judge found that employer had established a basis for modification of the claim pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found that the evidence does not establish that claimant suffered from a totally disabling respiratory impairment. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his determination that claimant failed to establish the existence of complicated pneumoconiosis. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, an is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 20

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[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] Claimant's first claim was denied on March 19, 1980. Director's Exhibit 165. The instant claim was filed on May 23, 1985. Director's Exhibit 1. The administrative law judge accurately summarizes the procedural history of this case. *See* Decision and Order at 2 – 3.

[3] We affirm, as unchallenged on appeal, the findings that claimant suffered from simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), but failed to establish total disability pursuant to 20 C.F.R. §718.204. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Claimant initially contends that the administrative law judge erred by failing to discuss the x-ray evidence in its entirety. Claimant's Petition for Review at 16 – 17. The administrative law judge indicated that he was incorporating the medical evidence which had previously been set forth in prior decisions by various administrative law judges and the Board. Decision and Order at 5. The administrative law judge additionally noted that this evidence was summarized in employer's pre-hearing report. Decision and Order at 5; Director's Exhibit 199. Claimant's assertion that the administrative law judge failed to consider x-ray rereadings by Dr. Navani is without merit as Dr. Navani's re-readings are contained in the pre-hearing report. Moreover, claimant has failed to indicate how Dr. Navani's re-readings would support claimant's entitlement to the irrebuttable presumption at Section 718.304.[4] Therefore, we affirm the administrative law judge's finding that the preponderance of x-ray evidence by dually-qualified B-readers and Board-certified radiologists is negative for complicated pneumoconiosis. *Millburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Worhach v. Director, OWCP*, 17 BLR 1- 105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Claimant next contends that the administrative law judge erred in failing to accord determinative weight to the opinion of the autopsy prosector, Dr. Wedemeyer who diagnosed complicated pneumoconiosis.[5] Claimant's Petition for Review at 16 – 21. Claimant contends that Dr. Wedemeyer, as the only physician who saw the lungs as a whole, is entitled to deference. The administrative law judge first found that autopsy evidence is the most reliable evidence regarding the existence and extent of pneumoconiosis. Decision and Order at 16. The administrative law judge next found that Dr. Wedemeyer believed himself to be in a unique position to judge claimant's lungs

[4] None of Dr. Navani's re-readings indicate a large opacity, type A, B or C. Director's Exhibits 136 - 137, 146 – 161.

[5] Dr. Wedemeyer conducted the autopsy. His findings included coal workers' pneumoconiosis and coronary atherosclerosis. Director's Exhibits 226, 227. In his deposition on August 21, 2001, Dr. Wedemeyer stated that he had reported black nodules two to three centimeters in diameter in his autopsy report. The physician further opined that based upon his gross examination of the miner's heart, cor pulmonale was present. Dr. Wedemeyer testified that one week prior to his deposition, he retrieved the miner's lungs, reexamined the heart and lungs, and took photographs of them. Based upon various nodules that the physician identified as ranging in size from 1.5 to 3 centimeters, Dr. Wedemeyer opined that claimant suffered from progressive massive fibrosis.

based upon his gross examination and his ability to see the lungs *in situ*. *Id*. However, the administrative law judge found that Drs. Bush and Oesterling credibly articulated why they were substantially in a similar position as Dr. Wedemeyer.[6] Furthermore, the administrative law judge rationally found that Drs. Bush, Oesterling, and Crouch, all of whom reviewed claimant's medical and occupational histories, had a more complete clinical picture than Dr. Wedemeyer. The administrative law judge permissibly found the opinions by Drs. Bush, Oesterling and Crouch, that claimant did not suffer from complicated pneumoconiosis, to be more consistent with the preponderance of the x-ray and CT scan evidence, the preponderance of the nonqualifying arterial blood gas and pulmonary function tests, and the credible opinions of the majority of the Board-certified pulmonary specialists.

We reject, therefore, claimant's contentions that the administrative law judge erred in according greater weight to the opinions of the reviewing pathologists. The administrative law judge permissibly declined to credit Dr. Wedemeyer's opinions solely on the basis of his status as autopsy prosector, and reasonably found that the opinions rendered by Drs. Bush, Oesterling, and Crouch were supported by the clinical and objective evidence of record. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. Because the administrative law judge's finding is supported by substantial

[6] Dr. Bush disagreed with the diagnosis of progressive massive fibrosis because of the absence of clinical findings of significant respiratory impairment, the absence of consistent radiographic findings of significant occupational pneumoconiosis and the absence of pathologic findings consistent with the diagnosis. Dr. Bush also examined the lungs and stated that his own findings revealed fibrotic nodules measuring no more than .8 centimeters. Dr. Bush also challenged the finding of cor pulmonale due to the absence of right ventricular hypertrophy. Director's Exhibit 244. At his deposition on July 24, 2002, Dr. Bush suggested that Dr. Wedemeyer had possibly considered several nodules to be as one, thus achieving a size of two to three centimeters. Dr. Bush conceded that it may not be possible to get an entire nodule on a slide, but that one would expect a large nodule to go beyond the edges of a slide. Dr. Bush also rejected Dr. Wedemeyer's suggestion that he had a distinct advantage as the autopsy prosector because if the preserved tissue was representative of the diseased tissue, then both physicians are in an equal position as to making a diagnosis.

Dr. Oesterling opined that claimant had moderate micronodular coalworkers' pneumoconiosis with some areas of confluence based upon his review of the autopsy slides. Director's Exhibit 232. At his deposition on July 18, 2002, Dr. Oesterling stated that the largest lesion he saw was less than seven millimeters. In rejecting Dr. Wedemeyer's assertion that he was in the best position to make a diagnosis, Dr. Oesterling stated that gross examination is not the way to make a diagnosis of progressive massive fibrosis. Employer's Exhibit 3.

evidence, we affirm his determination that the autopsy evidence fails to establish complicated pneumoconiosis. Moreover, based upon the administrative law judge's permissible finding that autopsy evidence is the most reliable evidence of pneumoconiosis, and his finding that the autopsy evidence in this case does not establish complicated pneumoconiosis, we affirm the administrative law judge's finding that employer has established a basis for modification and the prior finding of complicated pneumoconiosis, based upon Dr. Jaworski's medical opinion, constituted a mistake in a determination of fact.

Lastly, claimant contends that the administrative law judge erred by failing to make an equivalency determination. This contention is without merit as the administrative law judge did not find the irrebuttable presumption of complicated pneumoconiosis invoked by any method pursuant to Section 718.304. The administrative law judge considered all of the relevant evidence and found that the preponderance of the credible evidence under each prong fails to establish a basis for invocation. Contrary to claimant's assertion, because the administrative law judge did not credit any evidence which supports the invocation of the presumption at Section 718.304, he was not required to make an equivalency determination. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Consequently, we reject claimant's contention and affirm his findings pursuant to Section 718.304.

Accordingly, the administrative law judge's Decision and Order on Modification Request-Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge