BRB No. 07-0866 BLA

F.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L & M MACHINERY COMPANY	)	DATE ISSUED: 07/31/2008
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 - Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2005-BLA-05141) of Administrative Law Judge Ralph A. Romano (the administrative law judge) with respect to a subsequent 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). The miner's subsequent claim was filed on July 9, 2002.[1] The administrative law judge credited claimant with twenty years of coal mine employment, based on a stipulation by the parties, and determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further determined that this evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2), and that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits, commencing as of July 1, 2002.

On appeal, employer argues that the administrative law judge erred in finding the x-ray and medical opinion evidence sufficient to establish the existence of simple pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Employer also contends that the administrative law judge erred in finding that claimant proved that he has complicated pneumoconiosis and is, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304. In addition, employer contends that the administrative law judge erred in finding the medical evidence sufficient to establish disability causation pursuant to Section 718.204(c). In response, claimant urges affirmance of the award of benefits, as supported by substantial evidence.

[1] Claimant filed his initial claim for benefits with the Social Security Administration (SSA) on May 18, 1973, which was denied by SSA on September 4, 1973 and June 8, 1979. Director's Exhibit 1. The claim was then transferred to the Department of Labor, which denied the claim on August 24, 1981, based on the finding that claimant failed to establish any of the requisite elements of entitlement. *Id*. Claimant filed a second claim for benefits on May 9, 1995, which was denied by the district director because claimant failed to establish any of the elements of entitlement. Director's Exhibit 2. This claim was dismissed by Administrative Law Judge Henry B. Lasky on March 5, 1997, because claimant did not appear at the hearing or respond to an Order to Show Cause. *Id*. Claimant took no further action until filing his current application.

The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief in this claim unless requested to do so by the Board.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Initially, we address the administrative law judge's finding that the evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Weighing the x-ray evidence, the administrative law judge found that Dr. Patel read the August 6, 2002 x-ray as showing a Category A large opacity or neoplasm; whereas the remainder of the readers described the changes on x-ray as either a neoplasm or cancer. Decision and Order at 6; Director's Exhibits 16, 37, 38; Claimant's Exhibit 1; Employer's Exhibits 1, 2. The administrative law judge then considered the biopsy evidence and credited the opinion of Dr. Anselmo, that the biopsy evidence supported a diagnosis of complicated pneumoconiosis, over the contrary opinion of Dr. Naeye, that the lung tissue slides that he reviewed did not show the rapid growth at the margins that is characteristic of complicated pneumoconiosis. *Id.*; Director's Exhibit 36; Employer's Exhibit 3. The administrative law judge stated that Dr. Anselmo, who viewed the entirety of the right upper lobe of claimant's lungs when conducting the pathological examination, reported that the size of the lesion was well beyond one centimeter in diameter. Decision and Order at 6. The administrative law judge further observed that, in contrast, Dr. Naeye stated that he could not determine how large the nodules would appear if viewed on an x-ray because the tissue he examined was so small. *Id.* Consequently, the administrative law judge found that the existence of complicated pneumoconiosis was established based on Dr. Patel's x-ray interpretation, in conjunction with Dr. Anselmo's findings on biopsy. *Id.*

[2] The parties do not challenge the administrative law judge's decision to credit the miner with twenty years of coal mine employment, or his findings that simple pneumoconiosis was established by biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), that the medical evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

Employer contends that the administrative law judge erred in failing to consider all of the x-ray evidence pursuant to Section 718.304(a), particularly the x-ray readings of Drs. Binns, Gaziano and Wiot. Employer further contends that the administrative law judge erred in his consideration of the biopsy evidence at Section 718.304(b), because Dr. Anselmo's opinion is insufficient to satisfy the equivalency requirement as set forth in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Employer also maintains that the administrative law judge erred in failing to adequately explain how he resolved the conflicts between the findings of Drs. Anselmo and Naeye regarding the biopsy evidence. Regarding Section 718.304(c), employer asserts that that administrative law judge erred in failing to consider the medical opinions of Drs. Zaldivar and Spagnolo pursuant to Section 718.304(c), as both physicians addressed whether the evidence establishes the presence of complicated pneumoconiosis. There is merit, in part, to employer's contentions.

As employer alleges, the administrative law judge has not adequately addressed the relevant medical evidence in finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304. When weighing the biopsy evidence at Section 718.304(b), the administrative law judge stated that Dr. Naeye opined that he could not determine how large the changes in the lung tissue slides would appear on x-ray because the samples were so small. Decision and Order at 6; Employer's Exhibit 3. The administrative law judge did not address, however, Dr. Naeye's deposition testimony that the changes he saw on the slides would "probably not" appear as greater than one centimeter on x-ray. Employer's Exhibit 8 at 11. Moreover, although the administrative law judge found that Dr. Anselmo reported a lesion that was "well beyond 1 centimeter in diameter" upon gross examination, Decision and Order at 6, under *Blankenship*, the administrative law judge was also required to determine whether this lesion would yield findings of greater than one centimeter when viewed on x-ray. *Blankenship*, 177 F.3d at 243-244, 22 BLR at 2-561-562; *see also Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000) (the mere mention of a two centimeter mass on autopsy does not satisfy the equivalency determination standard requiring that such a mass would have to be equivalent to the finding of a one centimeter opacity on x-ray). In addition, irrespective of whether the equivalency requirement has been satisfied, the administrative law judge did not resolve the conflict between Dr. Anselmo's finding that the lesion that he observed on gross examination represented complicated pneumoconiosis and Dr. Naeye's determination that the lesion is not complicated pneumoconiosis, as evidence of rapid growth was absent. Director's Exhibit 36; Employer's Exhibit 3.

We also find merit in employer's contention that the administrative law judge erred in neglecting to address, at Section 718.304(c), the medical opinions in which Drs. Zaldivar and Spagnolo stated that complicated pneumoconiosis is not present based on their review of the x-ray evidence, the biopsy evidence and the objective studies of

record. *Tackett v. Director, OWCP*, 7 BLR 1-703, 706 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648, 1-651 (1985); Employer's Exhibits 5, 6, 7, 9.

Because the administrative law judge did not adequately address the opinions of Drs. Naeye, Anselmo, Zaldivar and Spagnolo, we vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis and remand the case for the administrative law judge to reconsider these opinions in their entirety. 20 C.F.R. §718.304(b), (c); *see Tackett*, 7 BLR at 1-706; *Arnold*, 7 BLR at 1-651; *see also Hunley v. Director, OWCP*, 8 BLR 1-323, 1-326 (1985).

However, contrary to employer's contention, the administrative law judge did not err in neglecting to set forth each individual x-ray reading when weighing the evidence relevant to Section 718.304(a). While he did not describe each x-ray reading, the administrative law judge nonetheless accurately determined that only Dr. Patel opined that the opacity seen on x-ray was a Category A large opacity and that the "[o]ther physicians only considered the possibility of neoplasm or cancer for the same changes." Decision and Order at 6. The administrative law judge rationally concluded that because the biopsy evidence ruled out the presence of neoplasm or cancer, Dr. Patel's x-ray reading supported a finding of complicated pneumoconiosis under Section 718.304(a). *See generally Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Nevertheless, in light of the need to remand this case for the administrative law judge to reconsider the biopsy evidence and the medical opinion evidence, the administrative law judge must reconsider the x-ray readings when determining whether claimant has established the existence of complicated pneumoconiosis by a preponderance of the medical evidence, as a whole, pursuant to Section 718.304(a)-(c). 20 C.F.R. §718.304; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

If on remand, the administrative law judge finds the medical evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, then claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge must then consider whether the complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203. If the administrative law judge determines that claimant has satisfied the terms of Section 718.203, then claimant is entitled to benefits. However, in the event that the administrative law judge finds that the evidence does not trigger invocation of the irrebuttable presumption, claimant must establish each of the elements of entitlement set forth under Part 718. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Consequently, in order to promote judicial efficiency, we will address employer's allegations of error regarding the administrative law judge's findings at Sections 718.202(a)(1), (a)(4), and 718.204(c).

Pursuant to Section 718.202(a)(1), the administrative law judge found the x-ray evidence sufficient to establish the existence of pneumoconiosis. The administrative law judge noted that the x-ray evidence submitted with the prior claims was in equipoise. Decision and Order at 4. The administrative law judge then set forth the newly submitted x-ray evidence, which consisted of seven readings of three films dated August 6, 2002, November 12, 2003 and May 27, 2004. *Id*. Drs. Patel and Binns, both of whom are B readers and Board-certified radiologists, read the August 6, 2002 x-ray as positive for simple pneumoconiosis, Director's Exhibits 16, 37; whereas, Dr. Wiot, also dually qualified, read this film as negative for pneumoconiosis, Employer's Exhibit 1. Dr. Patel also read the May 27, 2004 film as positive for simple pneumoconiosis; however, Dr. Wiot read this film as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 1. Dr. Wiot also read the November 12, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Weighing this evidence, the administrative law judge found that three x-rays were interpreted as positive for simple pneumoconiosis and three x-rays were interpreted as negative for pneumoconiosis with all of the readings provided by highly qualified physicians. Decision and Order at 4. The administrative law judge concluded, however, that in light of the biopsy evidence, which showed the existence of simple pneumoconiosis, the recent positive readings of Drs. Patel and Binns outweighed the negative readings by Dr. Wiot. *Id*. Consequently, the administrative law judge found that claimant established the existence of simple pneumoconiosis pursuant to Section 718.202(a)(1). *Id*.

On appeal, employer contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis, arguing that the administrative law judge erred in weighing the biopsy evidence with the x-ray evidence under Section 718.202(a)(1). In addition, employer asserts that the administrative law judge erred in finding the recent x-ray interpretations in equipoise, maintaining that the administrative law judge failed to consider the additional qualifications of Dr. Wiot, as a professor of radiology, in weighing the x-ray evidence. Employer also contends that the administrative law judge erred in not according greater weight to Dr. Wiot's negative readings because he had the advantage of being able to read a series of x-rays, rather than an individual film.

These allegations of error are without merit. Although an administrative law judge may accord greater weight to the reading of a physician who has demonstrated other radiological expertise, *e.g.*, he is a professor of radiology, *see Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993), the administrative law judge was not *required* to accord greater weight to Dr. Wiot's x-ray readings based on this qualification or his history of involvement in creating standards for B readers. *Id.* Similarly, without medical evidence demonstrating that viewing a series of films improves the accuracy of individual readings, the administrative law judge could not accord greater weight to Dr. Wiot's readings on that basis. We affirm, therefore, the administrative law judge's

finding that the positive and negative readings by highly qualified physicians were in equipoise. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Moreover, while the administrative law judge's reliance on the biopsy evidence in weighing the x-ray evidence is inconsistent with the regulations, which provide for consideration of x-rays, biopsy or autopsy evidence, and medical opinions under the corresponding subsections of Section 718.202(a), any irregularity in the administrative law judge's consideration of the biopsy evidence with the x-ray evidence does not constitute error requiring remand. In this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge must ultimately weigh all of the evidence, like and unlike, in determining whether a preponderance of the evidence is sufficient to establish the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Thus, the administrative law judge's consideration of the x-ray evidence and the biopsy evidence together was in accordance with applicable law. Consequently, contrary to employer's contention, we need not remand the case to the administrative law judge for reconsideration of the x-ray evidence of record. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Regarding the administrative law judge's findings at Section 718.202(a)(4), employer argues that the administrative law judge erred in according less weight to the medical opinions of Drs. Zaldivar and Spagnolo because their respective findings that claimant's coal workers' pneumoconiosis was minimal conflicts with Dr. Anselmo's biopsy results diagnosing complicated pneumoconiosis. In addition, employer alleges that the administrative law judge erred in according less weight to Dr. Naeye's opinion because Dr. Naeye diagnosed only a minimal degree of simple pneumoconiosis. Lastly, employer contends that the administrative law judge erred in crediting the opinions of Drs. Mullins and Rasmussen, arguing that the administrative law judge erred in finding that these opinions are supported by the x-ray and biopsy evidence of record. Employer maintains that the administrative law judge erred in determining the weight to be accorded to the medical opinions of record based on the degree of simple pneumoconiosis diagnosed by the physicians, rather than the presence or absence of pneumoconiosis.

We hold that error, if any, in the administrative law judge's weighing of the medical opinion evidence under Section 718.202(a)(4) is harmless, as all of the physicians, including Drs. Zaldivar and Spagnolo, diagnosed the presence of simple coal workers' pneumoconiosis. *See Larioni*, 6 BLR 1-1276. Indeed, employer concedes that both Drs. Zaldivar and Spagnolo diagnosed the existence of simple coal workers' pneumoconiosis based on the pathology evidence. Employer's Brief at 23. Their opinions are ultimately supportive, therefore, of the administrative law judge's finding

that claimant established simple coal workers' pneumoconiosis pursuant to Section 718.202(a)(4). Consequently, because all of the physicians diagnosed the presence of simple coal workers' pneumoconiosis, substantial evidence supports the administrative law judge's conclusion that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Moreover, because the administrative law judge has considered all of the evidence, like and unlike, in his weighing of the medical opinion evidence, as well as the other evidence of record, substantial evidence supports the administrative law judge's finding that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a). 20 C.F.R. §718.202(a); *Compton*, 211 F.3d 203, 22 BLR 2-162.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), employer contends that the administrative law judge erred in according determinative weight to the opinions in which Drs. Mullins and Rasmussen stated that pneumoconiosis is a substantially contributing cause of claimant's total disability and in discrediting the contrary opinions of Drs. Zaldivar and Spagnolo. This contention has merit. The administrative law judge found that the medical opinions of Drs. Zaldivar and Spagnolo were entitled to no weight on the cause of claimant's total disability because both physicians concluded that claimant does not have coal workers' pneumoconiosis, which is contrary to the administrative law judge's finding. Decision and Order at 12. A review of the medical opinions, as well as the deposition testimony of Drs. Zaldivar and Spagnolo, indicates that while both physicians initially opined that claimant does not have coal workers' pneumoconiosis, *see* Employer's Exhibits 5, 9, they stated at their depositions that their opinions had changed based upon a review of the biopsy evidence. Employer's Exhibits 6 at 20, 7 at 17-18. Because the administrative law judge did not accurately characterize the opinions of Drs. Zaldivar and Spagnolo, we vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(c), and remand the case for the administrative law judge to reconsider the relevant evidence in its entirety to determine whether claimant has proven that pneumoconiosis is a substantially contributing cause of his total disability.[4] *See Tackett*, 7 BLR at 1-706; *Arnold*, 7 BLR at 1-651; *see also Hunley*, 8 BLR at 1-326.

[4] The terms of 20 C.F.R. §718.204(c)(1) provide:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in Sec. 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

We also vacate the administrative law judge's finding that the opinions of Drs. Mullins and Rasmussen are sufficient to establish disability causation, as the administrative law judge merely concluded that these opinions were "more persuasive" without providing the rationale for his findings. Decision and Order at 12. Consequently, on remand, the administrative law judge must provide a detailed explanation of his weighing of the opinions of Drs. Mullins and Rasmussen, as well as his weighing of all of the evidence of record relevant to Section 718.204(c).[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

[5] In light of the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d), which has been affirmed as unchallenged on appeal, the administrative law judge must weigh both the prior evidence and the newly submitted evidence when determining whether claimant has established this element of entitlement on the merits. *See White v. New White Coal Co.*, 23 BLR 1-1 (2004).

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

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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BETTY JEAN HALL
Administrative Appeals Judge