BRB No. 07-0856 BLA

J.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/16/2008
	)	
ELKHORN EAGLE MINING COMPANY	)	
	)	
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 Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the 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:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-6514) of Administrative Law Judge Daniel F. Solomon 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). Claimant filed this claim on January 9, 2002. Director's Exhibit 2. In his January 31, 2006, and June 22, 2007 decisions, the administrative law judge found that claimant's claim is timely since employer failed to rebut the presumption of timeliness pursuant to 20 C.F.R. §725.308.[1] The administrative law judge also found that employer did not establish good cause for the admission of all evidence pursuant to 20 C.F.R. §725.456(b)(1), and thus admitted only that evidence designated by claimant and employer on their evidence summary forms, in accordance with 20 C.F.R. §725.414. The administrative law judge credited claimant with sixteen years of coal mine employment, as stipulated by the parties.[2] The administrative law judge further found that claimant established the existence of simple pneumoconiosis by biopsy pursuant to 20 C.F.R. §718.202(a)(2).[3] Additionally the administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed pursuant to Section 725.308, and in finding that employer did not establish good cause to submit excess evidence pursuant to Section 725.456(b)(1). Employer further asserts that the administrative law judge erred in determining that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, in support of the administrative law judge's finding pursuant to Section 725.308.

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. 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).

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[1] All references to "Decision and Order" are to the administrative law judge's June 22, 2007 Decision and Order in this case, unless otherwise noted.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[3] We affirm the administrative law judge's finding that the existence of simple pneumoconiosis was established by biopsy pursuant to 20 C.F.R. §718.202(a)(2), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

Employer first argues that the administrative law judge erred by finding that it failed to rebut the presumption of timeliness pursuant to Section 725.308. Employer contends that claimant's testimony that Dr. Sundarum told claimant in the 1990's that he was totally disabled due to pneumoconiosis establishes that claimant received a medical determination of total disability due to pneumoconiosis more than three years before claimant filed his claim. Claimant and the Director both respond that the administrative law judge properly found that claimant's testimony is insufficient to rebut the timeliness presumption pursuant to Section 725.308.

Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(c). In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [claimant]" more than three years prior to the filing of his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

To rebut the presumption of timeliness in this case, employer relies solely on claimant's testimony at the September 20, 2005 hearing before the administrative law judge. At the hearing, claimant was asked by employer's counsel, "Now who was the first doctor to tell you that you had black lung and that you were disabled because of it?" September 20, 2005 Transcript at 23. Claimant responded, "Dr. [Sundarum], I guess." *Id.* Employer's counsel asked, "And when was that?" *Id.* Claimant answered, "It was in the '90's but I don't know exactly what the date was on it." *Id.* Employer's counsel continued, "Was it early '90's?" *Id.* Claimant replied, "I'd be afraid to say. I wouldn't want to say if it wasn't, but it was in the '90's. I do know that." *Id*. at 24. Employer's counsel sought clarification by asking claimant, "But sometime in the '90's Dr. [Sundarum] told you that you had black lung and you were disabled from it[?]" *Id*. at 25. Claimant responded, "Yes." *Id.*

Claimant's vague testimony, without more, that he was told by Dr. Sundarum that he was totally disabled due to black lung does not meet employer's burden of rebutting the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to the miner more than three years prior to filing the present claim. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-296; *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006)(*en banc*), *recon. denied en banc*, BRB No. 05-0722 BLA (Oct. 26, 2006)(Order)(unpub.); 2007 Decision and Order at 4; 2006 Decision and Order at 3; September 20, 2005 Transcript at 23-25. Moreover, as the Director

argues, claimant's nonspecific testimony that Dr. Sundarum told claimant sometime in the 1990's that he was totally disabled due to black lung is insufficient because it does not establish that Dr. Sundarum told claimant that he was totally disabled due to pneumoconiosis before January 9, 1999. *Id.* Therefore, on the specific facts of this case, we affirm the administrative law judge's finding that employer did not rebut the timeliness presumption pursuant to Section 725.308.[4]

Employer next argues that the administrative law judge erred in failing to find good cause pursuant to Section 725.456(b)(1) for the admission of evidence submitted by employer in excess of the evidentiary limitations at Section 725.414. A showing of "good cause" is required to exceed the evidentiary limitations. 20 C.F.R. §725.456(b)(1). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Employer asserts that, contrary to the administrative law judge's finding, its argument that good cause existed because of the need to ensure an accurate diagnosis of claimant's pulmonary condition, was more than a mere claim that additional evidence would be relevant. Moreover, employer asserts that the administrative law judge improperly excluded medical evidence from a dually-qualified radiologist who provided a diagnosis other than pneumoconiosis as a cause of claimant's pulmonary condition.

The administrative law judge found that employer did not establish good cause for the admission of excess evidence, because its assertion that this evidence was needed to accurately diagnose claimant's condition was merely a claim of relevance, and that relevancy was insufficient to establish good cause. Decision and Order at 3. Moreover, the administrative law judge found that employer failed to explain why its designated evidence was insufficient to distinguish sarcoidosis or tuberculosis from complicated pneumoconiosis, or indicate how the additional evidence would be of assistance. *Id.*

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[4] Because we affirm the administrative law judge's determination on these grounds, we need not address his reliance on the Board's holding in *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-43 (1993), that a medical determination of total disability due to pneumoconiosis must be communicated to the miner in writing to trigger the statute of limitations. The Board is aware, however, of the decision in which the United States Court of Appeals for the Fourth Circuit held that neither the Act nor the implementing regulation requires that the medical determination be in writing to trigger the statute of limitations. *See Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006).

We reject employer's allegation of error. Employer has not shown that the administrative law judge abused his discretion in finding that employer's argument, that excess evidence was needed to accurately diagnose claimant's pulmonary condition, was essentially a claim of relevance, which is insufficient to establish good cause. 20 C.F.R. §725.456(b)(1); *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 n.18, 23 BLR 2-430, 2-460-61 n.18 (4th Cir. 2007); Decision and Order at 3. Nor has employer shown that the administrative law judge abused his discretion in finding that employer failed to explain why its designated evidence allowed under Section 725.414 was insufficient to distinguish sarcoidosis or tuberculosis from complicated pneumoconiosis, or indicate how the additional, excess evidence would be of assistance.[5] *Id.* Thus, we affirm the administrative law judge's finding that employer did not establish good cause for the admission of excess evidence pursuant to Section 725.456(b)(1).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter and would be classified in category A, B, or C; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.[6]

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[5] Employer's designated evidence attributed claimant's pulmonary condition to tuberculosis or sarcoidosis, and not complicated pneumoconiosis. Dr. Fino reported in 2002 and 2004 that the rapid progression of opacities seen on claimant's x-rays was caused by sarcoidosis, and not complicated pneumoconiosis. Employer's Exhibits 1, 4. Additionally, Dr. Wheeler's readings of the June 20, 2002 x-ray and CT scan, as well as his readings of the February 4 and May 20, 2004 CT scans, indicated that claimant probably has tuberculosis and not complicated pneumoconiosis. Director's Exhibits 15, 17 at 10; Employer's Exhibit 3.

[6] 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...from a chronic dust disease of the lung which:
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>> (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

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the evidence in each category 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. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 398-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc).*

Employer argues that the administrative law judge erred in finding that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 because the well-reasoned opinions of its three highly qualified physicians, Drs. Caffrey, Fino, and Wheeler, establish that claimant does not have complicated pneumoconiosis. Employer's Brief at 8-9. However, the administrative law judge considered the qualifications of employer's experts, noting that Dr. Caffrey was a Board-certified pathologist, that Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease, and was a B reader, and that Dr. Wheeler was a Board-certified radiologist and B reader. *See Eastover Mining Co. v. Williams,* 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); Decision and Order at 6, 7, 9, 10, 14, 15, 16. Moreover, the administrative law judge provided reasons for discounting the opinions of Drs. Caffrey, Fino, and Wheeler, and for according greater weight to the x-ray and CT scan readings and the medical opinions that diagnosed complicated pneumoconiosis, Decision and Order at 14-19, but employer alleges no specific error in regard to the administrative law judge's weighing of the medical evidence as to complicated pneumoconiosis.[7] *See Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 2-

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> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
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> (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.

[7] At Section 718.304(a), the administrative law judge gave less weight to the negative x-ray readings by Drs. Fino and Wheeler because they were contrary to the

48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-121 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's finding that claimant established entitlement to the irrebuttable presumption pursuant to Section 718.304.

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administrative law judge's finding of pneumoconiosis, noting that the biopsy evidence was more probative as to the composition of the masses shown on the x-rays read by Dr. Wheeler. Decision and Order at 15; Director's Exhibits 15, 17; Employer's Exhibits 1, 4. At Section 718.304(b), the administrative law judge accorded little weight to Dr. Caffrey's opinion of complicated pneumoconiosis because it was equivocal and internally inconsistent, in that Dr. Caffrey diagnosed complicated coal workers' pneumoconiosis, but also stated that a diagnosis of complicated coal workers' pneumoconiosis could not be based upon the biopsy slides he reviewed. Decision and Order at 16. However, the administrative law judge accepted Dr. Caffrey's finding of anthracotic pigment with fibrosis shown by biopsy. *Id.* At Section 718.304(c), the administrative law judge gave less weight to Dr. Wheeler's CT scan readings because they attributed claimant's lung masses to tuberculosis, when there is no evidence of claimant having tuberculosis, because Dr. Wheeler's finding of no small nodules was contradicted by other readings finding small nodules, and because Dr. Wheeler's reasoning that claimant could not have complicated pneumoconiosis based on his young age was based on generalities. Decision and Order at 17 n.10; Employer's Exhibit 3. The administrative law judge accorded less weight to Dr. Fino's opinion at Section 718.304(c) because it was inconsistent with the biopsy evidence, and because his reasoning that the rapid progression of the masses did not indicate a coal mine dust related condition was inconsistent with the most recent 2004 CT scan, showing that the masses had stabilized. Decision and Order at 18; Employer's Exhibits 1, 4. In weighing together all of the evidence at Section 718.304, the administrative law judge found that the preponderance of the evidence established the existence of complicated coal workers' pneumoconiosis, and that the biopsy evidence establishing the existence of simple pneumoconiosis diminished the credibility of the opinions of Drs. Fino and Wheeler, who diagnosed neither simple nor complicated pneumoconiosis. Decision and Order at 19.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge