BRB No. 97-1247 BLA

ELMER W. ANDERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, 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 on Remand of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

H. John Taylor, Rand, West Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (92-BLA-0709) of Administrative Law Judge Thomas Schneider awarding benefits 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). This case is before the Board for the second time.[1] The last time this matter was on appeal, the Board vacated Administrative Law

[1]Claimant filed his initial claim with the Social Security Administration (SSA) on April 20, 1973. Director's Exhibit 33. After several denials by the SSA, the claim was forwarded to the Department of Labor (DOL) for review, and subsequently denied. Director's Exhibits 21, 22, 33. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed another claim with the DOL on May 21, 1984. Director's Exhibit 1. Administrative Law Judge Robert J. Shea subsequently issued a Decision and Order denying benefits on October 23, 1987. Director's Exhibit 35. Claimant appealed Judge Shea's denial, and on August 23, 1989, the Board dismissed claimant's appeal as

Judge George P. Morin's denial of benefits and remanded the case for consideration of the medical evidence at 20 C.F.R. §718.304. *Anderson v. Bethenergy Mines, Inc.*, BRB No. 94-0156 BLA (Oct. 31, 1995)(unpub.). On remand, the case was reassigned to Administrative Law Judge Thomas Schneider (the administrative law judge) who found the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Consequently, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Claimant responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to 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,

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abandoned. *Anderson v. Bethlehem Mines Corp.*, BRB No. 88-2739 BLA (Aug. 23, 1989)(unpublished Order). On April 23, 1990, claimant filed his most recent claim with the DOL, which he indicated was a request for modification. Director's Exhibit 58. In considering claimant's request for modification, Administrative Law Judge George P. Morin credited claimant with twenty-nine years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. Judge Morin also found the evidence insufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204, and thus, he denied benefits. In response to claimant's appeal, the Board affirmed these unchallenged findings by Judge Morin. However, the Board acknowledged claimant's argument that Judge Morin erred in failing to consider the evidence relevant to complicated pneumoconiosis, and remanded the case for consideration of the evidence at 20 C.F.R. §718.304. *Anderson v. Bethenergy Mines, Inc.*, BRB No. 94-0156 BLA (Oct. 31, 1995)(unpub.).

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).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Specifically, employer asserts that the administrative law judge erred by relying on the opinions of Drs. Lee, Klapproth and Zaldivar to establish complicated pneumoconiosis. The administrative law judge stated that "[a]lthough [Dr. Lee] did not explicitly diagnose complicated pneumoconiosis, his description indicated a disease condition which had progressed to advanced stages and [he] used the term 'severe' when discussing claimant's pneumoconiosis."[2] Decision and Order on Remand at 6. Further, the administrative law judge stated that Dr. Klapproth "noted extensive fibrosis and a confluent nodularity approximately 2 x 1 x 0.8 cm. in diameter." *Id*. The administrative law judge properly accorded greater weight to the opinion of Dr. Zaldivar, that claimant suffers from complicated pneumoconiosis, Director's Exhibit 71, than to the contrary opinions of Drs. Broudy, Bush, Caffrey, Fino, Hansbarger, Hutchins, Kleinerman, Naeye and Wiot, Employer's Exhibits 1-10, because Dr. Zaldivar's opinion is supported by the opinions of Drs. Klapproth and Lee,[3] Director's Exhibits 43, 47, 57, 60, 71, 78; *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject employer's assertion that the administrative law judge erred by relying on the opinions of Drs. Lee, Klapproth and Zaldivar to establish complicated pneumoconiosis.

Next, employer asserts that the administrative law judge erred by discounting the opinions of Drs. Broudy, Bush, Caffrey, Fino, Hansbarger, Hutchins, Kleinerman, Naeye and Wiot because they are reviewing physicians. The administrative law judge observed that "Drs. Naeye, Hansbarger, Kleinerman, Hutchins, Broudy, Caffrey, Fino and Wiot either reviewed six slides of claimant's tissue samples or reviewed the reviewing physicians' reports of their findings."[4] Decision and Order on Remand at 6. In addition, the

[2]The administrative law judge also stated that Dr. Lee "noted 'extensive' fibrosis, which indicates more advanced pneumoconiosis." Decision and Order on Remand at 6.

[3]The administrative law judge stated that Dr. Zaldivar "concluded that claimant had complicated pneumoconiosis based on the findings of both Drs. Lee and Klapproth." Decision and Order on Remand at 6. The administrative law judge also stated that "[g]iven the descriptions used by [Drs. Lee and Klapproth] and the size of the nodularity noted by Dr. Klapproth, Dr. Zaldivar's conclusion is rational and supported by the best evidence of record." *Id*.

[4]The administrative law judge stated that "[n]one of these physicians actually examined claimant." Decision and Order on Remand at 6.

administrative law judge stated that "Drs. Naeye, Kleinerman and Hutchins commented on the difficulty of accurately assessing the severity of claimant's pneumoconiosis because of the small sample of claimant's tissue involved on those six slides."[5] *Id*. An administrative law judge, within a proper exercise of his discretion as trier of fact, may discount the medical opinion of a physician who never conducted a physical examination of the miner. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *see generally Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *cf. Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Therefore, we reject employer's assertion that the administrative law judge erred by discounting the opinions of Drs. Broudy, Bush, Caffrey, Fino, Hansbarger, Hutchins, Kleinerman, Naeye and Wiot because they are reviewing physicians.

[5]In contrast, the administrative law judge observed that "Dr. Lee, who performed the thoracotomy and biopsy, clearly had the best perspective of claimant's lung condition." Decision and Order on Remand at 6. The administrative law judge also observed that Dr. Klapproth "performed both gross and microscopic examination of his tissue samples." *Id*. Further, the administrative law judge stated that Dr. Zaldivar "was associated with Dr. Lee in treating claimant at the time of his March 1987 thoracotomy." *Id*.

Further, employer asserts that the administrative law judge erred by discounting the opinions of Drs. Hansbarger and Naeye because they relied on criteria that are not contained in the record. The administrative law judge observed that "Dr. Hansbarger stated that he disagreed with Dr. Zaldivar because a diagnosis of complicated pneumoconiosis required a lesion of greater than 2 cm." Decision and Order on Remand at 6. The administrative law judge also observed that Dr. Hansbarger "based this requirement on a 1979 article that was not admitted into evidence." *Id*. However, the administrative law judge found that "neither this requirement, nor any reference to this article is found in the pertinent regulations." *Id*. Furthermore, the administrative law judge found that "Dr. Naeye's conclusion is faulty for the same reason."[6] *Id*. An administrative law judge may discount a medical opinion that is not well documented or reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Hence, we reject employer's assertion that the administrative law judge erred by discounting the opinions of Drs. Hansbarger and Naeye because they relied on criteria that are not contained in the record.

Finally, we reject employer's assertion that the administrative law judge erred by failing to weigh the biopsy evidence together with the x-ray evidence. The administrative law judge properly found "the surgery and biopsy evidence more credible than chest x-rays[7] because it is the actual tissue of claimant's lung...." *Id.* at 7; *see generally Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Thus, substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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[6]The administrative law judge observed that Dr. Naeye based his finding that claimant suffers from simple pneumoconiosis "on the fact that the largest of the lesions measured 10 mm, or 1 cm, thereby qualifying as anthracotic macro nodules, but not enough to qualify as progressive massive fibrosis, or complicated pneumoconiosis, because the lesions have to be at least 2 cm. in diameter for such a diagnosis." Decision and Order on Remand at 4. Additionally, the administrative law judge observed that "[t]his standard is the one enunciated in a 1979 article published in 'Archives of Pathology and Laboratory Medicine.'" *Id*.

[7]The administrative law judge correctly stated that "the radiographic evidence does not establish the existence of complicated pneumoconiosis and claimant has made no contrary contention." Decision and Order on Remand at 5.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge