BRB No. 97-1309 BLA-A

BRUCE SEXTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SWITCH ENERGY CORPORATION[1]	)	
	)	
and	)	DATE ISSUED: _____
	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
	)	
Employer/Carrier-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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

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

PER CURIAM:

[1]On October 28, 1997, the Board issued an Order dismissing Magnum Coal Corporation as a party to the appeal and reforming the caption to reflect the administrative law judge's dismissal of Magnum. The administrative law judge dismissed Magnum Coal Company and its carrier Old Republic Insurance Company because he found that claimant last worked as a miner for at least one year for Switch Energy Corporation.

Employer appeals the Decision and Order Awarding Benefits (96-BLA-773) of Administrative Law Judge Donald W. Mosser on a duplicate 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 relevant procedural history of this case is as follows: Claimant filed his first claim for benefits on April 1 , 1987. Director's Exhibit 59. That claim was denied by the district director on September 24, 1987. Director's Exhibit 59 at 220. The claim was administratively closed and deemed abandoned on August 22, 1989. Director's Exhibit 59 at 292. Claimant filed the instant claim on July 7, 1994. The district director initially denied the claim. Director's Exhibit 30. Upon reconsideration, the district director awarded benefits on June 24, 1995 with an eligibility date of June 24, 1995. Director's Exhibit 37. The case was transferred to the Office of Administrative Law Judges for a formal hearing on March 5, 1996. Director's Exhibit 60.

The administrative law judge found that Switch Energy Corporation is the responsible operator. *See supra* at n. 1. He credited claimant with ten years and eight months of coal mine employment. Pursuant to the governing holding in *Sharondale Corp. v. Ross,* 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge considered the evidence generated subsequent to the last claim. He found that claimant established the existence of simple pneumoconiosis at Section 718.202(a)(1) and thus established a material change in conditions. He found the evidence insufficient to establish the existence of pneumoconiosis based on the biopsy evidence pursuant to Section 718.202(a)(2). He found, pursuant to Section 718.202(a)(3), that the presumptions provided at Section 718.305 and Section 718.306 do not apply in this living miner's claim filed after March 1, 1978. 20 C.F.R. §718.202(a)(3). Finding the evidence sufficient to establish the existence of complicated pneumoconiosis at Section 718.304, the administrative law judge concluded that claimant was entitled to the irrebuttable presumption of total respiratory disability due to pneumoconiosis arising out of coal mine employment at Sections 718.304 and 718.203 and declined to further assess the evidence. Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant suffered from complicated pneumoconiosis. Employer contends that remand is appropriate in this case. Neither the claimant nor the Director, Office of Workers' Compensation Programs, has submitted a brief on appeal.

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, and is in accordance with applicable law. 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 making his findings at Section 718.202(a)(1) with respect to a material change in conditions, the administrative law judge found that the first five x-rays in the newly submitted evidence were negative for pneumoconiosis and that the more recent x-rays, beginning with the August 25, 1994 x-ray, were found positive. The administrative law judge considered the comments of the interpreters appearing on the face of the x-ray reports which tend to undermine the ILO classifications, *see* 20 C.F.R. §718.102(b), and implicitly found, *see Pulliam v. Drummond Coal Co.,* 7 BLR 1-846 (1985), the comments to be ambiguous. *See generally Wolf Creek Collieries v. Robinson,* 872 F.2d 1264 , 12 BLR 2-259 (6th Cir. 1989). The administrative law judge reasonably relied on the recency of the x-ray evidence and the qualifications of the physicians to find simple pneumoconiosis established at Section 718.202(a)(1). *See Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cooley v. Island Creek Coal Co.,* 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). We therefore affirm the administrative law judge's finding of a material change in conditions based on his finding that the existence of simple pneumoconiosis was established at Section 718.202(a)(1). 20 C.F.R. §725.309(d); *Ross, supra*.

With respect to his finding of the existence of complicated pneumoconiosis at Section 718.304, the administrative law judge relied on the opinions of Drs. Broudy, Baker, Barrett, and Wiot,[2] who interpreted x-ray evidence of complicated pneumoconiosis, over the opinion of Dr. Branscomb because Dr. Branscomb did not review the x-rays but reviewed only the x-ray reports.[3] On appeal, employer

[2]Dr. Broudy, a pulmonary specialist and B reader, examined claimant in 1987 in connection with the original claim and in 1994 in connection with the instant claim. Comparing x-ray films taken in 1987 with those taken in 1994, he stated that there is a surprising increase in interstitial opacities in the mid and upper zones, especially in the right upper zone. Dr. Broudy categorized the 1994 films as showing complicated pneumoconiosis under the ILO classification. He noted that the interstitial nodules were not present on the films taken in 1987. Furthermore, he noted that this degree of progression in seven years is quite unusual and he believed that this raised the possibility that some other disease is present, such as sarcoidosis or perhaps a recurrence of tuberculosis. Dr. Broudy would not rule out the possibility of tuberculosis or histoplasmosis as the cause of these abnormalities. He stated, however, that still the possibility exists that the radiographic changes are due to pneumoconiosis. Director's Exhibit 19.

[3]Dr. Branscomb, a pulmonary specialist, in a consultative report, reviewed all the

contends that the administrative law judge erred in his consideration of the evidence of complicated pneumoconiosis at Section 718.304. We agree.

Once the administrative law judge found a material change in conditions established at Section 718.202(a)(1), he should have considered the entirety of the medical evidence to decide if claimant is entitled to benefits. *See Ross, supra.* Also, based on the express language of the Act as set forth at 30 U.S.C. §923(b) and *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135, 11 BLR 2-1 (1987), the Board held in *Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991)(*en banc*), that Section 718.304(a)-(c) does not provide alternative means of establishing invocation of the irrevocable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge to first evaluate the evidence in each category, and then weigh together the categories at Section 718.304(a), (b) and (c) prior to invocation. In the instant case the administrative law judge failed to consider the entirety of the medical record and failed to weigh together all the evidence probative of the issue of complicated pneumoconiosis at Section 718.304(a), (b) and (c) prior to finding invocation of the irrebuttable presumption. We therefore vacate the administrative law judge's finding that the existence of complicated pneumoconiosis was established and that claimant is entitled to the irrebuttable presumption pursuant to Section 718.304. We remand the case to the administrative law judge to consider the entirety of the medical evidence, make findings on the merits, and properly weigh all relevant evidence under *Melnick* on the issue of complicated pneumoconiosis at Sections 718.202(a)(3) and 718.304.

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evidence of record, including reports of the x-rays. Dr. Branscomb opined that claimant did not have pneumoconiosis. He concluded that the x-rays in their entirety support a diagnosis of either histoplasmosis or tuberculosis. Director's Exhibits 51, Employer's Exhibit 2.

In order to avoid error on remand, we now address employer's specific arguments. Employer correctly argues that while the administrative law judge found that the biopsy evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2), he failed to consider this finding in determining that complicated pneumoconiosis was established at Section 718.304.[4] On remand, in weighing the evidence at Section 718.304 under the standard in *Melnick,* the administrative law judge should consider the impact, if any, of the pathology reports. Employer also argues that even though Drs. Barrett, Baker, Broudy, and Wiot all diagnosed changes on the x-rays consistent with complicated pneumoconiosis, all had questions as to whether or not the changes represented complicated pneumoconiosis or tuberculosis and old granulomatous disease. Employer further argues that the administrative law judge's rejection of Dr. Branscomb's report solely on the ground that he failed to review the x-rays, though he relied on an x-ray report, is an inadequate rationale for discounting Dr. Branscomb's report at Section 718.304. We agree. On remand the administrative law judge should consider the x-ray reports and relevant medical opinions in their entirety and should provide a more complete rationale in weighing Dr. Branscomb's report and deposition testimony. *See Director, OWCP v. Congleton***,** 743 F.2d 428 (6th Cir. 1984).

Contrary to employer's urging, however, the administrative law judge need not accept the undocumented theories of Drs. Branscomb and Caffrey that the miner's retirement in 1986, and his absence of further coal dust exposure, preclude a finding that pneumoconiosis has developed or progressed. *See Old Ben Coal Co. v. Scott,* No. 96-3554, 1998 WL 237432 (7th Cir., May 13, 1998); *Peabody Coal Co. v. Spese*, 117 F.3d 667, 21 BLR 2-113 (7th Cir. 1997).

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 proceedings consistent with this opinion.

SO ORDERED.

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[4]Drs. Crouch, Hutchins and Caffrey, who are pathologists, reviewed the biopsy slides. Dr. Crouch indicated that because of the limited amount of lung tissue, he could not make a diagnosis of pneumoconiosis. Director's Exhibit 20. Dr. Hutchins reviewed the histologic slides and opined that coal workers' pneumoconiosis is not demonstrated. He stated: "It should be noted, however, that only a small amount of lung tissue is demonstrated on these slides." Director's Exhibits 55. Dr. Caffrey indicated that he could not make a diagnosis of pneumoconiosis. He acknowledged the unknown etiology of the miner's pulmonary pathology and he acknowledged the miner's history of tuberculosis and histoplasmosis. Director's Exhibit 54.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge