

BRB No. 00-0820 BLA

GLEN SEALS)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
GREAT WESTERN RESOURCES)	DATE	ISSUED:
)		
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 Third Remand - Denying Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Glen Seals, Baxter, Kentucky, *pro se*.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order On Third Remand - Denying Benefits (94-BLA-092) of Administrative Law Judge Lawrence P. Donnelly 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 involves a duplicate claim filed on November 16, 1992. The lengthy procedural history of this case was discussed

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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

in the Board's most recent decision, *Seals v. Great Western Resources*, BRB No. 98-1028 BLA (April 22, 1999)(unpub.), where the Board affirmed the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c)(1)-(4)(2000), but vacated the administrative law judge's finding that claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 (2000) because he did not establish the existence of complicated pneumoconiosis. The Board held that Dr. Aycoth's x-ray reading of a large opacity, size A, constitutes a reading of complicated pneumoconiosis which, if credited, could support a finding of entitlement to the irrebuttable presumption at Section 718.304(a)(2000). Accordingly, the Board vacated the administrative law judge's finding at Section 718.304 (2000), and remanded the case for the administrative law judge to weigh Dr. Aycoth's x-ray interpretation with the other relevant evidence at Section 718.304(a)-(c)(2000). On remand, the administrative law judge found that the evidence was insufficient to establish complicated pneumoconiosis and, therefore, insufficient to establish invocation of the irrebuttable presumption at Section 718.304 (2000). Accordingly, benefits were denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, filed a brief in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which the Director and employer have responded. The Director, in a brief dated March 27, 2001, asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer, however, argues that the amended regulations do affect the outcome of the instant case, citing to Sections 718.104(c), 718.201(a)(2), (c), 718.204, 718.205(c)(5), (d), and the amended provisions set forth in Part 725. Based on these responses and our review, however, we hold that the disposition of this case is not impacted by the challenged regulations, and that, in particular, the regulations cited by employer at Sections 718.104(c), 718.204, 718.205(c)(5), (d) and the amended provisions set forth in Part 725 are not relevant to the instant case. Further, we disagree with employer's argument that the amended regulation at Section 718.201(a)(2), (c) would, if applied, have an adverse affect on employer's ability to defend this claim, since the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has already acknowledged that pneumoconiosis is a progressive disease and that the definition of pneumoconiosis under the Act encompasses chronic obstructive pulmonary diseases related to coal mine employment. *Crace v. Kentland-*

Elkhorn Coal Corp., 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987). Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

On remand, the sole issue for the administrative law judge to consider was whether Dr. Aycoth's reading of complicated pneumoconiosis of the November 25, 1992 x-ray was sufficient, when considered with the other relevant evidence, to support a finding of entitlement to the irrebuttable presumption at Section 718.304(a)(2000). See Director's Exhibit 20.² In weighing the relevant evidence the administrative law judge rationally accorded little weight to Dr. Aycoth's finding of complicated pneumoconiosis on the x-ray dated November 25, 1992 inasmuch as Dr. Aycoth interpreted a subsequent January 3, 1993 x-ray as positive for simple pneumoconiosis, but did not find any large opacities. Director's Exhibit 37; Decision and Order on Remand at 3. Additionally, the administrative law judge properly found that Dr. Aycoth's finding of complicated pneumoconiosis "is inconsistent with virtually all of the other x-ray readings," of record including "the x-rays which were administered January 7, 1993 and January 12, 1993, almost contemporaneously with the November 25, 1992 x-ray and which were interpreted as "either negative for pneumoconiosis or as positive for only simple pneumoconiosis." Decision and Order at 3; see Director's Exhibits 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 35, 36, 37. Accordingly, the administrative law judge properly found that the evidence failed to establish the presence of complicated pneumoconiosis. 20 C.F.R. §718.304. See *Crace, supra*; *Woodward, supra*; *Ferda, supra*. We therefore affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304.

² The administrative law judge's reference to the November 15, 1992 x-ray should be read as November 25, 1992. Director's Exhibit 20. Our review of the record reveals no x-ray dated November 15, 1992.

Accordingly, the Decision and Order On Third Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge