

BRB No. 02-0370 BLA

PHYLLIS I. MABE)	
(Widow of ROBERT M. MABE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-BLA-0008) of Administrative Law Judge Robert L. Hillyard awarding benefits on a survivor's 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 is before the Board for the

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

second time. In the original Decision and Order, the administrative law judge credited the miner with twenty-four years of coal mine employment based upon the parties' stipulation and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Accordingly, the administrative law judge awarded benefits. In response to employer's appeal, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.304 (2000), and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to consider the x-ray interpretations of Drs. Kim and Shipley and to provide an adequate rationale for crediting or discrediting these readings as required by the Administrative Procedure Act (APA). With regard to the weighing of medical opinions, the Board instructed the administrative law judge to resolve the conflicts posed by the evidence on remand by considering the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. In addition, the Board instructed the administrative law judge to consider whether claimant can establish entitlement to survivor's benefits by proving that the miner suffered from pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203, and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), if he determined that the evidence is insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304(a), (b) and (c). *Mabe v. Consolidation Coal Co.*, BRB No. 00-0373 BLA (Jan. 30, 2001)(unpub.). On remand, the administrative law judge found the evidence sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge again awarded benefits.

on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Claimant² responds, urging affirmance of the administrative law judge's award of benefits.³ 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, 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).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304(a).⁴ Of the eighty-two x-ray interpretations of record,⁵ eleven readings indicate the presence of complicated pneumoconiosis, Director's

²Claimant is the widow of the miner, Robert M. Mabe. Director's Exhibit 1. The miner filed a claim with the Social Security Administration on June 25, 1973. Director's Exhibit 13. After several denials by the Social Security Administration, this claim was finally denied by the Department of Labor (DOL) on February 10, 1981. *Id.* The miner filed a claim with the DOL on October 30, 1984. *Id.* On October 7, 1988, Administrative Law Judge Robert J. Shea issued a Decision and Order denying benefits. *Id.* The miner filed another claim with the DOL on February 21, 1990. *Id.* On July 10, 1992, Administrative Law Judge Lawrence Gray issued a Decision and Order awarding benefits. *Id.* The miner died on November 9, 1996. Director's Exhibits 1, 3. Claimant filed a survivor's claim on November 22, 1996. Director's Exhibit 1.

³Although claimant urges affirmance of the Decision and Order on Remand of Administrative Law Judge Robert L. Hillyard (the administrative law judge), claimant contends that the Board's reasoning with respect to the administrative law judge's prior weighing of the x-ray evidence is flawed.

⁴The administrative law judge stated that "[t]here is no discussion of biopsy or autopsy evidence of massive lesions in the lungs pursuant to [20 C.F.R.] §718.304(b) because no autopsy was taken, and a bone marrow biopsy was conducted for the purpose of diagnosing leukemia only." Decision and Order on Remand at 5.

⁵The record consists of eighty-two interpretations of twenty-one x-rays taken from 1966 to 1996. Director's Exhibits 5, 12B, 13; Claimant's Exhibit 2; Employer's Exhibits 1-5.

Exhibit 13; Claimant's Exhibit 2, while forty-eight readings are positive for simple pneumoconiosis, Director's Exhibits 5, 13; Employer's Exhibit 2, twenty-two readings are negative for simple pneumoconiosis, Director's Exhibits 5, 12B, 13; Employer's Exhibits 1, 3-5, and one x-ray is unreadable, Employer's Exhibit 2.⁶

Employer argues that the administrative law judge erred in rejecting the x-ray interpretations of Drs. Scott, Spitz, Wheeler and Wiot on the grounds that they read early x-rays as positive for pneumoconiosis and later x-rays as negative for pneumoconiosis. The administrative law judge stated that "Drs. Wiot, Wheeler, Scott, and Spitz weakened their diagnoses by reversing their earlier positive x-ray interpretations." Decision and Order on Remand at 4. The administrative law judge therefore stated, "I find that their opinions are outweighed by the opinions of Drs. Ahmed, Cappiello, Pathak, and Aycoth, who cogently and consistently diagnosed complicated pneumoconiosis since 1991." *Id.* Contrary to the administrative law judge's finding with regard to the credibility of the x-ray readings by Drs. Scott, Spitz, Wheeler and Wiot, an administrative law judge may not discredit the x-ray readings of a radiologist on the basis that the radiologist rendered contradictory interpretations of separate x-rays. *See generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Physicians render medical opinions with respect to the existence of complicated pneumoconiosis on the bases of physical examinations, x-ray evidence, objective evidence, smoking and coal mine employment histories, and reviews of medical evidence. In contrast,

⁶Dr. Sargent found that the x-ray dated January 11, 1991 demonstrates the presence of complicated pneumoconiosis. Director's Exhibit 13. Similarly, Drs. Ahmed, Cappiello and Pathak found that the x-ray dated March 15, 1991 demonstrates the presence of complicated pneumoconiosis. Director's Exhibit 13. Further, Drs. Ahmed, Aycoth and Cappiello found that the x-rays dated September 17, 1996 and September 19, 1996 demonstrate the presence of complicated pneumoconiosis. Claimant's Exhibit 2. Dr. Pathak found that the x-ray dated September 17, 1996 demonstrates the presence of complicated pneumoconiosis. *Id.* Although Dr. Pathak noted "[c]omplexed pneumoconiosis category B" in the impression section of a narrative report of the September 19, 1996 x-ray, he classified the opacities as "O" in the actual September 19, 1996 x-ray form. *Id.*

radiologists render interpretations of the presence or absence of roentgenographic manifestations of the disease solely on the basis of the x-ray film that is before them. Compare 20 C.F.R. §§718.202(a)(1) and 718.304(a) with 20 C.F.R. §§718.202(a)(4) and 718.304(c). Thus, since the administrative law judge did not provide a valid reason for weighing the conflicting x-ray evidence, we vacate the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304(a), and remand the case for reconsideration of all the relevant evidence of record. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also argues that the administrative law judge mischaracterized Dr. Kim's radiological qualifications. After noting that Dr. Kim is a B reader, the administrative law judge stated, "I find that Dr. Kim's readings of the [m]iner's September 1996 x-rays⁷ are outweighed by the readings of Drs. Ahmed, Cappiello, and Pathak, all *dually* qualified readers." Decision and Order on Remand at 4 (emphasis added). The record, however, reveals that Dr. Kim is also *dually* qualified as a B reader and a Board-certified radiologist. Employer's Exhibit 5. Thus, in light of the administrative law judge's mischaracterization of Dr. Kim's radiological qualifications, the administrative law judge must reconsider Dr. Kim's x-ray reading in his weighing of all the x-ray evidence of record. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer further argues that the administrative law judge violated the APA by failing to provide an explanation for discrediting Dr. Shipley's x-ray readings. The administrative law judge stated that "Dr. Shipley, a B reader and Board-certified radiologist, read the [m]iner's September 1996 x-rays and opined that the large masses in the [m]iner's lungs 'most likely represented cancer' and were not consistent with coal workers' pneumoconiosis." Decision and Order on Remand at 5. The administrative law judge also stated, "I find that Dr. Shipley's opinion is outweighed by the opinions of Drs. Ahmed, Cappiello, Pathak, and Aycoth." *Id.* The APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. See *Wojtowicz, supra*; see also *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). In the instant case, the administrative law judge permissibly discredited Dr. Shipley's x-ray readings because he found that they are outweighed by the numerical

⁷Dr. Kim read x-rays dated September 17, 1996 and September 19, 1996 as negative for pneumoconiosis. Employer's Exhibit 5.

superiority of the x-ray readings by the best qualified physicians, which indicate the presence of complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Thus, we reject employer's specific argument that the administrative law judge violated the APA by failing to provide an explanation for discrediting Dr. Shipley's x-ray readings. Nonetheless, since we otherwise vacate the administrative law judge's credibility determinations with respect to the x-ray evidence, the administrative law judge must reconsider Dr. Shipley's x-ray reading on remand in accordance with the APA. *See Wojtowicz, supra*.

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304(c). The record contains reports by Drs. Bhasin, Dahhan, Hatahet and Repsher, and interpretations of the September 20, 1996 CT scan by Drs. Ahmed, Aycoth, Cappiello, Pathak, Shipley and Spitz. None of the physicians's interpretations of the September 20, 1996 CT scan indicates the presence of complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibits 1, 2. With regard to the medical reports, Drs. Bhasin and Hatahet opined that the miner suffered from complicated pneumoconiosis, Claimant's Exhibits 1, 3, while Drs. Dahhan and Repsher opined that the miner did not suffer from complicated pneumoconiosis, Employer's Exhibits 6, 8, 10.

Employer argues that the administrative law judge violated the APA by failing to explain why he found that the opinions of Drs. Bhasin and Hatahet are reasoned and documented and that the opinion of Dr. Dahhan is not well reasoned and documented. The administrative law judge stated, "[i]n reviewing the evidence, I find that the opinions of Drs. Bhasin and Hatahet are well reasoned and documented and supported by the medical evidence of record." Decision and Order on Remand at 6. In contrast, the administrative law judge stated, "I give less weight to Dr. Dahhan's opinion as it is not well reasoned and supported by the medical evidence." *Id.* As previously noted, the APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz, supra*. In the instant case, the administrative law judge did not explain why he found that the opinions of Drs. Bhasin and Hatahet are well reasoned and documented and why he found that the opinion of Dr. Dahhan is not well reasoned and documented. Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304(c), and remand the case for reconsideration of the evidence. On remand, the administrative law judge must provide an explanation for his weighing of the conflicting medical opinions in accordance with the APA. *See Wojtowicz, supra*.

In addition, employer argues that the administrative law judge erred in discrediting Dr.

Dahhan's opinion because it was based on the x-ray interpretations of Drs. Scott, Spitz, Wiot and Wheeler which were outweighed by the contrary x-ray interpretations of different x-rays of Drs. Ahmed, Aycoth, Cappiello and Pathak. The administrative law judge stated, "[t]o the extent that Dr. Dahhan relied on the x-ray interpretations of Drs. Wiot, Wheeler, Scott, and Spitz in forming his opinion, I give little weight to his opinion because I found the interpretations of those doctors to be outweighed by the opinions of Drs. Ahmed, Cappiello, Pathak, and Aycoth." Decision and Order on Remand at 5. An administrative law judge must consider a medical report as a whole, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and may not discredit an opinion merely because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *cf. Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Moreover, as the Board stated in its prior Decision and Order, "[t]he administrative law judge's discrediting of Dr. Dahhan's opinion is flawed inasmuch as it is based, in part, on his erroneous rejection of the x-ray readings of Drs. Wiot, Wheeler, Scott, and Spitz." *Mabe v. Consolidation Coal Co.*, BRB No. 00-0373 BLA, slip op. at 5 (Jan. 30, 2001)(unpub.). Since the administrative law judge repeated this error on remand, we again remand the case to the administrative law judge to reconsider Dr. Dahhan's opinion in his weighing of the conflicting medical opinion evidence.

Employer also argues that the administrative law judge mischaracterized Dr. Repsher's opinion as equivocal. In a report dated January 6, 1998, Dr. Repsher opined that "[t]here is not sufficient objective evidence to justify a diagnosis of coal workers['] pneumoconiosis." Employer's Exhibit 8. However, Dr. Repsher also opined that "it is possible that [the miner] did have mild and clinically insignificant simple coal workers['] pneumoconiosis." *Id.* Dr. Repsher additionally opined that "there was no evidence of complicated coal workers['] pneumoconiosis." *Id.* The issue in this case is whether the miner suffered from complicated pneumoconiosis. Thus, since Dr. Repsher unequivocally opined that the miner did not suffer from complicated pneumoconiosis, we hold that it was irrational for the administrative law judge to discredit Dr. Repsher's opinion with respect to the issue of complicated pneumoconiosis on the basis that his opinion on the issue of simple pneumoconiosis is equivocal. *See Tackett, supra.*

Finally, if, on remand, the administrative law judge finds the evidence insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, he must consider whether claimant is entitled to benefits on her survivor's claim by proving that the miner suffered from pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203, and by proving that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge