BRB No. 08-0234 BLA

T.J.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RHONDA COAL COMPANY	)	DATE ISSUED: 11/26/2008
	)	
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd and Lloyd, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (1999-BLA-00846) of Administrative Law Judge Stuart A. Levin awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Health and Coal Mine Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case appears before the Board for the fourth time as a petition for modification. When last before the Board, the case was remanded to the administrative law judge for further findings on the issue of whether claimant established a change in conditions pursuant to 20 C.F.R. §725.310, based on a finding of the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. The Board held that the administrative law judge erred in crediting the newly submitted CT scan interpretations of Drs. Naik and Navani without considering all relevant evidence submitted previously and in conjunction with the modification request. Specifically, the administrative law judge failed to address Dr. Wheeler's review of a March 9, 1999 CT

scan, Employer's Exhibit 2, and failed to address the majority of the x-ray evidence of record, which recognized the existence of calcified granulomatous disease and/or simple pneumoconiosis, but noted that claimant did not suffer from complicated pneumoconiosis, Director's Exhibits 11-21, 37, 38, 41. Accordingly, the Board directed the administrative law judge to reconsider his determination that the opinions of Drs. Naik and Navani outweighed the contrary medical evidence under Section 718.304. The Board also specified that the administrative law judge had not provided an affirmable basis for discrediting the medical opinions of Drs. Wheeler and Scott, and that his rejection of Dr. Castle's evidence was based on a mischaracterization of the physician's conclusions and the bases for his opinion. In reevaluating the medical opinions, therefore, the administrative law judge was directed to "address the explanations of the physicians' conclusions, the documentation underlying their medical judgments and the sophistication and bases of their diagnoses." [*T.J.W.*] *v. Rhonda Coal Co.*, BRB No. 05-0150 BLA, slip op. at 6 (Oct. 13, 2005) (unpub.).

On remand, the administrative law judge found that the weight of the evidence was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, and thus, claimant had established a change in conditions pursuant to Section 725.310. The administrative law judge further found that justice was rendered by the modification of the previous denial of benefits. Accordingly, benefits were awarded.

In the present appeal, employer argues that the administrative law judge improperly analyzed the evidence in finding complicated pneumoconiosis established pursuant to Section 718.304. Specifically, employer challenges the administrative law judge's weighing of the x-ray evidence, and his determination to credit the single CT scan interpretation of Dr. Navani over all of the other evidence of record on the issue of complicated pneumoconiosis, asserting that the administrative law judge mischaracterized and selectively analyzed the evidence. Employer's Petition at 29-30, 32-37, 42-44. Claimant has not filed a response, and the Director, Office of Workers' Compensation Programs, has declined to participate in this 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 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).[1]

[1] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibit 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities greater than one centimeter in diameter classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. In determining whether claimant has established invocation at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. At Section 718.304(a), the administrative law judge determined that the weight of the x-ray evidence of record was positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. In so finding, the administrative law judge first reviewed the original conflicting x-ray evidence, consisting of twenty-nine interpretations of thirteen films taken between 1980 and 1995, of which eleven were positive for pneumoconiosis, fourteen were negative, and four provided no specific opinion. The administrative law judge permissibly gave little weight to the readings of films taken in conjunction with the miner's acute medical care on May 16, 1980, August 29, 1980, November 5, 1985 and February 21, 1995, as these interpretations were silent as to the presence or absence of pneumoconiosis. Decision and Order at 12. The administrative law judge determined that the eleven positive interpretations were provided by ten different physicians, of whom three were dually qualified Board-certified radiologists and B readers, three were Board-certified radiologists, and one was a B reader.[2] By contrast, the fourteen negative interpretations were provided by four different

[2] Employer notes that Dr. Patel, a Board-certified radiologist, failed to classify the July 17, 1989 film in accordance with the regulatory requirements at 20 C.F.R. §718.102(b), but merely indicated that pneumoconiosis cannot be excluded, and listed findings of chronic interstitial disease, emphysema, and a single calcified granuloma. Director's Exhibit 47. While employer asserts that the administrative law judge erred in finding that Dr. Patel's interpretation was positive for pneumoconiosis, the error is harmless and does not affect the outcome of the case based on the administrative law

physicians, as follows: one by Dr. Sargent, a dually qualified physician; one by Dr. Castle, a B reader; and six each by Drs. Wheeler and Scott, both dually qualified physicians. The administrative law judge permissibly accorded little weight to the interpretations of physicians with no special radiological qualifications, and greater weight to the interpretations of the Board-certified radiologists, B readers, and dually qualified physicians, and he found that the weight of the earlier evidence was positive for simple pneumoconiosis, based on the positive interpretations of a greater number of different, highly qualified readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). While the newly submitted x-ray evidence was uniformly negative for pneumoconiosis and consisted of one interpretation by Dr. Castle, seven interpretations by Dr. Wheeler, and seven interpretations by Dr. Scott of seven films taken between 1986 and 1999, the administrative law judge nevertheless found that the totality of the x-ray evidence was positive for simple pneumoconiosis, based again on the positive interpretations of a numerical preponderance of different, highly qualified readers, and negative for complicated pneumoconiosis at Section 718.304(a). *Id.*; *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 12-13.

Reviewing the other medical evidence under Section 718.304(c), the administrative law judge determined that Drs. Navani and Naik each interpreted the newly submitted CT scan of March 11, 1998 as positive for complicated pneumoconiosis and granulomata, while Drs. Wheeler and Scott each interpreted the newly submitted CT scans of March 11, 1998 and February 9, 1999 as negative for pneumoconiosis, but with large masses representing granulomatous disease compatible with tuberculosis (TB) of unknown activity. Decision and Order at 14-15. The administrative law judge also determined that Drs. Wheeler and Scott each interpreted the earlier CT scan of May 31, 1995 as negative for pneumoconiosis but compatible with TB, while Dr. Peterkin interpreted the earlier CT scan of October 1994 as showing multiple round densities with some coalescence and a single calcified granuloma, and indicated that his findings were most likely related to pneumoconiosis with conglomerate fibrotic masses.[3] Decision and Order at 18. After analyzing the relevant evidence and considering the qualifications of the physicians, the administrative law judge permissibly concluded that the negative

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judge's stated rationale for weighing the x-ray evidence of record. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3] Although finding Drs. Wheeler and Scott, both Board-certified radiologists and B readers, "highly credentialed," the administrative law judge stated they were "persistently unable to detect, or unwilling to acknowledge, the presence of pneumoconiosis," and "consistently failed to appreciate the existence of pneumoconiosis." Decision and Order at 13, 16.

interpretations of Drs. Wheeler and Scott were unreliable, and explained that:

> [i]n this instance, Drs. Wheeler and Scott, time and again, failed to detect the presence of simple pneumoconiosis in the lungs of a miner who presented with x-ray evidence of the disease to eight other highly qualified radiologists….[a]lthough Drs. Wheeler and Scott are also highly credentialed, they have failed to demonstrate, in this particular instance, their competence in recognizing simple pneumoconiosis in this miner; and their credibility as experts in this proceeding is diminished accordingly.

Decision and Order at 16. The administrative law judge analogized his reasoning to that of the United States Court of Appeals for the Third Circuit, which stated in *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004) that: "[c]ommon sense suggests that it is usually exceedingly difficult for a doctor to properly assess the contribution, if any, of pneumoconiosis to a miner's death if he/she does not believe it was present." *Id.*; Decision and Order at 17. The administrative law judge concluded that one would not expect a doctor to read a CT scan as positive for complicated pneumoconiosis when he has repeatedly been unable to read claimant's x-rays as positive for simple pneumoconiosis.[4] By contrast, the administrative law judge found that Dr. Navani's finding of complicated pneumoconiosis on CT scan was credible and persuasive, as it was consistent with the weight of the earlier x-ray evidence showing simple pneumoconiosis, and the earlier CT scan interpretation by Dr. Peterkin of coalescing densities and conglomerate fibrotic masses most likely related to pneumoconiosis.[5] The administrative law judge acted within his discretion in finding that:

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[4] Moreover, medical opinions which are found to be based on a premise contrary to the administrative law judge's findings, as with Drs. Scott and Wheeler, may validly be accorded less weight. *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

[5] We reject employer's assertion that administrative law judge's crediting of the earlier October 1994 CT scan interpretation by Dr. Peterkin as "consistent with the presence of pneumoconiosis," was improper for failure to include an equivalency finding. *See* Employer's Brief at 41; Director's Exhibit 48 at 21-22. The record reflects that Dr. Peterkin found multiple round densities, some of which coalesce together; single calcified granuloma; findings most likely related to pneumoconiosis with conglomerate fibrotic masses. Because Dr. Peterkin's CT scan interpretation was found consistent with the existence of simple pneumoconiosis, rather than complicated pneumoconiosis, no equivalency finding was required. In this connection, we note also that Drs. Scott and Wheeler found no simple pneumoconiosis.

> [c]onsidering the newly submitted CT scan evidence, in conjunction with the previously submitted CT scan evidence, the record shows the progression of Claimant's pneumoconiosis from early coalescence to conglomerate density over eight years [….This] represents a worsening of his lung disease, from a diagnosis of simple pneumoconiosis to a diagnosis of complicated pneumoconiosis, and thereby, [establishes] a change in his condition.

Decision and Order at 18. Additionally, as directed by the Board, the administrative law judge considered Dr. Castle's opinion "that claimant did not suffer from complicated pneumoconiosis, but rather had a granulomatous disease such as tuberculosis or histoplasmosis." *Id*. The administrative law judge found that Dr. Castle's medical opinion was not well-reasoned or well-documented primarily because the physician did not diagnose simple pneumoconiosis on x-ray, again analogizing to *Soubik*. *See* Decision and Order at 18-19. Further, the administrative law judge noted that Dr. Castle failed to indicate what effect the claimant's negative 1994 TB test had on his medical opinion. A medical opinion may be discredited where a physician attributing an abnormality on x-ray to TB was aware, but failed to discuss, testing showing that TB was not present. *See Yogi Mining Co. v. Director, OWCP* [*Fife*], 159 Fed.Appx. 441, 2005 WL 3309319 (4th Cir. Dec. 7, 2005)(unpub); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Moreover, the administrative law judge was not persuaded by Dr. Castle's explanation for finding that claimant's abnormalities were inconsistent with pneumoconiosis, *i.e.*, pneumoconiosis developed slowly, appeared in the central areas of the upper lungs, was not normally calcified, and never involved the spleen. The administrative law judge noted that Dr. Castle provided no references to support his assertion that pneumoconiosis cannot progress rapidly in an individual or that pneumoconiosis cannot develop in all six lung zones, and concluded that Dr. Castle's findings "may indicate, as Dr. Navani suggested, that other disease processes are also at work, but his explanation dismissing pneumoconiosis as the etiology of conglomerate density in Claimant's lung is not…credible." Decision and Order at 18-19. It is the province of the administrative law judge to determine whether an opinion is sufficiently reasoned; an opinion unsupported by sufficient underlying rationale may be discounted. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). We therefore reject employer's arguments with respect to the administrative law judge's evaluation of Dr. Castle's medical opinion on the issue of complicated pneumoconiosis.

Rather, the administrative law judge permissibly chose to credit Dr. Navani's CT scan findings, which he characterized as "entirely consistent with the majority of the more credible chest x-ray readings that identified the presence of simple pneumoconiosis," and which indicated a mixed disease process that included both granulomata and complicated pneumoconiosis. Decision and Order at 17; *see generally*

Minnich v. Pagnotti Enterprises, Inc., 9 BLR 1-89, 1-90 n.1 (1986). Crediting the medical opinion of Dr. Navani, supported by that of Dr. Naik, that the evidence demonstrates a "progression…[and] represents a worsening of [the miner's] lung disease, from a diagnosis of simple pneumoconiosis to a diagnosis of complicated pneumoconiosis," Decision and Order at 17-18, the administrative law judge permissibly focused on the evidence of a progression of opacities on x-ray and CT scan suggested by both parties' evidence. In doing so, the administrative law judge properly exercised his discretion in resolving conflicting medical evidence to determine that the identified abnormalities represented complicated pneumoconiosis based on the opinions of Drs. Naik and Navani. We therefore reject employer's argument that the evidence was improperly or selectively analyzed,[6] and affirm the administrative law judge's evaluation and weighing of the conflicting medical evidence in finding that the evidence of record established the existence of complicated pneumoconiosis pursuant to Section 718.304. *See Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Based on the foregoing, we hold that the administrative law judge conducted a full and comparative weighing of all of the relevant evidence. In doing so, he rationally determined that the evidence was sufficient to invoke the irrebuttable presumption at Section 718.304, and fully explained how the opinion of Dr. Navani warranted determinative weight, as supported by the more credible evidence of record. *See Scarbro*, 220 F.3d 250, 22 BLR 2-93; *see also Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006); *Clark*, 12 BLR at 1-149. Consequently, we affirm the administrative law judge's findings pursuant to Section 718.304, as supported by substantial evidence, and affirm his granting of modification and his award of benefits pursuant to Section 725.310.

[6] An assertion that the administrative law judge should have weighed the evidence differently is insufficient to support an assertion that the evidence was selectively analyzed; rather, the moving party must show that the administrative law judge's analysis was illogical or factually wrong. Absent such a showing, employer's assertion essentially amounts to a request to reweigh the evidence, which is beyond the Board's scope of review. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge