BRB No. 00-1197 BLA

TERRY M. FIFE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
YOGI MINING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Terry M. Fife, Maxie, Virginia, *pro se.*

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (99-BLA-1207) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge credited claimant with seventeen years and three months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000), based on claimant's December 17, 1998 filing date. Initially, the administrative law judge found that the application for benefits was timely filed, that Yogi Mining Company (employer) was the properly named responsible operator and that claimant has two dependents, his wife and disabled adult son, for purposes of augmentation. Addressing the merits of the claim, the administrative law judge found the evidence of record sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000) and complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). In view of claimant establishing he suffers from complicated pneumoconiosis, the administrative law judge found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 (2000). Accordingly, the administrative law judge awarded benefits commencing in February 1999.

On appeal, employer contends that the administrative law judge erred in

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

finding the medical evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000). Additionally, employer contends that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish the existence of simple pneumoconiosis pursuant to Section 718.202(a)(1) (2000). In particular, employer argues that the administrative law judge failed to adequately explain the rationale for his credibility determinations in weighing the medical evidence of record. Claimant has not responded. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief 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 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).

Employer raises numerous challenges to the administrative law judge's finding that the evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000). Employer contends that the administrative law judge erred in according determinative weight to the opinions of Drs. Forehand and Alexander, that complicated pneumoconiosis was present, over the contrary opinions and evidence of Drs. Wheeler, Scott, Tuteur and Dahhan, that complicated pneumoconiosis was not present but that claimant was most likely suffering from tuberculosis. In particular, employer contends that the administrative law judge erred in finding the opinions of Drs. Wheeler, Scott and Dahhan entitled to little weight because they failed to take into consideration the medical report of Dr. Sutherland, claimant's treating physician, which included a statement that claimant was evaluated for tuberculosis and that there was no evidence of the disease. Employer further contends that the administrative law judge erred in crediting the opinion of Dr. Sutherland inasmuch as he did not determine on what evidence Dr. Sutherland's opinion was based. Employer further contends that the administrative law judge erred in failing to consider the entirety of the medical opinions of Drs. Wheeler, Scott and Dahhan, arguing that

[2] The parties do not challenge the administrative law judge's decision to credit claimant with seventeen years and three months of coal mine employment, or his findings that the claim was timely filed, that Yogi Mining Company was the properly named responsible operator, that claimant had two dependents for purposes of augmentation or his determination of February 1999 as the date from which benefits commence. Inasmuch as these findings are not adverse to claimant, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the administrative law judge failed to consider all of the pieces of evidence submitted by each physician, *in toto*, in determining whether the medical opinions were reasoned and credible.

The administrative law judge, in considering the evidence pertaining to complicated pneumoconiosis, found the opinions of Drs. Wheeler and Scott, as expressed in their x-ray interpretations and CT scan readings, as well as Dr. Wheeler's deposition, stated that the abnormalities seen were most likely due to tuberculosis. Decision and Order at 21-22; Director's Exhibits 28, 30; Employer's Exhibits 1, 6, 8. The administrative law judge determined that the opinions of Drs. Wheeler and Scott were entitled to little weight because the physicians failed to discuss the negative tuberculosis findings by Dr. Sutherland. Decision and Order at 21-22; Claimant's Exhibit 1. Therefore, the administrative law judge found the failure of Drs. Wheeler and Scott to discuss these negative findings undermine the reliability of their opinions. Similarly, the administrative law judge accorded little weight to the opinion of Dr. Dahhan because he also attributed claimant's abnormalities to old healed granulomatous disease, most likely tuberculosis, but failed to discuss Dr. Sutherland's statement that claimant tested negative for tuberculosis. Decision and Order at 21-23; Employer's Exhibits 2, 7. The administrative law judge also accorded less weight to Dr. Dahhan's opinion because the physician's x-ray interpretation of simple pneumoconiosis 1/1 and size A large opacities, is inconsistent with his narrative report and the physician failed to adequately explain the inconsistency. Decision and Order at 22. With respect to the opinion of Dr. Tuteur, the administrative law judge accorded this opinion little weight because he found that the physician provided only vague explanations for the abnormal x-ray and that, in stating that the abnormality was a tissue reaction to infection, failed to explain how the noted abnormality was consistent with a reaction to an infection and was not large opacities of pneumoconiosis. Decision and Order at 23; Employer's Exhibit 4. Lastly, the administrative law judge accorded greatest weight to the opinion of Dr. Forehand, that claimant is suffering from complicated pneumoconiosis, as supported by the x-ray interpretation of Dr. Alexander. Decision and Order at 23-24; Director's Exhibits 14, 16; Claimant's Exhibit 2. The administrative law judge found Dr. Forehand's conclusions were based on specific examination findings, coal mine employment and smoking histories, and his x-ray interpretation. *Id*.

In weighing the relevant evidence of record, the administrative law judge relied on the statement by Dr. Sutherland that "patient was evaluated for tuberculosis and coccidial mycosis with no evidence of these diseases," to establish that claimant was not suffering from tuberculosis and, therefore, that the medical evidence to the contrary was not reliable. Decision and Order at 21-23; Claimant's Exhibit 1. In particular, the administrative law judge, in crediting Dr. Sutherland's statement regarding claimant's testing for tuberculosis, found that

Dr. Sutherland was claimant's treating physician for seven years and also the only physician to evaluate claimant for tuberculosis and, therefore, his opinion regarding the absence of evidence of tuberculosis was entitled to great weight. Decision and Order at 21; Claimant's Exhibit 1. However, as employer correctly contends, the administrative law judge has not specifically determined whether Dr. Sutherland's opinion was a reasoned and documented opinion, *i.e.*, whether the underlying documentation supports the physician's assessment of the miner's health. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we must vacate the administrative law judge's weighing of the opinion of Dr. Sutherland. *See Fields, supra*; *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *see generally Cooper v. Director, OWCP*, 11 BLR 1-95 (1988); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985).

Moreover, inasmuch as the administrative law judge's weighing of the other medical evidence of record at Section 718.304 (2000) is dependent on his crediting of the opinion of Dr. Sutherland regarding the absence of evidence of tuberculosis, *see* Decision and Order at 21-24, we must also vacate the remainder of his findings under Section 718.304 (2000) and remand the case for the administrative law judge to specifically determine whether Dr. Sutherland's opinion constitutes a well-reasoned and documented opinion and, as a result, the administrative law judge must reweigh all of the evidence of record.

We note that the administrative law judge mischaracterized Dr. Dahhan's overall medical opinion when he stated that Dr. Dahhan did not consider the negative tuberculosis evaluation. Decision and Order at 22. Contrary to the administrative law judge's finding, Dr. Dahhan, in a supplemental medical report dated March 27, 2000 submitted in conjunction with the physician's deposition testimony, stated that he reviewed the additional medical evidence of record including a March 9, 2000 letter from Dr. Sutherland. Employer's Exhibit 7 at Exhibit 3. Therefore, on remand, the administrative law judge should consider Dr. Dahhan's reports, *in toto*, in determining whether the physician's overall assessment of claimant's health is credible. *See Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *see also Clark, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Similarly, the administrative law judge failed to explain his conclusion that the physician failed to adequately explain the inconsistency in his positive x-ray interpretation and his narrative report inasmuch as Dr. Dahhan provided a supplemental report and deposition testimony regarding his reconsideration of his initial diagnosis. *See* Employer's Exhibit 7. Therefore, on remand, the administrative law judge must provide a more detailed explanation of his weighing of the entirety of Dr. Dahhan's opinion, as evidenced by his multiple reports. *See generally Hunley, supra*.

Lastly, contrary to employer's contention, the administrative law judge is not required to accord determinative weight to the opinions of Drs. Wheeler and Scott, as expressed in their readings of the CT scan, merely because their opinions as to the absence of complicated pneumoconiosis are uncontradicted. *See Blackledge v. Director, OWCP*, 6 BLR 1-1060 (1984); *see generally Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Rather, the administrative law judge must ultimately weigh this evidence with the other relevant evidence, like and unlike, to determine whether claimant has established the existence of complicated pneumoconiosis under Section 718.304 (2001). *See 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)(*en banc*); *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Consequently, on remand, the administrative law judge must consider all of the relevant medical evidence in determining whether claimant has established the existence of complicated pneumoconiosis by a preponderance of the evidence. *Id*.

If, on remand, the administrative law judge finds the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2001), he must then determine whether claimant has established the existence of simple pneumoconiosis arising out of claimant's coal mine employment pursuant to Sections 718.202(a) and 718.203 (2001). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In *Compton*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that "all relevant evidence is to be considered together rather than merely within the discrete subsections of [Section] 718.202(a)." *Compton*, 211 F.3d at 208. Consequently, on remand, the administrative law judge must consider not only the x-ray evidence of record, but also the evidence relevant under Section 718.202(a)(4) (2001), including the CT scan evidence and medical opinion evidence, in determining whether claimant has established the existence of either medical or legal pneumoconiosis pursuant to Section 718.202(a) (2001). 20

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[3] In order to establish the existence of complicated pneumoconiosis and thus invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, an administrative law judge must consider all relevant evidence found at each subsection pursuant to Section 718.304(a)-(c), and then weigh together such evidence prior to invocation of the presumption. 20 C.F.R. §718.304 (2001); *see Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir.1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*).

C.F.R. §§718.201, 718.202(a) (2001); *see Compton, supra*.

Finally, if on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2001), he must then determine whether the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to Section 718.204(b), (c). 20 C.F.R. §718.204(b), (c) (2001); *see Hicks, supra*.

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 further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge