BRB No. 03-0236 BLA

CUBERT SPENCE)
)
Claimant-Petitioner)
)
v.)
)
WEST VIRGINIA SOLID ENERGY,)
INCORPORATED) DATE ISSUED: 10/20/2003
)
and)
)
AMERICAN BUSINESS & PERSONAL)
INSURANCE MUTUAL INCORPORATED)
)
Employer/Carrier-Respondents)
)
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Harlan Callis, III (Kirk Law Firm), Paintsville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2000-BLA-00834) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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 has been before the Board previously.[2] In the prior Decision and Order, the administrative law judge noted that the instant case is a duplicate claim and accepted employer=s stipulation to twelve years of qualifying coal mine employment and his concession that claimant has pneumoconiosis. Decision and Order dated May 10, 2001 at 2, 4. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. '718.304 or total disability pursuant to 20 C.F.R. '718.204(b) and therefore was insufficient to establish a material change in conditions pursuant to 20 C.F.R. '725.309 (2000). Decision and Order dated May 10, 2001 at 10-14. On appeal, the Board affirmed the administrative law judge=s findings pursuant to 20 C.F.R. ''718.204(b)(2)(i)-(iv) and 718.304(a) and (c) but vacated the administrative law judge=s findings pursuant to 20 C.F.R. '718.304(b) and the denial of benefits and remanded the case for the administrative law judge to determine if the biopsy evidence established complicated pneumoconiosis. *See Spence v. West Virginia Solid Energy, Inc.*, BRB No. 01-0724 BLA (April 25, 2002)(unpublished).

On remand, the administrative law judge reviewed the relevant evidence and concluded that claimant failed to establish a material change in conditions as the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. '718.304(b). Decision and Order on Remand at 3-6. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in failing to find the existence of complicated pneumoconiosis. Employer responds urging affirmance of the administrative law judge=s denial of benefits as supported by substantial evidence. The Director, Office of Workers= Compensation Programs, has filed a letter asserting that the administrative law judge=s Decision and Order should be affirmed.

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

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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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The procedural history of this case is set forth in detail in the Board=s prior decision in *Spence v. West Virginia Solid Energy, Inc.*, BRB No. 01-0724 BLA (April 25, 2002)(unpublished), which is incorporated herein by reference.

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).

In order to establish entitlement to benefits in a living miner=s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. ''718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge=s Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge=s Decision and Order is supported by substantial evidence and contains no reversible error.[3] Claimant initially argues that the administrative law judge erred in failing to give adequate consideration to the medical opinions of record on the issue of complicated pneumoconiosis. Claimant=s Brief at 5-13. We do not find merit in claimant=s argument. Claimant=s contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board=s powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director=s Exhibit 2.

Contrary to claimant=s arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to complicated pneumoconiosis and permissibly concluded that the medical opinion evidence fails to carry claimant=s burden pursuant to Section 718.304(b). Claimant=s Brief at 5-7; Decision and Order on Remand at 3-6; Director=s Exhibits 26, 32; Employer=s Exhibits 2, 6-9; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge, in the instant case, properly considered the relevant medical opinion evidence and rationally concluded that the evidence was insufficient to establish complicated pneumoconiosis as no physician of record opined that the 1.5 centimeter nodule found on biopsy would, if seen on x-ray, appear as an opacity of greater than one centimeter in diameter.[4] *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *see also Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236 (2003)(Gabauer, J., concurring); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director=s Exhibits 26, 32; Employer=s Exhibits 2, 6-9; Decision and Order on Remand at 3-6.

Substantial evidence supports the administrative law judge=s conclusion that claimant failed to establish the existence of complicated pneumoconiosis by the biopsy evidence as Dr. Dubilier=s statement that there was a caseating granuloma measuring 1.5 centimeters and the physician=s opinion that the miner had Aquite prominent anthracosis and fibrosis with silicates,@ without equating these findings with the size of x-ray opacities, are insufficient to trigger the presumption.[5] *See* 20 C.F.R. '718.304; *Gray*, 176 F.3d 382; *Lohr v. Rochester &*

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[4]Dr. Dubilier found on biopsy: 1) in the right lower lobe of the lung, a caseating granuloma measuring 1.5 centimeters in diameter and away from this mass there is interstitial fibrosis with anthracosis and within these areas of fibrosis, polarized material compatible with silicates; 2) Nodular anthracosilicosis with fibrosis in the inferior ligament lymph node; 3) Anthracosilicosis identified with fibrosis in the right upper lung. Director=s Exhibit 26. Dr. Hansbarger reviewed the biopsy slides and additional medical evidence and concluded that there is evidence of a very mild degree of pulmonary anthracosilicosis which is compatible with simple coal workers= pneumoconiosis. Director=s Exhibit 32. Drs. Caffrey, Fino and Branscomb reviewed the pathology reports and additional medical evidence and concluded that claimant suffered from simple coal workers= pneumoconiosis. Employer=s Exhibits 2, 6-9.

[5] The United States Court of Appeals for the Sixth Circuit in *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999), held that a one-centimeter nodule which appeared on the miner=s autopsy slides could only justify invocation of the irrebuttable presumption of complicated pneumoconiosis pursuant to 20 C.F.R. '718.304 if a physician provided an opinion that such a nodule would produce an opacity of greater than one

Pittsburgh Coal Co., 6 BLR 1-1264 (1984); *see also Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); Director=s Exhibits 26, 32; Employer=s Exhibits 2, 6-9. Additionally, no physician characterized the biopsy as revealing Amassive lesions.@ *See* 20 C.F.R. '718.304(b); Director=s Exhibits 26, 32; Employer=s Exhibits 2, 6-9. Thus, we affirm the administrative law judge=s finding that the evidence of record is insufficient to establish entitlement to the presumption at Section 718.304 as it is supported by substantial evidence and is in accordance with law. *See Gray*, 176 F.3d 382; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Smith v. Island Creek Coal Co.*, 7 BLR 1-734 (1985); *Lohr*, 6 BLR 1-1264; Decision and Order on Remand at 6.

Claimant further contends that the administrative law judge erred in failing to follow the remand instructions of the Board in reconsidering the biopsy evidence. In particular, claimant contends that the administrative law judge never did an analysis of whether the biopsy evidence supports a positive finding of complicated pneumoconiosis by x-ray. Claimant=s Brief at 6-7. We disagree. Contrary to claimant=s contention, the administrative law judge did not fail to apply the Board=s remand instructions in his consideration of the biopsy evidence. Rather, the administrative law judge noted the specifics of the Board=s holdings and reconsidered the evidence within the parameters of those instructions. Decision and Order on Remand at 2-6.

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centimeter if viewed by x-ray, or an opinion that such a nodule constitutes a massive lesion.

Moreover, claimant=s assertion that this case must be remanded yet again as the administrative law judge failed to consider whether claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. '718.304, lacks merit. The administrative law judge clearly considered all the relevant evidence in finding that complicated pneumoconiosis was not established.[6] *See* Decision and Order dated May 10, 2001 at 7-12; Decision and Order on Remand at 3-6. Because the administrative law judge properly found that the evidence in subsections (a)-(c) was insufficient to establish claimant=s burden, he thus was not required to weigh together all the conflicting evidence. *See Melnick*, 16 BLR 1-31. As claimant makes no other specific challenge to the administrative law judge=s finding on the merits of the instant decision upon remand, we affirm the administrative law judge=s finding that the evidence of record is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff=g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent,* 11 BLR 1-26; *Perry,* 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found that the evidence of record does not establish that claimant has complicated pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Clark,* 12 BLR 1-149; *Trent,* 11 BLR 1-26; *Perry,* 9 BLR 1-1. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark* 12 BLR 1-149; *Anderson,* 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge=s finding that the evidence of record is insufficient to establish the

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[6]Contrary to claimant=s assertion, the administrative law judge fully considered the x-ray evidence of record, as well as the other medical evidence, in concluding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. '718.304(a) and (c) and these findings were affirmed by the Board in the previous appeal. *See Spence*, BRB No. 01-0724 BLA (April 25, 2002)(unpublished); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

existence of complicated pneumoconiosis pursuant to Section 718.304 as it is supported by substantial evidence and is in accordance with law. *See Gray*, 176 F.3d 382; *Melnick*, 16 BLR 1-31; *Clark,* 12 BLR 1-149; *Trent,* 11 BLR 1-26; *Perry,* 9 BLR 1-1; *Lohr*, 6 BLR 1-1264. Because claimant has failed to establish a totally disabling respiratory or pulmonary impairment, an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Anderson,* 12 BLR 1-111; *Trent,* 11 BLR 1-26; *Perry,* 9 BLR 1-1.

Accordingly, the administrative law judge=s Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge