BRB No. 99-0755 BLA

BOBBY LEE TILLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAPLE MEADOW MINING COMPANY	)	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 Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Bobby L. Tilley, McGraws, West Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits (98-BLA-0508) of Administrative Law Judge Daniel F. Sutton 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-nine years and that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[2]

[1] Claimant is Bobby L. Tilley, who filed an application for benefits on June 24, 1997. Director's Exhibit 1.

Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

Relevant to Section 718.304(a), a review of the x-ray evidence reveals nine x-ray interpretations of x-ray films dated July 1, 1997, August 6, 1997, April 10, 1998, and July 8, 1998, which were interpreted by Board-certified radiologists/B-readers and which found a large opacity classified as Category A complicated pneumoconiosis in claimant's right upper lung. Director's Exhibits 18, 19; Claimant's Exhibits 2-7.[3] To the contrary, these same films

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[2] The administrative law judge found that, "[b]ased on the parties' statements at the hearing, the positions argued in their post-hearing briefs, and the absence of any evidence which would establish total disability under 20 C.F.R. §718.204(c), the sole issue presented for adjudication is whether the evidence establishes the presence of complicated pneumoconiosis so that the Claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304." Decision and Order at 3.

[3] The record also contains readings of a film dated October 8, 1990, none of which are positive for the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a); Claimant's Exhibit 3; Employer's Exhibits 3, 12, 13.

were reread by equally-qualified radiologists who found absolutely no evidence of complicated pneumoconiosis. Employer's Exhibits 3, 11-15. In addition, Dr. Wheeler testified in a deposition on June 25, 1998 that his review of the x-ray and CT scan evidence revealed abnormalities of simple pneumoconiosis, but that complicated pneumoconiosis was not present. Employer's Exhibit 3.

The administrative law judge acknowledged all of the conflicting x-ray evidence relevant to Section 718.304,[4] and within a proper exercise of his discretion, found the deposition testimony of Dr. Wheeler more persuasive because Dr. Wheeler discussed the x-ray and CT scan evidence in detail and carefully explained why the abnormalities evident by x-ray are typical of tuberculosis and distinguishable from pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-64-65 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Allen v. Union Carbide Corp.*, 8 BLR 1-393 (1985); Employer's Exhibit 3. Hence, the administrative law judge rationally found that Dr. Wheeler's opinion was better reasoned and supported than the x-ray interpretations demonstrating the presence of complicated pneumoconiosis inasmuch as Dr. Wheeler provided an unrebutted rationale for his opinion and a longitudinal analysis of the x-ray readings over a period of several years. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1998); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 10-11; Employer's Exhibit 3.

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[4] The administrative law judge stated, "Eight of the eighteen interpretations of the most recent x-rays (*i.e.*, July 1, 1997, August 6, 1997, April 10, 1998, and July 8, 1998) contain findings of a large opacity greater than one centimeter in diameter which has been classified as Category A complicated pneumoconiosis." A review of the record reveals that there are nine out of nineteen interpretations that were read as positive for complicated pneumoconiosis. Director's Exhibits 18, 19; Claimant's Exhibits 2-7. The administrative law judge, however, noted all nine interpretations and the radiologists who provided each. *See* Decision and Order at 10 n.6. We, therefore, deem the administrative law judge's error harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Relevant to Section 718.304(b), a review of the biopsy evidence reveals the report of Dr. Rasheed, who found a "fibrotic mass over-laden with coal dust," and those of Drs. Castle, Hutchins and Kleinerman, who opined that there are no lesions of progressive massive fibrosis or evidence of complicated pneumoconiosis. Director's Exhibit 14; Employer's Exhibits 1, 4, 6. Even more specifically, Dr. Castle concluded that the mass "probably represents either old granulomatous disease, neoplasm, or some other form of benign disease." Employer's Exhibit 6. The administrative law judge, within a proper exercise of his discretion, found that Dr. Rasheed's diagnosis was "ambiguous as to whether the biopsy yielded massive lesions in the lung as required by Section 718.304(b)." *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 11; Director's Exhibit 14. Moreover, the administrative law judge rationally found Dr. Rasheed's opinion further undermined based on Dr. Kleinerman's conclusion that the biopsy tissue sample was not obtained from the mass in claimant's right lung, but rather, was a discrete macule of simple pneumoconiosis, and that this conclusion was uncontradicted as the operative report was not introduced. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); Decision and Order at 11; Employer's Exhibit 4. Inasmuch as the administrative law judge's discrediting of Dr. Rasheed's opinion is rational and supported by substantial evidence, we affirm his weighing of the biopsy evidence. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

Relevant to Section 718.304(c), a review of the evidence of record reveals the reports of Drs. Doyle and Wheeler, who specifically addressed the chest CT scan evidence. Dr. Doyle interpreted the chest CT scan dated July 29, 1997 as demonstrating a "right upper lung mass measuring 26 x 26 millimeters." Claimant's Exhibit 3. Dr. Wheeler interpreted two chest CT scans dated July 26, 1997 and July 29, 1997 and, finding that there was no change in the latter scan, he found an oval mass measuring three centimeters wide in the posterior right upper lung and superior segment right lower lung compatible with conglomerate tuberculosis, minimal fibrosis in posterior apices, and pleural scarring compatible with healed tuberculosis in left upper lung. Employer's Exhibits 3, 13. Similarly, Dr. Wheeler opined, "silicosis and coal workers' pneumoconiosis should have small nodules in central portion mid and upper lungs which are largely spared in this case strongly favoring conglomerate healed tuberculosis." *Ibid*. The administrative law judge noted the confusion regarding the date or dates on which claimant underwent a CT scan, but nevertheless, permissibly found Dr. Wheeler's opinion entitled to determinative weight because he discussed the CT scan evidence in detail and fully explained his opinion during his deposition. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); Decision and Order at 8 n.5, 10-11;

Employer's Exhibit 3. We, therefore, affirm the administrative law judge's determination that the CT scan evidence is insufficient to demonstrate the existence of complicated pneumoconiosis pursuant to Section 718.304(c). *See* 20 C.F.R. §718.304(c); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Accordingly, we affirm the administrative law judge's weighing all of the evidence supportive of the presence of complicated pneumoconiosis and his determination that claimant failed to satisfy his burden of affirmatively establishing the existence of complicated pneumoconiosis, and consequently, invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 inasmuch as this determination is rational, contains no reversible error, and is supported by substantial evidence. *See Gray*, *supra* (any of three types of evidence under Section 718.304 is sufficient, in absence of other evidence, to invoke presumption, but none is conclusive if outweighed by contrary evidence); *Lester*, *supra*; *Melnick, supra*. We, therefore, affirm the administrative law judge's finding that claimant is not entitled to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge