BRB No. 96-1689 BLA-A

DENNIS E. KEENE )
)
Claimant-Respondent )
)
v. ) DATE ISSUED:
)
G & A COAL COMPANY, INC. )
)
and )
)
OLD REPUBLIC INSURANCE COMPANY )
)
Employer/Carrier- )
Petitioners )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer.

Michelle S. Gerdano (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor of Labor; 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 (96-BLA-0364) of Administrative Law Judge Vivian Schreter-Murray awarding 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*. Claimant filed his claim on February 17, 1995. The administrative law judge determined that claimant invoked the irrebuttable presumption of total disability due to

pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge issued a Decision and Order awarding benefits on August 19, 1996. Employer filed a cross-appeal with the Board on September 18, 1996.[1] On appeal, employer challenges the administrative law judge's finding that claimant is entitled to invocation of the Section 718.304 irrebuttable presumption of total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, has filed a Motion to Remand, similarly arguing that the administrative law judge erred in finding the presumption invoked under Section 718.304. Claimant has not filed a brief.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law, they are binding upon this Board and must be affirmed. 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).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulations found at 20 C.F.R. §718.304 provide that if a miner is suffering or suffered from complicated pneumoconiosis, then there is an irrebuttable presumption that he is totally disabled due to pneumoconiosis, or that, at the time of his death, he was totally disabled due to pneumoconiosis. Complicated pneumoconiosis may be established by x-ray evidence, only if the x-ray evidence, which must be weighed, reveals one or more large opacities (greater than one centimeter in diameter) which would be classified as category A, B, or C. 20 C.F.R. §718.304(a). Further, complicated pneumoconiosis may be established by biopsy or autopsy evidence, if such evidence establishes massive lesions in the lungs. 20 C.F.R. §718.304(b). Additionally, a provision is made for the diagnosis of complicated pneumoconiosis by other means, if the condition diagnosed would yield results similar to those described at Sections 718.304(a) and (b). 20 C.F.R. 718.304(c). The Board has held that Section 718.304(a)-(c) does not provide alternative means of establishing the irrebuttable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge to first evaluate the evidence in each category, and then weigh together the categories at Sections 718.304(a)-(c) prior to invocation. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

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[1] Claimant initially filed a notice of appeal with the Board on September 5, 1996; however, claimant subsequently requested that his appeal be withdrawn. By Order dated September 27, 1996, the Board granted claimant's motion, and dismissed his appeal. *Keene v. G&A Coal Co.*, BRB No. 96-1689 BLA (Sept. 27, 1996) (unpublished Order).

Both employer and the Director argue on appeal that the administrative law judge's analysis of the evidence relevant to Section 718.304 is not in compliance with *Melnick*. According to employer, the administrative law judge disregarded most of the record evidence, basing his Section 718.304 invocation finding solely on Dr. Franche's interpretation of the March 17, 1995 x-ray, while ignoring relevant pulmonary function studies, and arterial blood gas study and medical opinion evidence establishing that claimant does not have complicated pneumoconiosis. The Director likewise contends that the administrative law judge improperly found invocation of the irrebuttable presumption at Section 718.304(a) based upon a single x-ray reading for complicated pneumoconiosis. Contrary to the arguments of employer and the Director, the administrative law's determination that claimant has complicated pneumoconiosis is properly based on his consideration of the record as a whole. We note that the administrative law judge permissibly considered the x-ray evidence in conjunction with the CT scan evidence, finding that the latter supported Dr. Franche's Category A reading. Decision and Order (D&O) at 9-10. In this regard, the administrative law judge specifically found that the interpretations of the September CT scan by Drs. Templeton and Wheeler confirm the presence of a large irregular density or mass greater than one centimeter in diameter. D&O at 9. The administrative law judge then thoroughly discussed the conflicting medical opinion evidence regarding the possible causes for the large opacity, rejecting those opinions which attributed claimant's x-ray and CT scan abnormalities to tuberculosis and not complicated pneumoconiosis.[2] D&O at 5-10. Thereafter, the administrative law judge specifically

[2] We specifically note that the administrative law judge thoroughly discussed the opinions of Drs. Branscomb and Castle, but rejected their conclusion that claimant does not have complicated pneumoconiosis, as each doctor relied primarily on Dr. Wheeler's interpretation of the September CT scan, which the administrative law judge found to be questionable. Decision and Order (D&O) at 8. Contrary to employer's contention, the administrative law judge was not required to weigh the pulmonary function and arterial blood gas studies as that evidence is not relevant to a finding of complicated pneumoconiosis under Section 718.304. *See e.g.*, *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Once the disease is established, claimant is entitled to an irrebuttable presumption that he is totally disabled. *See* 20 C.F.R. §718.304.

stated that "I conclude based on the evidentiary record as a whole, that Keene has coal workers' pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to complicated pneumoconiosis pursuant to 20 C.F.R. 718.304(a) and (c)." D&O at 10-11. Inasmuch as the administrative law judge considered all of the record evidence, we find his analysis at Section 718.304 to be in compliance with *Melnick*.

Employer contends that the administrative law judge erred in crediting Dr. Franche's interpretation of Category A pneumoconiosis, because the doctor did not identify a "suitable background of simple pneumoconiosis, categories 2 or 3" within the medical definition of complicated pneumoconiosis provided by the administrative law judge. Employer's Brief at 18. Despite employer's argument, in crediting Dr. Franche's Category A interpretation, the administrative law judge properly applied the legal definition of complicated pneumoconiosis. 20 C.F.R. §718.304(a). Moreover, we note that the record includes x-ray readings of simple pneumoconiosis, category 2. Director's Exhibits (DXs) 17, 18; Employer's Exhibit (EX) 6.

Employer further contends that even if the March 17, 1995 x-ray is positive for complicated pneumoconiosis, the administrative law judge was required to weigh that film against the prior x-rays of record, interpreted as showing only simple pneumoconiosis. Contrary to employer's contention, the administrative law judge had discretion to find that claimant established complicated pneumoconiosis at Section 718.304(a), based solely on the March 17, 1995 x-ray, as it is the most recent film of record. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); D&O at 10.

Under Section 718.304(c), employer argues that the administrative law judge mischaracterized the reports of Drs. Wheeler and Templeton, relying only on the doctors' notation as to the size of the large opacity viewed on the September CT scan, not on its origin.[3] Employer further contends that the administrative law judge's analysis improperly shifts the burden of proof to employer to negate that the large opacity is pneumoconiosis. Contrary to employer's contention, the administrative law judge specifically noted Dr. Wheeler's opinion that claimant does not have complicated pneumoconiosis, but found his interpretation of the September CT scan unpersuasive with regard to the cause of the large opacity. The administrative law judge properly pointed out that when Dr. Wheeler initially read the March 17, 1995 x-ray he included a statement that, if there were any central involvement of the fibrosis, claimant likely had silicotuberculosis. D&O at 8-9; DX 35. Yet, when Dr. Wheeler subsequently read the September CT scan, which showed some central involvement of fibrosis, he retreated from his earlier statement, describing the condition as

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[3] Employer's argument that the administrative law judge initially erred by not making a finding that the opacities identified on the September CT scan are equivalent to a one centimeter opacity on x-ray is without merit. Employer's Brief at 19; *see generally Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264. The administrative law judge noted that Dr. Branscomb stated that if he had seen the large opacity identified on the September CT scan, on a PA film, he would have scored it Category A. D&O at 9; Employer's Exhibit 8.

"probably also granulomatous disease." D&O at 8-9; EX 1. The administrative law judge permissibly found that this type of shift in his opinion, without a reasoned explanation, undermined Dr. Wheeler's credibility. D&O at 9. Furthermore, the administrative law judge reasonably concluded that Dr. Wheeler's opinion, that claimant's large opacity is compatible with tuberculosis, does not negate its compatibility with complicated pneumoconiosis. D&O at 10.

Employer also argues that Dr. Templeton's opinion is insufficient to carry claimant's burden of proof. We disagree. As noted by the administrative law judge, Dr. Templeton stated that the "right upper lobe mass could be related to coalescence from the smaller nodules, however, this can be seen in granulomatous disease such as from histoplasmosis or tuberculosis." EX 5. The administrative law judge reasonably construed Dr. Templeton's opinion to mean that claimant has a combination of diseases that, in part at least, owe their origins to coal dust exposure.[4] D&O at 10. We, therefore, hold that the administrative law judge properly relied on Dr. Templeton's opinion to invoke the presumption under Section 718.304(c).

The weight to be assigned the evidence, and determinations as to the credibility of the medical experts, is within the discretion of the administrative law judge. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Inasmuch as the administrative law judge properly considered all of the relevant evidence in finding that claimant established complicated pneumoconiosis at Section 718.304(a) and (c), his award of benefits is affirmed *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

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[4] The administrative reasonably concluded, based on Dr. Forehand's opinion, that claimant's thirty year history of coal mine employment may have increased his risk for the development of tuberculosis. D&O at 8.

NANCY S. DOLDER
Administrative Appeals Judge