BRB No. 01-0724 BLA

CUBERT SPENCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEST VIRGINIA SOLID ENERGY, INCORPORATED	)	DATE ISSUED:
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John W. Mann (Kirk Law Firm), Paintsville, Kentucky, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (00-BLA-0834) of Administrative Law Judge Daniel J. Roketenetz on a duplicate claim[1] filed pursuant to the

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[1] Claimant, Cubert Spence, filed his first application for benefits on September 15, 1980, which the district director deemed abandoned on December 12, 1981. Director's Exhibit 36. Subsequently, claimant filed a second application for benefits on November 16,

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).[2] Finding that the previous claim was denied because

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1990, which was finally denied on April 30, 1991. *Ibid*. Claimant did not pursue this claim further, but filed a third application on August 5, 1993. Administrative Law Judge Paul H. Teitler denied benefits, which claimant appealed without the assistance of counsel, and the Board affirmed the denial. *Spence v. West Virginia Solid Energy, Inc.,* BRB No. 96-1052 BLA (Mar. 25, 1997) (unpub.); Director's Exhibit 36. On October 20, 1999, claimant filed a fourth application for benefits, which is the subject of the appeal before us. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations

claimant failed to establish total disability or disability causation, the administrative law judge considered all of the newly submitted evidence since the denial of the previous claim

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became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 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). 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*, 160 F. Supp. 2d 47 (D.D.C. 2001). In the instant case, the administrative law judge found that the newly promulgated regulations would not alter the outcome of this case and accordingly, applied the amended regulations where applicable. Decision and Order at 5 n.3.

and found that a material change in conditions was not established since claimant again failed to establish total disability and disability causation. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in not finding total disability established in light of the evidence showing the existence of complicated pneumoconiosis which entitled claimant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis.[3] Further, claimant argues that the administrative law judge erred by rejecting evidence which established total disability and disability causation. In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating that he

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[3] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:
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> > (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original], implementing 30 U.S.C. §921(c)(3); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *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 Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B. Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

will not participate in this appeal.[4]

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 the applicable law, they are binding upon this Board and may not be 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address claimant's contentions relevant to 20 C.F.R. §718.204(b)(2)(iv) and 718.204(c). Claimant contends that the administrative law judge erred in finding total disability was not established based on the opinion of Dr. Sundaram, claimant's treating physician, and claimant's testimony. Claimant's Brief at 7-8. The administrative law judge acknowledged that Dr. Sundaram was the only physician of record to opine that claimant had a breathing impairment, but properly found, weighing together all relevant evidence on disability, *i.e.*, non-qualifying pulmonary function study and blood gas studies and other medical opinion evidence, that Dr. Sundaram's opinion was insufficient to establish total disability. This was permissible. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986); Decision and Order at 13; Director's Exhibit 26; Employer's Exhibit 1. Additionally, contrary to claimant's argument, while relevant to the issue of total disability, claimant's testimony, is not sufficient, in and of itself, to establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(d)(5); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Consequently, we affirm the administrative law judge's finding that claimant failed to demonstrate total disability pursuant to Section 718.204(b)(2)(iv).

Claimant next contends that he is entitled to the presumption that his pneumoconiosis arose out of coal mine employment at Section 718.305 because he has fifteen years of qualifying coal mine employment instead of the twelve years found by the administrative law judge. Section 718.305 is not, however, applicable to claims filed on or after January 1, 1982. 20 C.F.R. §718.305(e). Further, because a finding of disability causation necessarily

[4] We affirm the administrative law judge's findings pursuant to Sections 718.204(b)(2)(i)-(iii) and 718.304(c) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 12-13.

rests on first finding total disability, we will not further address claimant's contention that Dr. Sundaram's opinion establishes disability causation.

Next, we consider claimant's contention that he has established total disability and disability causation because he has established the existence of complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(iii), 718.304. Claimant contends that the administrative law judge erred in failing to consider the extent to which the biopsy evidence supported the x-ray evidence of complicated pneumoconiosis. Although, claimant concedes that Dr. Dubilier's biopsy report does not make a specific finding of "complicated pneumoconiosis", he contends that Dr. Dubilier's finding on biopsy of a 1.5 centimeter nodule and massive fibrosis greatly bolsters the likelihood that those doctors who diagnosed complicated pneumoconiosis by x-ray were correct. Claimant's Brief at 6. In addition, claimant contends that the administrative law judge erred in relying on the numerical superiority of the x-ray interpretations that did not establish the existence of complicated pneumoconiosis (4-3) and failed to consider the party affiliation of the physicians who submitted these readings, in finding that the x-ray evidence did not establish complicated pneumoconiosis.

In considering the evidence relevant to complicated pneumoconiosis, the administrative law judge found that the majority of the x-ray interpretations by equally qualified physicians supported a finding of no large opacities. Additionally, the administrative law judge found that the biopsy evidence did not establish the existence of complicated pneumoconiosis because the biopsy reports of Drs. Hansbarger and Caffrey, found only simple coal workers' pneumoconiosis, with Dr. Caffrey additionally stating that claimant did not suffer from complicated pneumoconiosis, and Dr. Dubilier, while mentioning a 1.5 centimeter nodule and massive fibrosis, did not specifically diagnose the existence of complicated pneumoconiosis. Regarding the medical opinion evidence, the administrative law judge found that it did not establish complicated pneumoconiosis as no medical opinion of record found complicated pneumoconiosis and Dr. Younes's finding of "coal workers' pneumoconiosis with progressive massive fibrosis due to coal mine employment, standing alone, did not establish the existence of complicated pneumoconiosis. Decision and Order at 10-12.

Contrary to claimant's argument, the administrative law judge may assign greater weight to the x-ray interpretations based on their numerical superiority when all the x-ray evidence of record has been read by equally qualified physicians. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Further, contrary to claimant's assertion, the administrative law judge was not required to examine the party affiliation of the physicians who read the x-rays. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991)(*en banc*).

Accordingly, we affirm the administrative law judge's finding at Section 718.304(a).

Claimant's argument that the administrative law judge erred in failing to consider the extent to which the biopsy evidence supported x-ray evidence of complicated pneumoconiosis, however, has merit. Drs. Younes, Sargent and Barrett found Category A opacities on x-ray. On biopsy, Dr. Dubilier found a 1.5 centimeter nodule surrounded by fibrosis and anthracosis and massive areas of fibrosis and anthracosis. The administrative law judge citing *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999) and *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984) found that the biopsy evidence did not support a finding of complicated pneumoconiosis. Discussing *Blankenship*, the administrative law judge noted that the court had found that "a physician's findings of 'massive fibrosis' on biopsy, which included a lesion or nodule which was 1.3 centimeters in diameter, was insufficient to determine whether Claimant suffered from complicated pneumoconiosis." Decision and Order at 11. The administrative law judge failed, however, to recognize that the court also remanded that case for the administrative law judge to determine whether the lesion seen on biopsy would if x-rayed have shown an opacity of greater than 1 centimeter in diameter. *Blankenship* at 244. Accordingly, this case must also be remanded to determine whether Dr. Dubilier's findings on biopsy trigger the congressionally defined condition of "complicated pneumoconiosis" set forth in the presumption, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Blankenship*, *supra*. The administrative law judge's finding that complicated pneumoconiosis was not established based on the new evidence is, therefore, vacated, and the case is remanded for further consideration of this issue. If, on remand, the administrative law judge finds that the new evidence establishes the existence of complicated pneumoconiosis established, he must find that claimant has established total disability and disability causation and, therefore, a material change in conditions and consider the case on the merits. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge