BRB No. 91-1458 BLA

CHARLES K. LEIGH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE YOUGHIOGHENY & OHIO COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of George P. Morin, Administrative Law Judge, United States Department of Labor.

Eileen S. Goodin (Barkan & Neff, LPA), Columbus, Ohio, for claimant.

John G. Paleudis (Hanlon, Duff & Paleudis Co., LPA), St. Clairsville, Ohio, for employer.

Eileen McCarthy (Marshall J. Breger, 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 and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Employer appeals the Decision and Order (90-BLA-2140) of Administrative Law Judge George P. Morin 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. (the Act). The administrative law judge credited claimant with at least thirty-five years of qualifying coal mine employment, and adjudicated this duplicate claim on its merits after determining that claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and thus was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.304. Claimant and the Director, Office of Workers' Compensation Programs, respond,

urging affirmance.[1]

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 disturbed. 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).

[1] The administrative law judge's findings pursuant to Section 718.203(b), and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Employer contends that the administrative law judge erred in weighing the x-ray evidence of record pursuant to Sections 718.202(a)(1) and 718.304. We disagree. The administrative law judge properly reviewed all of the x-ray evidence of record and the radiological qualifications of the readers, and acted within his discretion in according determinative weight to the interpretation of Dr. Cole, who found 3/2 r/q small opacities and Size A large opacities, based on Dr. Cole's superior qualifications as both a Board-certified radiologist and B-reader. Decision and Order at 4-7; Director's Exhibit 30. See Trent v. Director, OWCP, 11 BLR 1-26 (1987); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985). Contrary to employer's contentions, the administrative law judge properly considered only the radiological qualifications of the readers, and no other pulmonary credentials, in weighing the evidence pursuant to Section 718.202(a)(1). See Melnick v. Consolidation Coal Co., BLR , BRB No. 89-2153 BLA (Dec. 27, 1991)(en banc). Moreover, the administrative law judge was not required to base his determination of whether the evidence was sufficient to establish the existence of complicated pneumoconiosis upon a numerical preponderance of x-ray interpretations. See generally Shortt v. Director, OWCP, 7 BLR 1-318 (1984). Finally, employer's argument that the administrative law judge erred in discounting

the interpretations of the most recent film by Drs. Selby, Fiehler, Zaldivar and Altmeyer, finding simple pneumoconiosis only, lacks merit since the film was only three months more recent. See generally Aimone v. Morrison Knudson Co., 8 BLR 1-32 (1985). The administrative law judge's finding that the evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.202(a)(1) is supported by substantial evidence and is hereby affirmed.[2] Consequently, we affirm the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, and is therefore entitled to benefits pursuant to 20 C.F.R. Part 718.

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

SO ORDERED.

[2] We also affirm the administrative law judge's finding that Dr. Cole's x-ray interpretation of Size A large opacities was sufficient to establish a material change in conditions pursuant to Section 725.309, as supported by substantial evidence. Decision and Order at 6; Director's Exhibit 30. See Rice v. Sahara Coal Co., Inc., 15 BLR 1-19 (1990).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge