BRB No. 00-0538 BLA

BOBBY BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
DOUBLE B MINING, INCORPORATED	)	
	)	
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 on Second Remand - Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp, Grundy, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for employer.

Rita Roppolo (Judith E. Kramer, 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, the United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand - Awarding Benefits (92-BLA-1685) of Administrative Law Judge Thomas M. Burke 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 is before the Board for the third time.[2] In a previous Decision and Order on Remand, dated January 27, 1998, the administrative law judge found that employer was the properly designated responsible operator. The administrative law judge then determined that the weight of the x-ray and CT scan evidence of record was sufficient to establish complicated pneumoconiosis pursuant to Section 718.304(a), and that the weight of the medical opinion evidence established complicated pneumoconiosis under Section 718.304(c).[3] The administrative law judge determined that the relevant like and unlike evidence, when weighed together, established that claimant was entitled to the irrebutable presumption of total disability due to pneumoconiosis under Section 718.304. Accordingly, the administrative law judge awarded benefits. Employer appealed, challenging the administrative law judge's responsible operator finding, and his finding that the presence of complicated pneumoconiosis was established by a preponderance of the evidence under Section 718.304. The Board affirmed the administrative law judge's finding that employer is the properly named responsible operator. *Blankenship v. Double B Mining, Inc.*, BRB No. 98-0736 BLA (July 14, 1999)(unpublished). The Board vacated the administrative law judge's finding that the evidence of record established the existence of complicated pneumoconiosis under Section 718.304(a) and (c), however, and remanded the case for the administrative law judge to reconsider all of the relevant evidence of record thereunder. *Id.*

[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 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.

[2]The procedural history of this case is set forth in the Board's most recent prior Decision and Order, dated July 14, 1999. *See Blankenship v. Double B Mining, Inc.*, BRB No. 98-0736 BLA (July 14, 1999)(unpublished).

[3]The administrative law judge noted that claimant stipulated at his 1993 hearing before Administrative Law Judge Sheldon R. Lipson that total disability could not be established in this case under 20 C.F.R. §718.204(c) (2000), and that an award of benefits was dependent upon a determination that the irrebuttable presumption of total disability due to pneumoconiosis was invoked under 20 C.F.R. §718.304 (2000). 1998 Decision and Order on Remand at 7-8; 1993 Hearing Tr. at 16. In amending the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, regulations which became effective on January 19, 2001, the Department of Labor did not revise Section 718.304.

In his Decision and Order on Second Remand, dated January 31, 2000, the administrative law judge found the x-ray evidence of record sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and found the medical opinion and CT scan evidence of record sufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(c). The administrative law judge then weighed the relevant like and unlike evidence together under Section 718.304(a)-(c), and found it sufficient to establish the existence of complicated pneumoconiosis. The administrative law judge determined that claimant was entitled, therefore, to the irrebutable presumption of total disability due to pneumoconiosis. Consequently, the administrative law judge awarded benefits. On appeal, employer again argues that it was not properly designated as the responsible operator in this case, and challenges the administrative law judge's weighing of the evidence under Section 718.304(a) and (c). Claimant responds in support of the decision awarding benefits. The Director Office of Workers' Compensation Programs (the Director), has filed a letter responding to employer's contention that it was incorrectly designated as the responsible operator.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule in an Order issued on February 21, 2001, to which each of the parties has responded. The Director and employer assert that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has filed a letter in which he states that "[a]s the new regulations restrict the amount of evidence that either side can develop in regard to the claim, I feel it is rather obvious that they would have some affect [sic] on this case to the extent that much of the employer's evidence would have to be excluded under the new regulations." Based upon the positions of the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.[4] Therefore, the Board will adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law

[4]There is no merit to claimant's contention that the instant claim will be affected by the new regulations because the new regulations restrict the amount of evidence which may be developed. The new regulations restricting the amount of evidence either party may submit are inapplicable to the instant claim, as these regulations apply to claims filed after January 19, 2001. *See* 20 C.F.R. §725.414.

judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

In challenging the administrative law judge's consideration of the x-ray evidence under Section 718.304(a), employer contends that the administrative law judge erred in weighing the interpretations of the x-ray films of record as a whole without weighing the interpretations of each x-ray film separately in order to determine whether each film weighed for or against a finding of complicated pneumoconiosis. Employer argues that this method was impermissible, especially in light of the fact that the films dated July 8, 1988 and January 5, 1989 were read exclusively as negative for complicated pneumoconiosis. Employer contends that, even if it were permissible for the administrative law judge to consider all of the interpretations of the various films of record together, it was impermissible for the administrative law judge to find the existence of complicated pneumoconiosis established on the basis that the majority of the interpretations by dually-qualified physicians was positive for complicated pneumoconiosis. Employer argues that such analysis amounts to no more than an improper head count. In addition, employer contends that the administrative law judge erred in counting Dr. Wheeler among the experts who submitted an x-ray reading which was positive for complicated pneumoconiosis. Employer also suggests that the administrative law judge should have credited Dr. Baker's two x-ray interpretations, which were negative for complicated pneumoconiosis, in light of Dr. Baker's status as claimant's treating physician.

Employer's contentions challenging the administrative law judge's finding that the weight of the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis are without merit. The administrative law judge properly considered the x-ray evidence, analyzing the quantity and the quality of the negative and positive x-ray readings of record, as instructed by the Board. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.3d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Blankenship v. Double B Mining, Inc.*, BRB No. 98-0736 BLA (July 14, 1999)(unpublished); Decision and Order on Second Remand at 3-4. Contrary to employer's contention, the administrative law judge was not required to consider the interpretations of each film independently, and then compare the number of films supporting a finding of complicated pneumoconiosis against the number of films weighing against such a diagnosis. *See Akers, supra; Adkins, supra*. As for Dr. Wheeler, the administrative law judge correctly found that Dr. Wheeler's reading of the film dated January 27, 1992 supported a finding of complicated pneumoconiosis. Decision and Order on Second Remand at 3-4; Employer's Exhibit 1. We reject employer's argument that the administrative law judge erred in failing

to construe Dr. Wheeler's interpretation of this film as a negative interpretation based on the fact that Dr. Wheeler otherwise read two different x-rays and a CT scan as negative for complicated pneumoconiosis. Director's Exhibits 45, 84. Because x-rays are objective pieces of evidence, a physician could reasonably interpret one x-ray as indicative of large, size B opacities, as Dr. Wheeler did in this case in reading the January 27, 1992 film, and reasonably interpret a different x-ray or CT scan as indicative of no large opacities. The administrative law judge properly characterized, as negative for complicated pneumoconiosis, the two x-ray interpretations and CT scan interpretation by Dr. Wheeler to which employer refers. Decision and Order on Second Remand at 3-4; Director's Exhibits 45, 84; Employer's Exhibit 1. Moreover, the administrative law judge ultimately weighed these negative readings against Dr. Wheeler's positive reading of the January 27, 1992 film, thereby properly considering all of the reports submitted by Dr. Wheeler. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); Decision and Order on Second Remand at 3-4; Director's Exhibits 45, 84; Employer's Exhibit 1. Finally, contrary to employer's contention, the administrative law judge did not err in finding the x-ray evidence sufficient to establish the presence of complicated pneumoconiosis notwithstanding that claimant's treating physician, Dr. Baxter, did not diagnose complicated pneumoconiosis.[5] The administrative law judge properly credited the positive readings which satisfied the classification requirements of Section 718.304(a) for complicated pneumoconiosis based upon the radiological qualifications of the physicians submitting those readings.[6] *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Akers, supra; Adkins, supra*. Accordingly, we affirm the administrative law judge's finding that the x-ray evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a).

Employer also challenges the administrative law judge's finding on remand that the CT scan and medical opinion evidence was sufficient to establish the existence of complicated pneumoconiosis under Section 718.304(c). Specifically, employer argues that the administrative law judge failed to analyze the CT scan evidence independently of the x-ray evidence, in contravention of the Board's remand instruction to avoid making credibility

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[5]In a letter dated February 21, 1991, Dr. Baxter indicated that x-rays were performed in his office on January 23, 1991 and August 31, 1987, both of which revealed "emphysema and reticular nodular densities in both lung fields suggestive of exposure to inorganic dust." Director's Exhibit 65. Dr. Baxter indicated that there are larger densities in the lung apices, but did not indicate the specific size of the densities or opine that claimant has complicated pneumoconiosis. *Id*.

[6]The record does not reflect that Dr. Baxter is a B reader or Board-certified radiologist.

determinations with respect to the medical opinions and CT scan reports under subsection (c) solely on the basis that such evidence is consistent with the x-ray evidence. In addition, employer contends that the CT scan evidence indicating that claimant has tuberculosis rather than complicated pneumoconiosis is extremely probative, and should have been accorded more weight than the x-ray evidence indicative of complicated pneumoconiosis pursuant to Section 718.304(a). Finally, employer argues that the administrative law judge violated the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), because he did not provide a sufficient rationale for resolving the conflict posed by the CT scan and medical opinion evidence.

In remanding this case to the administrative law judge for further consideration of the CT scan and medical opinion evidence under Section 718.304(c), the Board vacated the administrative law judge's previous decision to discount the opinions of Drs. Endres-Bercher, Fino and Castle and to credit the contrary opinions of Drs. Sargent, Cander and Abernathy, as buttressed by the opinions of Drs. Fulchiero and Smith, on the basis that the latter were most consistent with the more credible x-ray findings of complicated pneumoconiosis. The Board instructed the administrative law judge to consider on remand the evidence under Section 718.304(c) separately from the x-ray interpretations under Section 718.304(a) prior to weighing all of the like and unlike evidence together, and cautioned the administrative law judge against making credibility determinations with respect to the medical opinions and CT scan reports under subsection (c) solely on the basis that such evidence is consistent with the x-ray evidence. *See Melnick, supra*. Contrary to employer's contention on appeal, the administrative law judge provided additional reasons for according greater weight to the positive CT scan and medical opinion evidence at Section 718.304(c). The administrative law judge accorded greater weight to the CT scans and medical opinions which support a finding that claimant has complicated pneumoconiosis not only because this evidence was "most consistent with the credible, objective x-ray findings of large opacities by dual-qualified B-readers [sic] and Board-certified radiologists," but also because this evidence was "most consistent with the [c]laimant's significant coal mine employment history and the negative results on numerous tuberculosis tests."[7] Decision and Order on Second Remand at 5. Furthermore, contrary to employer's argument, the administrative law judge was not *required* to find that the CT scan evidence which indicates that claimant has tuberculosis,

[7]Claimant testified at his hearing on January 13, 1993 that he had five to ten tuberculosis tests, all of which were negative for tuberculosis. Hearing Transcript at 19-22. Employer does not dispute that claimant had negative tuberculosis test results. Rather, employer challenges the administrative law judge's rejection of the CT scan evidence indicating the presence of tuberculosis, without having considered Dr. Wheeler's deposition testimony that tuberculosis testing is not necessarily reliable. Employer's Brief at 26.

was more probative than the x-ray evidence which satisfies the regulatory criteria for complicated pneumoconiosis at Section 718.304(a). The United States Court of Appeals for the Fourth Circuit has held in *Scarbro, supra,* that x-ray evidence can lose probative force "only if other evidence affirmatively shows that [such] opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader." *Scarbro, supra* at 220 F.3d 256, 22 BLR 2-101.

We agree with employer, however, that the administrative law judge erred to the extent that he credited the CT scan and medical opinion evidence indicating that claimant has complicated pneumoconiosis without discussing Dr. Wheeler's deposition testimony, questioning the significance of tuberculosis testing, and without adequately considering the bases Dr. Wheeler provided in support of his opinion that claimant does not have complicated pneumoconiosis, but rather tuberculosis.[8] In weighing the medical opinions and resolving conflicts posed by the evidence, an administrative law judge must consider the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Akers, supra*. We are thus unable to affirm the administrative law judge's finding under Section 718.304(c) on remand. We vacate the administrative law judge's finding that the evidence was sufficient to establish the existence of complicated pneumoconiosis under Section 718.304(c), and remand the case for the administrative law judge to reconsider the relevant evidence thereunder, consistent with the court's decisions in *Scarbro, Hicks* and *Akers.*[9] *See Scarbro, supra; Hicks, supra; Akers, supra*. The administrative law judge must

[8]We note that, while the administrative law judge did not adequately consider the conflicting evidence at 20 C.F.R. §718.304(c), he correctly characterized the evidence, consistent with the Board's prior remand instructions. *See Blankenship v. Double B Mining, Inc.*, BRB No. 98-0736 BLA (July 14, 1999)(unpublished), slip op. at 7-8; Decision and Order on Second Remand at 4. Specifically, the administrative law judge correctly stated that Drs. Wheeler and Fishman opined that claimant does not suffer from complicated pneumoconiosis. Decision and Order on Second Remand at 4; Director's Exhibit 84; Employer's Exhibit 3. The administrative law judge also correctly stated that, contrary to his previous finding in his 1998 Decision and Order, Dr. Smith's CT scan interpretation does not support a finding of complicated pneumoconiosis. *Id.*; Director's Exhibit 85.

[9]Employer requests that the case be remanded to a different administrative law judge. Because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, this request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

then weigh the relevant like and unlike evidence together under Section 718.304(a)-(c), in order to determine whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See Melnick, supra*.

Finally, we reject employer's renewed contention in the present appeal that it was improperly designated as the responsible operator. The Board previously addressed this issue, affirming the administrative law judge's finding that employer is the responsible operator in this case. *Blankenship v. Double B Mining, Inc.*, BRB No. 98-0736 BLA (July 14, 1999)(unpublished), slip op. at 9-11. This affirmance is the law of the case. *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Accordingly, the administrative law judge's Decision and Order on Second Remand - Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge