BRB No. 00-0591 BLA

LLOYD 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 Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Sarah M. Hurley (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, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (92-BLA-1697) of Administrative Law Judge C. Richard Avery 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). This case is before the Board for the third time.[1] In the original Decision and Order, Administrative Law Judge Robert A. Shea credited claimant with at least twenty-three years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000), based on claimant's April 9, 1991 filing date. In weighing the medical evidence of record, Judge Shea found the x-ray evidence sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000), and that it arose out of claimant's coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). In addition, he found the medical evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Accordingly, Judge Shea awarded benefits.

Employer appealed to the Board, and in a Decision and Order issued on July 27, 1995, the Board vacated the award of benefits and remanded the case for further proceedings. *Blankenship v. Double B Mining, Inc.,* BRB No. 95-0705 BLA (Jul. 27, 1995)(unpub.). In particular, the Board vacated Judge Shea's determination that the evidence was sufficient to establish total disability pursuant to Section 718.204(c) (2000), holding that Dr. Robinette's opinion was not sufficient to establish total respiratory disability. However, the Board further held that Judge Shea did not consider whether the evidence was sufficient to establish complicated pneumoconiosis and invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304 (2000).

[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.

Therefore, the Board remanded the case to Judge Shea for further consideration of the evidence under Section 718.304 (2000) and, if deemed insufficient, to reconsider the evidence pursuant to 20 C.F.R. §718.204(b) and (c) (2000).

On remand, the case was transferred to Administrative Law Judge C. Richard Avery (the administrative law judge), who found the medical evidence of record sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) (2000) and, therefore, found that the medical evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's second appeal, the Board affirmed the administrative law judge's Decision and Order on Remand, holding that the administrative law judge reasonably found the medical evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b) (2000). *Blankenship v. Double B Mining, Inc.*, BRB No. 96-1444 BLA (Apr. 29, 1997)(unpub). By Order dated December 27, 1997, the Board denied employer's motion for reconsideration. *Blankenship v. Double B Mining, Inc.*, BRB No. 96-1444 BLA (Dec. 27, 1997)(Order)(unpub.).

Employer appealed the Board's Decision and Order to the United States Court of Appeals for the Fourth Circuit, wherein jurisdiction for this case arises, which vacated the award of benefits and remanded the case for further consideration. Addressing the issue of the standard to be applied under Section 718.304 (2000), the court held that it would not impose on the Board a rule requiring that lesions observed on autopsy and/or biopsy measure at least two (2) centimeters in order to be considered complicated pneumoconiosis, inasmuch as the statute does not mandate the use of the medical definition of complicated pneumoconiosis. Rather, applying the Congressional intent as set forth in Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), the court held that because the irrebuttable presumption found at Section 718.304 (2000) provides three methods of diagnosing complicated pneumoconiosis, the administrative law judge must make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption, *i.e.*, if a "massive lesion" is found on biopsy, it would appear as an opacity greater than one centimeter in diameter on an x-ray. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 244 (4th Cir. 1999). Consequently, the court remanded the case for the administrative law judge to reevaluate the biopsy evidence to determine whether the 1.3 centimeter lesion, as identified on biopsy, is the equivalent of a lesion that would appear as 1 centimeter on x-ray. *Id.* By Order dated July 22, 1999, the Board remanded the case to the administrative law judge pursuant to the instructions of the

Fourth Circuit court. *Blankenship v. Double B Mining, Inc.*, BRB No. 96-1444 BLA (Jul. 22, 1999)(Order) (unpub.).

On remand, the administrative law judge afforded the parties the opportunity to submit additional medical evidence relevant to the issues as outlined by the Fourth Circuit court. In response, employer submitted a medical report by Dr. Naeye and claimant submitted a medical report by Dr. Robinette. Noting the instructions of the Fourth Circuit and weighing this evidence, the administrative law judge found the medical evidence sufficient to establish the existence of complicated pneumoconiosis inasmuch as the administrative law judge determined that the evidence was sufficient to establish that the 1.3 centimeter lesion observed on biopsy was the equivalent of a lesion that would appear as at least a 1 centimeter opacity on x-ray. Therefore, the administrative law judge found the medical evidence established invocation of the Section 718.304 (2000) irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in admitting into the record the medical opinion of Dr. Robinette. In addition, employer contends that the administrative law judge erred in his weighing of the medical opinion evidence pursuant to Section 718.304 (2000). In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's weighing of the evidence and his finding that the lesion found on claimant's lung biopsy was sufficient to demonstrate complicated pneumoconiosis pursuant to Section 718.304(b) (2000). However, the Director requests that the Board vacate the award of benefits and remand the case to the administrative law judge for further consideration of the evidence in light of the holding of the Fourth Circuit court in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

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 amended regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association 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 by Order issued on February 21, 2001, to which all

the parties have responded. The Director and employer assert that the amended regulations at issue in the lawsuit do not affect the outcome of this case. Employer further states that if the Board holds that the amended regulations will affect the outcome of this case, then the case must be held in abeyance. In its response to the Board's Order, claimant sets forth several of the amended regulations and notes the possible impact of these amended regulations. However, claimant argues specifically that the outcome of the instant case is impacted by the amended regulation set forth at 20 C.F.R. §718.104(d), and, thus, the case must be held in abeyance.[2] Having considered the briefs submitted by the parties, and reviewed the record, we hold that the ultimate disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address the procedural issue raised by employer regarding whether the administrative law judge erred in admitting the post-remand medical report of Dr. Robinette. Specifically, employer contends that Dr. Robinette's report was not timely submitted under the administrative law judge's August 1999 Order and, thus, the administrative law judge erred in admitting claimant's medical evidence. In addition, employer contends that the administrative law judge erred in admitting Dr. Robinette's report because it was not responsive to the Fourth Circuit court's remand instructions. We disagree.

Based on the facts of this case, we reject employer's contention that the administrative law judge erred in admitting the medical report of Dr. Robinette as untimely filed. The administrative law judge is granted broad discretion in the disposition of procedural issues. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984); *see also*

[2] We reject claimant's contention that the amended version of 20 C.F.R. §718.104(d) will have an impact on the outcome of this case inasmuch as the changes to Section 718.104(d) only apply to claims filed after January 19, 2001, *see* 20 C.F.R. §§718.101, 718.104. Moreover, the remainder of claimant's contentions regarding application of the amended regulations are not presently applicable in this case.

Lynn v. Island Creek Coal Co., 12 BLR 1-146 (1989)(*en banc*)(McGranery, J., concurring); *Toler v. Eastern Associated Coal Corp*., 12 BLR 1-49 (1988). Herein, by Order dated August 30, 1999, the administrative law judge granted the parties 90 days from receipt of the Order in which to submit additional evidence responsive to the remand instructions of the Fourth Circuit court and 120 days in which to submit additional briefs responsive to the issue on remand. The administrative law judge's Order provided that the submission of the additional evidence and briefs was to be done simultaneously within the aforementioned time periods.

On December 21, 1999, claimant submitted the report of Dr. Robinette along with a request to remand the case to the district director for the purpose of filing a petition for modification. Employer objected to claimant's submission of this medical report as well as claimant's petition for modification. In an Order dated January 24, 2000, the administrative law judge addressed employer's objections to claimant's Motion to Remand as well as its objections to claimant's medical evidence. The administrative law judge denied claimant's Motion to Remand, stating that he was under a mandate from the Fourth Circuit to rule on the issue raised by the court. With regard to claimant's medical evidence, the administrative law judge determined that the terms of his August 30, 1999 Order allowed receipt of new evidence and, therefore, he would consider the evidence offered by both parties in conjunction with the previous record. Consequently, in light of the August 1999 Order requesting the simultaneous filing of additional evidence, we hold that the administrative law judge's decision to accept Dr. Robinette's medical report, although filed after the expiration of the ninety day time period, was not inherently unreasonable and was within his discretion. *Clark, supra; Lynn, supra; Toler, supra; Laird, supra.*

Moreover, we reject employer's contention that the administrative law judge erred in accepting the medical report of Dr. Robinette, arguing that the report was not responsive to the remand instructions of the Fourth Circuit court because it was based, at least in part, on new physical examination findings. Contrary to employer's contention, the determination of the responsiveness of the report of Dr. Robinette is a factual determination for the administrative law judge as trier-of-fact to render in his weighing of the medical evidence. Herein, the administrative law judge noted employer's objection, but stated that he was "allowing the evidence to be admitted to the extent the information addresses the issue presented. The additional evidence regarding progression of Claimant's illness is not admitted as it does not pertain to the issue at hand." Decision and Order on Remand at 2, n.1. Therefore, while relevancy is the critical element in the admission of evidence, nevertheless, the Act and regulations favor the admission of all evidence, even where relevancy is questionable, with reliance on the

administrative law judge, as trier-of-fact, to determine the weight to be assigned the evidence. Section 413(b) of the Act, 30 U.S.C. §923(b); *see* 20 C.F.R. §725.456 (2000); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). Consequently, it was not unreasonable for the administrative law judge to admit Dr. Robinette's opinion on remand.

With respect to the administrative law judge's weighing of the medical opinion evidence, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b) (2000). Initially, employer contends that the administrative law judge erred in accepting Dr. Robinette's medical report because it was based on evidence, specifically x-ray and CT scan evidence, which was not formerly admitted into the record inasmuch as this prevented employer the opportunity to verify the interpretations provided by Dr. Robinette. In addition, employer contends that Dr. Robinette's opinion is based on lateral x-ray views which fail to comply with the quality standards. Employer also contends that the administrative law judge erred in admitting Dr. Robinette's opinion because it was based on recent evidence, not subject to the remand instructions. These contentions lack merit.

Contrary to employer's contentions, it was not error for the administrative law judge to admit the medical report of Dr. Robinette because it was based on evidence not contained in the record. There is nothing in the regulations or the Act which require that the materials on which a physician, as a medical expert, bases his opinion be admitted into the record, provided that they are of the type of evidence which a reasonable expert would normally use in formulating a professional opinion. *See Peabody Coal Co. v. Director, OWCP* [*Durbin*], 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999); *see generally* Fed. R. Evid. 703. Moreover, a review of the record indicates that the x-ray evidence and CT scan relied upon by Dr. Robinette, in rendering his most recent opinion, were discussed in the previously admitted medical reports. While Dr. Robinette did not explicitly state the date of the x-ray and CT scan referenced within his October 1999 medical report, nonetheless, he stated that the evidence was obtained in conjunction with his initial evaluation of claimant in August 1990, which was fully described in previous reports submitted by Dr. Robinette as including a CT scan dated August 21, 1990 and x-ray films dated July 31, 1990 and August 21, 1990. *See* Claimant's Post Remand Exhibit; Director's Exhibits 22, 52; Hearing Transcript dated April 20, 1993. Additionally, the record reflects that the August 1990 CT scan and the x-ray films were reviewed by Drs. Fino, Wiot, Sargent and Castle at the behest of employer. *See* Employer's Exhibits 3-7.

Furthermore, we reject employer's contention that the administrative law judge erred in relying on Dr. Robinette's opinion since it was based on a lateral view x-ray, which fails to comply with the quality standards. In weighing Dr. Robinette's opinion, the administrative law judge specifically noted the presence of the lateral x-ray reading and Dr. Robinette's explanation that the lateral x-ray view was necessary in this case because the location of the density was obscured by the heart and, therefore, not well seen on standard x-ray views and, thus, Dr. Robinette's reliance on this lateral x-ray film in rendering his opinion was justified. Decision and Order on Remand at 4; Claimant's Post Remand Exhibit. The administrative law judge further found that Appendix A of Part 718 (2000) provides that "additional chest films or views shall be obtained if they are necessary for clarification and classification." Decision and Order on Remand at 4; 20 C.F.R. Part 718, Appendix A(1) (2000); Claimant's Post Remand Exhibit. Therefore, it was not unreasonable for the administrative law judge to accept the medical opinion of Dr. Robinette, although based on lateral view x-ray films, inasmuch as they were obtained for clarification or classification purposes. *Id*.

In addition, contrary to employer's contention, the diagnosis of the progression of claimant's complicated pneumoconiosis by Dr. Robinette, based on evidence gathered in connection with a 1998 examination of claimant, which was part of Dr. Robinette's October 1999 medical report, does not disqualify the entire medical report from consideration on the issue in this remand. Rather, the administrative law judge noted Dr. Robinette's inclusion of the more recent evaluation and diagnosis as well as employer's objection to it, but within a reasonable exercise of his discretion the administrative law judge determined that the two portions of Dr. Robinette's opinion were separable and, therefore, reasonably admitted the report of Dr. Robinette only to the extent that it addressed the Fourth Circuit court's remand instructions. Decision and Order on Remand at 2, n.1; *see Cochran, supra; see also Clark, supra*.

Employer further contends that the administrative law judge erred in failing to offer a valid basis for discounting the opinion of Dr. Naeye. We disagree. Contrary to employer's contention, the administrative law judge did not substitute his opinion for that of Dr. Naeye. The administrative law judge found that in his 1999 medical opinion Dr. Naeye opined that claimant does not suffer from complicated pneumoconiosis, but suffers from only simple pneumoconiosis. Decision and Order on Remand at 4; Employer Post Remand Exhibit. The administrative law judge accorded little weight to Dr. Naeye's opinion inasmuch as the administrative law judge found that it did not further address any of the other abnormalities noted and, therefore, was insufficient to address the Section 718.304 (2000) requirements. Decision and Order on Remand at 4. A review of

the record reflects that Dr. Naeye's 1999 report, which was submitted in response to the administrative law judge's Order requesting additional evidence regarding the Fourth Circuit's remand instructions, did not specifically address whether the 1.3 centimeter lesion on biopsy was equivalent to 1 centimeter on x-ray film. Rather, Dr. Naeye stated from a pathological perspective why the findings were not complicated pneumoconiosis.[3] Employer's Post Remand Exhibit.

Moreover, contrary to employer's contention, the administrative law judge did not explicitly reject Dr. Naeye's opinion because the physician did not examine claimant. Rather, the administrative law judge determined that Dr. Robinette's opinion was more probative because he examined claimant over a course of time, specifically prior to claimant's biopsy surgery. Decision and Order on Remand at 4. However, the administrative law judge did not solely rely upon Dr. Robinette's status as an examining physician, but accorded Dr. Robinette's opinion more weight because it was not only a more complete analysis of claimant's condition, but also included specific testimony regarding the size of claimant's lesion as it appeared on the pre-biopsy x-ray films. *Id*. Consequently, the administrative law judge reasonably accorded greater weight to the opinion of Dr. Robinette over the other opinions of record in finding that the 1.3 centimeter lesion from claimant's lung biopsy was the equivalent of lesion which would appear as at least a 1 centimeter opacity on x-ray. Decision and Order on Remand at 5; 20 C.F.R. §718.304(b) (2000); *Blankenship, supra*.

However, as the Director correctly contends, the administrative law judge must weigh all of the evidence relevant to each of the Section 718.304 (2000) subsections to determine whether the evidence, as a whole, is sufficient to establish the existence of complicated pneumoconiosis. In a decision issued subsequent to the administrative law judge's Decision and Order on Remand, the Fourth Circuit court held that an administrative law judge must weigh the evidence pertinent to the existence of complicated pneumoconiosis under Section 718.304(a), (b) and (c) (2000) together in determining whether the irrebuttable

[3] Dr. Naeye stated that "if the only evidence in the case was the x-ray findings, I can see how the law might consider them evidence of complicated pneumoconiosis," but additionally stated further examination of the lesion showed it to be only simple pneumoconiosis. Employer's Post Remand Exhibit.

presumption has been invoked. *Scarbro, supra*. We, therefore, vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption pursuant to Section 718.304(b) (2000) and remand the case to the administrative law judge for reconsideration of the medical evidence relevant to this issue in accordance with the holding in *Scarbro*. *Id.*; *see also 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*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge