BRB No. 06-0127 BLA

LLOYD BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE B MINING, INCORPORATED	)	DATE ISSUED: 09/22/2006
	)	
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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-6) of Administrative Law Judge Richard T. Stansell-Gamm 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).[1] This case is before the Board for

[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.

the fourth time, and the complete procedural history is set forth in our prior decision in *Blankenship v. Double B Mining, Inc.*, BRB No. 00-0591 BLA (Jun. 20, 2001) (unpub.).

In the most recent appeal, employer's third, the Board rejected employer's allegations of error regarding Administrative Law Judge C. Richard Avery's evidentiary rulings and credibility determinations. *Blankenship v. Double B Mining, Inc.*, BRB No. 00-0591 BLA (Jun. 20, 2001) (unpub.). However, the Board noted that in a decision issued subsequent to Judge Avery's Decision and Order on Remand, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must weigh the evidence pertinent to the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a), (b) and (c) (2000) together in determining whether the irrebuttable presumption has been invoked. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Therefore, the Board vacated Judge Avery's finding that claimant established invocation of the irrebuttable presumption pursuant to Section 718.304(b) (2000) and remanded the case for reconsideration of the medical evidence relevant to this issue in accordance with the holding in *Scarbro*. By Order dated December 6, 2001, the Board denied employer's motion for reconsideration. *Blankenship v. Double B Mining, Inc.*, BRB No. 00-0591 BLA (Dec. 6, 2001)(Order)(unpub.).

On remand, the case was transferred to Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge), who admitted additional evidence into the record. At the hearing, held on June 8, 2004, employer stipulated that claimant had developed complicated pneumoconiosis by at least September 24, 1996. Thus, the administrative law judge confined his inquiry to whether claimant established that he had developed complicated pneumoconiosis prior to that date. Following an evaluation of the medical evidence, the administrative law judge determined that the x-ray, biopsy and medical opinion evidence established that claimant had developed complicated pneumoconiosis as defined in Section 718.304 (2000) by August 21, 1990, and, therefore, found claimant entitled to benefits beginning August 1, 1990.

On appeal, employer contends that the administrative law judge erred in his weighing of the x-ray, biopsy and medical opinion evidence pursuant to Section 718.304 (2000), and in finding the evidence sufficient to establish the existence of complicated pneumoconiosis as of August 21, 1990. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to employer's 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).

Section 411(c)(3)(A) of the Act, as implemented by Section 718.304(a) of the regulations, provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*). Additionally, the Fourth Circuit had held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999). In *Scarbro*, the Fourth Circuit further explained that where the x-ray evidence vividly displays the presence of large opacities, medical evidence under another prong of 30 U.S.C. §923(c) can undermine the positive x-rays only by affirmatively showing that the opacities are not there or are not what they seem to be. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

Employer initially asserts that in evaluating the x-ray evidence, the administrative law judge erred in according greater probative weight to the lateral view of the August 21, 1990 x-ray, read by Dr. Epling on behalf of Dr. Robinette, as showing a four centimeter mass or lesion in the left lower lobe of the lung, than to Dr. Epling's reading of the postero-anterior (PA) view of the same x-ray, which did not reveal any large lesions. Claimant's Exhibit 3; Director's Exhibits 62, 63; Employer's Brief at 11-12. Specifically, employer asserts that lateral view x-rays fail to comply with the quality standards and, therefore, fail to constitute valid evidence under the regulations. Employer further contends that, even if the August 21, 1990 lateral view x-ray constitutes valid evidence, as it was not properly classified in accordance with the ILO-U/C requirements set forth at Section 718.304(a), the administrative law judge erred in finding this x-ray sufficient to support claimant's burden of proof. Employer's Brief at 12. We disagree.

Initially, we note 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." 20 C.F.R. Part 718, Appendix A(1) (2000). In finding the reading of the August 21, 1990 lateral view x-ray to be more probative than the three readings of the PA view of the same x-ray, which did not reveal the presence of any large lesions, the administrative law judge permissibly credited, as reasonable and unchallenged, 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 shown on standard x-ray views. Director's Exhibit 187; Decision and Order on Remand at 12. In addition, the administrative law judge noted that Dr. Robinette's opinion was somewhat supported by Dr. Castle's testimony that a mass located behind the heart's shadow would be difficult to interpret on x-ray. Director's Exhibit 67, p.91. We also note that, contrary to employer's arguments, Dr. Robinette specifically stated that the radiographic presentation on the August 21, 1990 lateral view x-ray was a "Category A" mass which, "within the guideline for the use of the 1980 ILO Classification for pneumoconiosis" represented a "pulmonary nodule measuring more than 1 cm. in size and, in fact, was 4 cm. on the routine x-ray on the lateral view only." Director's Exhibit 182; Decision and Order on Remand at 17. Therefore, we hold that the administrative law judge acted within his discretion in accepting the reading of the August 21, 1990 lateral view x-ray, and in according it greater probative value than the corresponding PA view readings of the same x-ray.

Employer further contends that the administrative law judge erred in failing to weigh the positive reading of the August 21, 1990 lateral view x-ray against all of the contrary x-ray interpretations of record, the preponderance of which are negative for the presence of large opacities and thus do not support an August 1990 onset date. Employer's Brief at 13-15. Employer's argument is without merit.

In evaluating the x-ray evidence, the administrative law judge initially noted, as Dr. Robinette pointed out, that because claimant's left lower lobe, the location of the large opacity seen on the August 21, 1990 lateral view x-ray, was surgically removed on September 4, 1990, post-surgical x-rays would not be expected to reveal a large opacity in this region. Decision and Order on Remand at 9. Nonetheless, because employer had stipulated to the presence of complicated pneumoconiosis beginning in September 1996, the administrative law judge properly considered the x-ray evidence up to that date. Decision and Order on Remand at 9-11. Contrary to employer's arguments, the administrative law judge specifically found that the preponderance of the x-ray evidence from 1976 through July 31, 1990, and, understandably, the preponderance of the post-operative x-ray evidence from September 4, 1990 through April 13, 1992, does not establish the presence of a large pulmonary opacity. Claimant's Exhibit 3; Director's Exhibits 25, 37, 50, 59, 62, 63; Employer's Exhibit 1; Decision and Order on Remand at

11. Furthermore, in considering the relative probative weight of the August 21, 1990 lateral view x-ray, and whether the reading was possibly erroneous, the administrative law judge properly noted that the record contained no contrary interpretation of this x-ray. Decision and Order on Remand at 12. In addition, the administrative law judge found that while Dr. Hansbarger, a Board-certified pathologist, indicated that the mass he observed on biopsy was only 1.3 centimeters and would not appear on x-ray as greater than one centimeter, thereby suggesting that the x-ray image might be false, Dr. Hansbarger did not discuss the August 21, 1990 lateral view x-ray or the results of the computerized tomography (CT) scan taken that same day, which also revealed the presence of a 4 x 3 centimeter mass in the left lower lobe, nor had the doctor attempted to reconcile his pathology findings with these actual, radiographic images. Decision and Order on Remand at 13. Finally, the administrative law judge properly considered that while the physicians of record disagreed as to what the 4 x 3 centimeter mass represented, there was no disagreement as to the existence of the mass on the August 21, 1990 CT scan. Decision and Order on Remand at 12-13. Thus, the administrative law judge permissibly concluded that the CT scan evidence of a 4 x 3 centimeter mass provided sufficient corroboration for Dr. Epling's reading of the August 21, 1990 lateral view x-ray, which was both uncontradicted and specifically classified by Dr. Robinette as representing a Category A opacity, to establish that Dr. Epling's reading was accurate and established the presence of a radiographic opacity greater than one centimeter pursuant to Section 718.304(a). Decision and Order on Remand at 13.

Having found that the more probative x-ray evidence of record supported the presence of a large radiographic opacity, the administrative law judge then properly weighed this evidence together with the biopsy and medical opinion evidence of record to determine whether claimant established the existence of complicated pneumoconiosis prior to September 1996. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. In concluding that claimant established the existence of complicated pneumoconiosis as of August 21, 1990, the administrative law judge accorded greater probative weight to the pathology findings of Dr. Ferguson, and the medical opinion of Dr. Robinette, which supported a finding of complicated pneumoconiosis as of August 1990 and thus corroborated the August 21, 1990 lateral view x-ray, than to the contrary pathology findings of Dr. Hansbarger and the contrary medical opinions of Drs. Naeye, Sargent, Fino, Castle and Wiot, which supported a finding of only simple pneumoconiosis. Decision and Order on Remand at 21-24.

Regarding the administrative law judge's evaluation of the medical opinion evidence, employer initially contends that the administrative law judge erred in finding Dr. Ferguson's pathology opinion sufficient to establish the existence of complicated pneumoconiosis. Employer asserts that the Fourth Circuit specifically held, as a matter of law, that Dr. Ferguson's opinion could not carry claimant's burden of proof to

establish the existence of complicated pneumoconiosis. Employer's Brief at 17-18. Employer's argument is misplaced.

In *Blankenship*, the Fourth Circuit held that Dr. Ferguson's September 6, 1990 pathology report was insufficient to establish a diagnosis of complicated pneumoconiosis because Dr. Ferguson's descriptions of a 2 x 3 centimeter "mass" and "massive fibrosis" did not equate to the statutorily required diagnosis of "massive lesions," and because the administrative law judge had failed to determine whether the lesion or nodule found by Dr. Ferguson would, if x-rayed prior to its surgical removal, have showed as a one-centimeter opacity. Director's Exhibit 46; *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562. Subsequent to the issuance of the Fourth Circuit's decision, however, Dr. Ferguson fully explained his pathology findings in a deposition taken on April 8, 2003. Director's Exhibit 210. Dr. Ferguson specifically stated that at the time of his examination of the lung tissue, the gross dissection of the lung specimen had already been performed by another member of his practice, and that therefore his own measurements had been made from the slides. Director's Exhibit 210, p.5-6. He explained that the area of massive fibrosis in the lung specimen had been dissected into multiple pieces and was not contained on a single slide. Therefore, it was necessary to estimate the size of the original lesion based on the maximal dimensions of several areas of fibrosis. Director's Exhibit 210, p.5-6. Dr. Ferguson concluded that, taking into account the tissue shrinkage that occurs when slides are prepared, he estimated the size of the fibrotic lesion to be two to three centimeters in greatest dimension. Director's Exhibit 210, p.6. Dr. Ferguson further explained that the smaller nodules described in the pathology report were present *in addition* to this two to three centimeter fibrotic lesion. Director's Exhibit 210, p.10. Finally, Dr. Ferguson specifically stated that the two to three centimeter fibrotic lesion he observed in 1990 would be the equivalent of at least a one centimeter lesion on x-ray. Director's Exhibit 210, p.7. In light of Dr. Ferguson's supplemental testimony, we hold that the administrative law judge could properly credit his opinion as supportive of a diagnosis of complicated pneumoconiosis. Decision and Order on Remand at 14-15, 21.

Employer next contends that the administrative law judge erred in failing to accord greater weight to Dr. Hansbarger's pathology opinion, that claimant has only simple pneumoconiosis. Employer's Brief at 18-21. Contrary to employer's argument, the administrative law judge permissibly accorded less weight to the opinion of Dr. Hansbarger in part because the physician's opinion was based on his belief that the largest biopsy lesion he observed, 1.3 centimeters, was below the two centimeter threshold necessary for a diagnosis of complicated pneumoconiosis or pulmonary massive fibrosis. As the administrative law judge correctly found, however, neither the statute nor the regulation imposes such a threshold. Rather, all that must be proven is that any mass observed by biopsy or other means, would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. 20 C.F.R §718.304; *see Scarbro*, 220

F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; Employer's Exhibit 6; Decision and Order on Remand at 21.

Employer further contends that the administrative law judge erred in failing to offer a valid basis for discounting the opinions of Drs. Naeye, Castle, Sargent, Fino, and Wiot, that claimant had only simple pneumoconiosis prior to 1996, or for crediting the opinion of Dr. Robinette, that claimant developed complicated pneumoconiosis by August 1990. Employer's Brief at 16, 21-22. In addition, employer contends that the administrative law judge substituted his opinion for that of Dr. Naeye, and, by noting that Drs. Castle, Sargent, Fino and Wiot did not identify another cause for the lesion seen in claimant's left lower lobe, impermissibly placed the burden of proof on employer to refute the existence of complicated pneumoconiosis. Employer's Brief at 16, 21. We disagree.

Initially, we hold that, 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. Director's Exhibit 129; Decision and Order on Remand at 20, 22. The administrative law judge permissibly accorded little weight to Dr. Naeye's opinion in part because he based his conclusions on a narrow medical definition of complicated pneumoconiosis, rather than addressing whether the lesion described on biopsy was equivalent to one centimeter on x-ray film, and failed to explain why he agreed with Dr. Hansbarger's description of that lesion as being only 1.3 centimeters, rather than with Dr. Ferguson's description of the lesion as being 2 x 3 centimeters. *See Blankenship*, 177 F.3d at 244, 22 BLR at 2-562; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director's Exhibit 129; Decision and Order on Remand at 22. Similarly, the administrative law judge permissibly accorded less weight to the opinions of Drs. Castle and Fino because their conclusions were also based in part on a narrow medical definition of complicated pneumoconiosis. *See Blankenship*, 177 F.3d at 244, 22 BLR at 2-562; Director's Exhibits 59, 64, 67, 198; Employer's Exhibit 3; Decision and Order on Remand at 18, 22-23.

The administrative law judge further acted within his discretion in according less weight to the opinions of Drs. Sargent and Wiot because he found their conclusions not well reasoned. Specifically, the administrative law judge permissibly found that while Dr. Sargent based his conclusion, that claimant does not have complicated pneumoconiosis, in part on the absence of a background of severe simple pneumoconiosis, he failed to reconcile this statement with Dr. Hansbarger's opinion that the biopsy evidence revealed "moderately severe" coal workers' pneumoconiosis in claimant's left lower lung lobe. *Clark*, 12 BLR at 1-149; Director's Exhibit 40; Employer's Exhibit 5; Decision and Order on Remand at 22. Similarly, the

administrative law judge further acted within his discretion in finding the opinion of Dr. Wiot to be insufficiently reasoned because the physician did not reconcile his conclusion, that the 4 x 3 centimeter mass seen on the August 21, 1990 x-ray and CT scan represented an old inflammatory process, with the pathology evidence, or otherwise support his opinion with evidence from the record. *Clark*, 12 BLR at 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Employer's Exhibit 4; Decision and Order on Remand at 23. Thus, as the administrative law judge gave valid reasons for according diminished probative weight to the opinions of Drs. Naeye, Castle, Fino, Sargent, and Wiot, there is no merit to employer's contention that the administrative law judge erroneously imposed the burden of proof on employer to establish an alternative cause for the mass observed in claimant's left lower lung lobe. Employer's Brief at 21; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Finally, we reject employer's argument that the administrative law judge erred in according the greatest probative weight to the opinion of Dr. Robinette. Contrary to employers assertions, the administrative law judge permissibly found that because Dr. Robinette integrated the August 1990 radiographic evidence with Dr. Ferguson's pathology findings, and further sufficiently explained his difference of opinion with Dr. Hansbarger's contrary pathology findings, Dr. Robinette's opinion is the best documented and best reasoned medical opinion on the causation and characterization of the pulmonary mass in claimant's left lower lobe. *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19; Director's Exhibits 22, 52, 67, 182, 187, 188; Decision and Order on Remand at 16-17, 23.

It is the province of the administrative law judge to evaluate the physicians' opinions, *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993), and the Board will not substitute its inferences for those of the administrative law judge. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Because the administrative law judge examined the evidence and explained his findings with supporting rationale, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998), we affirm the administrative law judge's finding that Dr. Epling's August 21, 1990 lateral view x-ray, Dr. Ferguson's pathology report and the medical opinion of Dr. Robinette together establish that claimant had developed complicated pneumoconiosis as defined in Section 718.304 by August 21, 1990. In addition, as the administrative law judge correctly determined that claimant is entitled to benefits from the first month the evidence established that he suffered from complicated pneumoconiosis, in this case, August 21, 1990, we, therefore, affirm the administrative law judge's finding that claimant is entitled to benefits beginning August 1, 1990. 20 C.F.R. §725.503; *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); Decision and Order on Remand at 24.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge