BRB No. 98-1560 BLA

DENNIS E. KEENE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
G & A COAL COMPANY, INC.	)	
	)	
Employer-Petitioner	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Dennis E. Keene, Bandy, Virginia, *pro se*.

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-0364) of Administrative Law Judge Vivian Schreter-Murray 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 second time. When this case was initially before the Board, upon employer's appeal of the award of benefits of Administrative Law Judge Vivian Schreter-Murray (the administrative law judge), the Board affirmed the administrative law judge's finding that invocation of the irrebuttable presumption of 20 C.F.R. §718.304 was established by the x-ray and CT scan evidence of record. *Keene v. G & A Coal Co., Inc.,* BRB No. 96-1689 BLA-A (Sept. 19, 1997)(unpub.). Specifically, the Board held that, pursuant to 20 C.F.R. §718.304(a), the administrative law judge properly credited Dr. Franche's interpretation of complicated pneumoconiosis based on the March 17, 1995 x-ray, as it was the most recent x-ray of record. *Id.* The Board also affirmed the administrative law judge's finding that the opinion of Dr. Templeton established the

presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.* Employer filed a Motion for Reconsideration, pointing out that the March 17, 1995 x-ray was not, in fact, the most recent x-ray of record. Employer noted that there was a subsequent x-ray dated September 13, 1995. The Board granted employer's motion and stated that, inasmuch as the March 17, 1995 x-ray was not the most recent x-ray of record, "it is not entirely clear upon what basis the administrative law judge accorded determinative weight to Dr. Franche's interpretation of the March 17, 1995 x-ray." *Keene v. G & A Coal Co.,* BRB No. 96-1689 BLA-A (Dec. 23, 1997)(Order on Recon.)(unpub.). Therefore, the Board vacated the award of benefits and remanded the case for the administrative law judge to "re-weigh the x-ray evidence, and to provide a specific rationale for the weight he accords conflicting readings...pursuant to Section 718.304(a)." *Id*.

On remand, the administrative law judge held that although the most recent x-ray was taken on September 13, 1995, it was of poor quality and was unreadable. Thus, she concluded that the x-ray of March 17, 1995 should be regarded as the most recent x-ray of record because it was the most recent *readable* x-ray. With respect to Dr. Templeton's CT scan interpretation, the administrative law judge stated that "[t]he Board upheld the...determination that Dr. Templeton's opinion, based on the CT scan, is sufficient to invoke the presumption under 20 C.F.R. §718.304(c)." Decision and Order at 5. Based on these findings, the administrative law judge again awarded benefits. Employer appeals this determination.[1] Claimant has not responded to the appeal. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to this appeal.

The Board's scope of review is defined by statute. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a). 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 on the Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that

[1]This is a consolidated appeal, in which employer also challenges the administrative law judge's denial of its Motion to Vacate and for Reconsideration and its Motion to Recuse. The appeal with respect to the former motion will be considered in this Decision and Order. However, it is noted that inasmuch as Administrative Law Judge Vivian Schreter-Murray is no longer with the Department of Labor, the appeal of the denial of employer's Motion to Recuse is moot.

he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first asserts that the administrative law judge has provided no basis for finding that the most recent x-ray is unreadable because it was of "exceptionally poor quality."[2] Employer argues that the administrative law judge erred by mischaracterizing Dr. Castle's description of the September 13, 1995 x-ray. We agree. In the Decision and Order on remand the administrative law judge stated that Dr. Castle, a B-reader, found the film to be of such poor quality that he could not even discern simple pneumoconiosis, although this diagnosis had been made by a majority of the x-ray readers since December, 1991. Decision and Order on Remand at 4. Dr. Castle's x-ray interpretation includes a notation that the film quality is Grade 2 based on "poor inspiration." Employer's Exhibit 3, p.6. In his report, Dr. Castle stated that on x-ray "there was some s/t type opacities in the right upper and mid lung zone with a profusion of 0/1." *Id*. at 3. He concluded that there was "no evidence of coal workers' pneumoconiosis by physical examination, radiographic evaluation and physiologic studies including arterial blood gases." *Id*. at 4. Despite the fact that Dr. Castle did not find the September 13, 1995 x-ray to be of an ideal quality, he did interpret the x-ray. Thus, the administrative law judge was not at liberty to disregard the x-ray merely because of film quality. See *Preston v. Director, OWCP,* 6 BLR 1-1229 (1984). Under the Black Lung regulations "the x-ray [is required to] be of suitable quality for interpretation, not optimal quality. 20 C.F.R. §410.428(b)." *Id. at* 1-1233. Unless a film is classified as unreadable, a conforming x-ray must be considered in the administrative law judge's assessment of the evidence. *See Wheatley v. Peabody Coal Co.,* 6 BLR 1-1214,1215-1216 (1984). Thus, we hold that the administrative law judge erred in disregarding the September 13, 1995 x-ray and in finding complicated pneumoconiosis on the basis that the March 17, 1995 x-ray was the most recent. Furthermore, the administrative law judge failed to explain why she discredited the interpretations of the March 17, 1995 x-ray by two other equally qualified physicians[3], both of whom diagnosed only simple pneumoconiosis and another reading of simple pneumoconiosis by Dr. Shahan, a Board certified radiologist. Director's Exhibit 20. Therefore, we vacate the administrative law judge's finding that the x-ray of March 17, 1995 is the most recent x-ray of record and remand the case for the administrative law judge to consider the readings of the September 13, 1995 x-ray[4] and all of the readings of the March 17, 1995 x-ray.

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[2]The administrative law judge stated that the March 17, 1995 x-ray must be disregarded. However, contextually, it is clear that the administrative law judge was referring to the September 13, 1995 x-ray.

[3]Drs. Scott and Wheeler, who rendered these interpretations, are both B-readers and Board certified radiologists. Director's Exhibit 35.

[4]The September 13, 1995 x-ray was read by three physicians, Drs. Castle, Templeton,

Wheeler, all of whom are B-readers and/or Board certified radiologists, as showing no large opacities. Employer's Exhibits 3, 6, 12 at 52.

Next, employer asserts that the administrative law judge erred in finding that Dr. Templeton's interpretation establishes the presence of complicated pneumoconiosis, noting that Dr. Templeton never mentioned coal workers' pneumoconiosis or any other dust related disease. The record contains three interpretations of a single CT scan. Dr. Wheeler read the scan as showing tuberculosis. Employer's Exhibit 1. Dr. Templeton interpreted the scan as being suggestive of granulomatous disease, such as histoplamosous or tuberculosis. Employer's Exhibit 5. Dr. Branscomb read the scan as showing no complicated coal workers' pneumoconiosis, as well as no silicosis or simple coal workers' pneumoconiosis. Employer's Exhibit 8. Of these three interpretations, the administrative law judge found that only that of Dr. Templeton established the presence of complicated pneumoconiosis. Decision and Order at 5. In the original Decision and Order, the Board noted that the administrative law judge "reasonably construed Dr. Templeton's opinion to mean that claimant has a combination of diseases that, in part at least, owe their origins to coal dust exposure." *Keene v. G & A Coal Co.,* BRB No. 96-1689 BLA-A (Sept. 19, 1997)(unpub.). Employer reiterates its earlier argument that Dr. Templeton failed to draw a nexus between the diseases he diagnosed on CT scan and coal mine employment.[5] Our prior affirmance of the administrative law judge's crediting of Dr. Templeton's opinion as establishing the presence of complicated pneumoconiosis was based, in part, on Dr. Forehand's opinion that claimant's thirty years of coal mine employment "may have increased [the miner's] risk for the development of tuberculosis." *Id*. at 5, n. 4. Thus, based on Dr. Forehand's opinion, the Board determined that coal dust exposure caused the physical changes noted in Dr. Templeton's report. In the instant appeal, however, upon further reflection of Dr. Templeton's report, we question whether the report, in fact, meets the standard for establishing complicated pneumoconiosis at Section 718.304(c). Thus, we vacate the administrative law judge's crediting of Dr. Templeton's report. On remand, the administrative law judge must assess whether Dr. Templeton's report establishes the presence of complicated pneumoconiosis on its own merit.

Further, employer contends that the administrative law judge erred in failing to grant its Motion to Vacate and for Reconsideration of her original Decision and Order in view of employer's challenge to the administrative law judge's taking official notice of certain medical authorities.[6] Inasmuch as the administrative law judge's substantive findings are

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[5]Although raised by employer on motion for reconsideration, this argument was not addressed by the Board in its December 23, 1997 Decision and Order on Reconsideration. Thus, on remand, the administrative law judge stated that "[t]he Board upheld the...determination that Dr. Templeton's opinion, based on the CT scan, is sufficient to invoke the presumption under 20 C.F.R. §718.304(c)." Decision and Order on Remand at 5. Contrary to this pronouncement, the Board's silence on this issue should not have been construed as an affirmance on reconsideration of the administrative law judge's assessment of Dr. Templeton's report.

[6]Specifically, employer challenged the administrative law judge's sources, arguing, *inter alia*, that they referred to the mining of hard coal, whereas, claimant mined soft coal; that an item in quotation marks was actually a paraphrased statement from a text; that the administrative law judge provided either the wrong author, or no author at all, for certain materials; and that certain medical references utilized by the administrative law judge were out of date.

vacated, and the case is remanded for reassessment of the record evidence, employer is now afforded the opportunity to challenge whatever judicially noticed materials employer contends were relied upon improperly by the administrative law judge. Thus, in view of the disposition of this case, we need not address the propriety of the administrative law judge's ruling on Employer's Motion To Vacate and for Reconsideration.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is vacated, and this 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge