BRB No. 01-0701 BLA

HUGH E. HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:_______________
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Hugh E. Hall, Beckley, West Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order (99-BLA-1352) of Administrative Law Judge Daniel L. Leland denying benefits on a miner's duplicate 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).[3] The administrative

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[1]Claimant is Hugh E. Hall, the miner, who filed his second and present claim for benefits on January 8, 1998. Director's Exhibit 1. The miner's first claim for benefits, filed on June 30, 1992, was finally denied on September 28, 1993 because claimant failed to establish total respiratory disability due to pneumoconiosis. Director's Exhibit 32.

[2]Claimant was unrepresented by counsel before the administrative law judge. The administrative law judge repeatedly asked claimant if he wanted to be represented by an attorney, gave claimant the opportunity to object to and admit evidence, and to testify at the hearing. December 8, 2000 Hearing Transcript at 4-28, 30. Therefore, we hold that claimant voiced a knowing and voluntary waiver of his right to be represented by counsel pursuant to 20 C.F.R. §725.362(b), and that the hearing was conducted in accordance with *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

[3]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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

law judge credited claimant with thirty-nine years of coal mine employment. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 6-7. Therefore, the administrative law judge found the new evidence insufficient to establish a material change in conditions. *Id.* at 7. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the revised regulations will not affect the outcome of this case.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by the Act, 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates*, Inc., 380 U.S. 359 (1965).

Because this case involves a duplicate claim, the administrative law judge, in accordance with *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), considered the new evidence to determine whether it was sufficient to prove one of the elements of entitlement that formed the basis of the prior denial of the miner's claim. *See* 20 C.F.R. §725.309 (2000). Claimant's first claim was finally denied because he failed to establish total respiratory disability. *See* n.1, *supra*. Therefore, the administrative law judge considered the evidence submitted since the denial of claimant's first claim to determine whether it is sufficient to establish total respiratory disability due to pneumoconiosis. Decision and Order at 6-7.

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[4]We affirm the administrative law judge's length of coal mine employment finding inasmuch as it is not adverse to claimant and is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Since the record contains evidence of complicated pneumoconiosis, the administrative law judge first considered the new x-ray evidence to determine whether claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Decision and Order at 6. The new evidence contains fourteen x-rays which were interpreted by nine different physicians. The administrative law judge noted that four physicians, Drs. Ranavaya, Gaziano, Zaldivar, and Patel, read claimant's x-ray as showing evidence of complicated pneumoconiosis. *Id.* The administrative law judge further noted that these physicians, Drs. Ranavaya, Gaziano, Zaldivar, and Patel, are all B-readers[5] and that "Dr. Patel is a radiologist, although the record is silent as to whether he is a board certified radiologist."[6] *Id.* Moreover, the administrative law judge stated that Drs. Gayler, Scott, Wheeler, and Cole, who are B-readers and Board-certified radiologists, and Dr. Fino, a B-reader, interpreted claimant's x-rays as showing "evidence of at most simple pneumoconiosis." *Id.* Inasmuch as the administrative law judge permissibly found "the most expert x-ray interpreters [Drs. Gayler, Scott, Wheeler, and Cole] did not find large opacities on claimant's chest x-rays," the administrative law judge concluded that the "preponderance of the x-ray evidence does not support invocation of the § 718.304 presumption." *Id.*; *see Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Accordingly, we affirm the administrative law judge's finding that complicated pneumoconiosis was not established pursuant to Section 718.304(a).

The administrative law judge next considered whether the biopsy evidence revealed "massive lesions" in the lung, and, therefore, established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Decision and Order at 7. The administrative law judge reviewed the physicians' opinions of Drs. Naeye, Caffrey, and Green, who reviewed the biopsy slides. *Id.* The administrative law judge stated that Drs. Naeye and Caffrey "only diagnosed simple pneumoconiosis and did not find the presence of complicated pneumoconiosis." *Id.* With regard to Dr. Green's report, the administrative law judge stated that Dr. Green did not definitively diagnose complicated pneumoconiosis and "relied heavily on Dr. Patel's x-ray findings of large opacities for his conclusion that the miner has

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[5]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[6]While the record reflects that Drs. Gaziano and Zaldivar are B-readers, the qualifications of Drs. Ranavaya and Patel are not in the record.

complicated pneumoconiosis [when] the more expert x-ray interpreters did not find large opacities." *Id.* Therefore, the administrative law judge concluded that "[t]he biopsy evidence as a whole does not demonstrate the existence of massive lesions in claimant's lungs." *Id.*

The administrative law judge properly found that the biopsy opinions of Dr. Naeye and Caffrey do not establish complicated pneumoconiosis pursuant to Section 718.304(b) inasmuch as neither of these physicians diagnosed complicated pneumoconiosis. Employer's Exhibits 4, 6, 8; *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *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*). Moreover, because Dr. Green stated in his report that "[i]f the biopsy was taken in the region of the large masses present on the x-ray, then they confirm the presence of [progressive massive fibrosis]," the administrative law judge permissibly found Dr. Green's diagnosis of complicated pneumoconiosis to be equivocal. *See U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Accordingly, we affirm the administrative law judge's finding that the biopsy evidence is insufficient to establish the existence of complicated pneumoconiosis at Section 718.304(b).

The administrative law judge concluded that claimant failed to establish invocation of the irrebuttable presumption of total respiratory disability due to pneumoconiosis pursuant to Section 718.304 because "a preponderance of the chest x-rays did not diagnose large opacities and the biopsy slides did not indicate massive lesions." Decision and Order at 7. Inasmuch as the administrative law judge properly found that the existence of complicated pneumoconiosis could not be established pursuant to Section 718.304(a) and (b) and there is no credible evidence that would establish complicated pneumoconiosis at Section 718.304(c),[7] we affirm the administrative law judge's finding that claimant failed to establish

[7]In his February 18, 1998 report, Dr. Gaziano found the existence of complicated pneumoconiosis. Director's Exhibit 14. Because Dr. Gaziano's interpretation of claimant's

complicated pneumoconiosis. *See Scarbro*, *supra*; *Blankenship*, *supra*; *Lester*, *supra*; *Melnick*, *supra*.

February 18, 1998 x-ray has been permissibly discredited by the administrative law judge, *see* discussion, *supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877 (1984), we deem harmless error, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), the administrative law judge's failure to specifically consider Dr. Gaziano's finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

The administrative law judge next considered whether claimant could establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge considered the newly submitted pulmonary function studies and blood gas studies and properly found that claimant failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(ii) inasmuch as none of these tests yielded qualifying[8] values. Decision and Order at 7; *see Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Similarly, the administrative law judge properly found that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iii) inasmuch as the record does not contain any evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 7. Therefore, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found the newly submitted medical opinion evidence to be insufficient to establish total respiratory disability because "[n]o physician in the record has concluded that claimant has a totally disabling pulmonary or respiratory impairment." Decision and Order at 7. The administrative law judge stated that Drs. Tuteur[9] and Fino opined that claimant does not have any respiratory impairment, and that Dr. Zaldivar did not express an opinion regarding the miner's respiratory ability. *Id.* The administrative law judge additionally reported that Dr. Gaziano opined that "claimant should not return to work because he has complicated pneumoconiosis, but he did not find total respiratory disability." *Id.* In fact, Dr. Gaziano stated in his medical report that claimant has a moderate respiratory disability and that both his complicated pneumoconiosis and his heart disease "equally contribute to [his] total impairment." Director's Exhibit 14. Because the administrative law judge has mischaracterized Dr. Gaziano's opinion, *see Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate his Section 718.204(b)(2)(iv) finding and remand this case for the administrative law judge to reconsider Dr. Gaziano's report regarding claimant's total respiratory disability.

If, on remand, the administrative law judge finds the new evidence sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), he must then weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Fields v.*

[8]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[9]Dr. Tuteur, in fact, found that claimant was not disabled in whole or in part from coal workers' pneumoconiosis or coal dust exposure. Director's Exhibit 36.

Island Creek Coal Co., 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Finally, we instruct the administrative law judge that if he finds that claimant has established a material change in conditions on remand by establishing total respiratory disability pursuant to Section 718.204(b)(2), then he must consider the entire evidentiary record to determine if claimant has established entitlement to benefits. *See Rutter*, *supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge