

BRB No. 05-0840 BLA

BOB L. SZCZEBLEWSKI)
)
 Claimant-Petitioner)
)
 v.)
)
 OLD BEN COAL COMPANY) DATE ISSUED: 07/24/2006
)
 Employer-Respondent)
)
 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 Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Cully & Wissore), Carbondale, Illinois, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (01-BLA-0561) of
Administrative Law Judge Robert L. Hillyard denying 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 involves a claim filed on October
5, 1999 and is before the Board for the second time. In the initial decision, the
administrative law judge, after crediting claimant with twenty-eight years of coal mine

¹The 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
(2002). All citations to the regulations, unless otherwise noted, refer to the amended
regulations.

employment, found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304 (2000).² Accordingly, the administrative law judge awarded benefits. By Decision and Order dated June 29, 2004, the Board affirmed the administrative law judge's length of coal mine employment finding as unchallenged on appeal. *Szczeblewski v. Old Ben Coal Co.*, BRB No. 03-0627 BLA (June 29, 2004) (unpublished). The Board, however, vacated the administrative law judge's finding that claimant was entitled to the irrebuttable presumption at 20 C.F.R. §718.304 (2000) and remanded the case for further consideration.³ *Id.*

On remand, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See* 20 C.F.R. §718.202(a)(3). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant further contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.⁴

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable

²The administrative law judge also found that the evidence was sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000).

³The Board also vacated the administrative law judge's findings that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). *Szczeblewski v. Old Ben Coal Co.*, BRB No. 03-0627 BLA (June 29, 2004) (unpublished).

⁴Because no party challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

After consideration of the administrative law judge’s Decision and Order on Remand, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge’s denial of benefits on the miner’s claim under 20 C.F.R. Part 718. In considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that the x-ray interpretations rendered by physicians qualified as B readers and Board-certified radiologists were entitled to greater weight than the x-ray interpretations rendered by physicians with no known radiographic expertise. Decision and Order on Remand at 7. The administrative law judge properly accorded greater weight to the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists.⁵ See *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 7. Because the administrative law judge found that the x-ray interpretations rendered by the physicians qualified as B readers and/or Board-certified radiologists were conflicting,⁶ he found that claimant failed to establish the existence of

⁵The record contains a total of thirty-four interpretations of ten x-rays. However, the record only contains twenty-four x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. These twenty-four interpretations are of claimant’s x-rays taken on December 6, 1999 and October 6, 2000. While six physicians qualified as B readers and/or Board-certified radiologists interpreted claimant’s December 6, 1999 x-ray as positive for pneumoconiosis, Director’s Exhibit 11; Claimant’s Exhibits 105, six equally qualified physicians rendered negative interpretations of this x-ray. Director’s Exhibits 17-19; Employer’s Exhibits 3, 6, 7. While five physicians qualified as B readers and/or Board-certified radiologists interpreted claimant’s October 6, 2000 x-ray as positive for pneumoconiosis, Claimant’s Exhibits 6-10, six equally qualified physicians rendered negative interpretations of this x-ray. Director’s Exhibits 24-26; Employer’s Exhibits 1, 7, 10. Dr. Fino, a B reader, found that claimant’s October 6, 2000 x-ray was unreadable. Employer’s Exhibit 6.

⁶The administrative law judge found that there were eleven negative and twelve positive interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. See Decision and Order on Remand at 8. However, the administrative law judge, in his consideration of the x-ray evidence, failed to consider Dr. Dahhan’s negative interpretation of claimant’s October 6, 2000 x-ray. See Decision and Order on Remand at 4, 7-8; Employer’s Exhibit 10. Dr. Dahhan is a B reader. Employer’s Exhibit 10. Consequently, there are a total of twelve negative interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. Moreover, contrary to the administrative law judge’s characterization, there are eleven,

pneumoconiosis by a preponderance of the x-ray evidence. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order on Remand at 8. In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual readings.⁷ See *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); see also *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); see generally *Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).⁸

not twelve, positive x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. Consequently, among the interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists, eleven are positive and twelve are negative.

⁷Claimant argues that the administrative law judge erred in failing to address the fact that the physicians who rendered negative x-ray interpretations provided "conflicting diagnoses." Claimant's Brief at 6. Contrary to claimant's contention, the negative x-ray interpretations are largely consistent. As documented by the administrative law judge's summary of the x-ray evidence, eight of the twelve negative x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists include a finding of either "granulomas," "granulomatous changes" or "granulomatous disease." See Decision and Order on Remand at 3-5; Director's Exhibits 17, 24-26; Employer's Exhibits 1, 6, 7. Moreover, each of the negative interpretations is "consistent" in that each interpretation is negative for the existence of pneumoconiosis, the relevant issue at 20 C.F.R. §718.202(a)(1).

⁸We decline to address claimant's contention that the Board, in its 2004 Decision and Order, erred in vacating the administrative law judge's initial finding (in his previous 2003 Decision and Order) that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge's initial finding has been vacated and is not currently at issue on appeal before the Board.

We similarly reject claimant's contentions that the Board erred in vacating the administrative law judge's previous findings pursuant to 20 C.F.R. §§718.304 (2000) and 718.202(a)(4) (2000). These findings have also been vacated and are not currently at issue before the Board.

Claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(3).⁹ Claimant contends that the administrative law judge erred in finding that claimant was not entitled to benefits based on the irrebuttable presumption at 20 C.F.R. §718.304.¹⁰ In considering whether the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists.¹¹ *See Sheckler, supra; Roberts, supra; Decision and*

⁹Section 718.202(a)(3) provides that if the presumptions described in 20 C.F.R. §§718.304, 718.305 or 718.306 are applicable, it shall be presumed that the miner is suffering from pneumoconiosis. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Because the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

¹⁰Section 718.304 provides that there is an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. 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. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

¹¹As previously noted, the record contains twenty-four x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. While five physicians qualified as B readers and/or Board-certified radiologists interpreted claimant's December 6, 1999 x-ray as positive for complicated pneumoconiosis, Claimant's Exhibits 1-5, seven equally qualified physicians interpreted this x-ray as negative for complicated pneumoconiosis. Director's Exhibits 11, 17-19; Employer's Exhibits 3, 6, 7. While four physicians qualified as B readers and/or Board-certified radiologists interpreted claimant's October 6, 2000 x-ray as positive for complicated pneumoconiosis, Claimant's Exhibits 6, 8-10, seven equally qualified physicians interpreted this x-ray as negative for complicated pneumoconiosis. Director's Exhibits 24-26; Claimant's Exhibit 7; Employer's Exhibits 1, 7, 10. Dr. Fino, a B reader, found that claimant's October 6, 2000 x-ray was unreadable. Employer's Exhibit 6.

Order on Remand at 9. Because the administrative law judge found that the x-ray interpretations rendered by the physicians qualified as B readers and/or Board-certified radiologists were conflicting regarding the existence of complicated pneumoconiosis,¹² he found that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the x-ray evidence.¹³ See *Ondecko, supra*. The administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual readings. See *Dixon, supra*; *Roberts, supra*; see also *Wheatley, supra*; see generally *Gober, supra*. Because it is supported by substantial evidence,¹⁴ we affirm the administrative law judge's finding that

¹²Of the twenty-three x-ray interpretations of claimant's December 6, 1999 and October 6, 2000 x-rays rendered by physicians qualified as B readers and/or Board-certified radiologists, fourteen are negative for complicated pneumoconiosis.

¹³Citing *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993), the administrative law judge stated that claimant had the burden of establishing that the diagnosed large opacities were caused by coal dust exposure. Claimant accurately notes an x-ray report supports a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) if it yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B or C in one of three designated classification systems. See 20 C.F.R. §718.304(a). However, in this case, the administrative law judge did not find the x-ray evidence insufficient to establish the existence of complicated pneumoconiosis because claimant failed to establish that the large opacities were caused by coal dust exposure. The administrative law judge found that the x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis because physicians qualified as B readers and/or Board-certified radiologists disagreed as to whether the x-ray evidence was sufficient to support a such a finding.

¹⁴Claimant argues that the administrative law judge erred in finding that Dr. Miller did not interpret claimant's December 6, 1999 x-ray as positive for complicated pneumoconiosis. Contrary to claimant's contention, the administrative law judge properly found that while Dr. Miller interpreted claimant's December 6, 1999 x-ray as positive for both simple and complicated pneumoconiosis, the doctor interpreted claimant's subsequent October 6, 2000 x-ray as positive for only simple pneumoconiosis. See Decision and Order at 4-5, 9; Claimant's Exhibits 4, 7.

We also reject claimant's contention that the administrative law judge erred in failing to address the alternative findings of the physicians who interpreted claimant's x-rays as negative for complicated pneumoconiosis. Each of the negative interpretations is

the x-ray evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).¹⁵

We also reject claimant's contention that the administrative law judge erred in finding the CT scan evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Eleven physicians (Drs. Wiot, Rosenbaum, Spitz, Perme, Cohen, Meyer, Fino, Renn, Castle, Repsher and Hippensteel) rendered interpretations of claimant's October 6, 2000 CT scan. Director's Exhibits 21, 24-26; Claimant's Exhibit 11; Employer's Exhibits 1, 3, 6-9. Of these eleven physicians, ten are qualified as B readers and/or Board-certified radiologists.¹⁶ *Id.* Of these ten physicians, only Dr. Cohen interpreted claimant's October 6, 2000 CT scan as positive for complicated pneumoconiosis. *See* Claimant's Exhibit 11. The administrative law judge found that Dr. Cohen's positive interpretation of claimant's October 6, 2000 CT scan was outweighed by the multiple negative interpretations of the scan rendered by equally qualified physicians. Decision and Order on Remand at 10. Because it is based upon substantial evidence, the administrative law judge's finding that the CT scan evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c) is affirmed.

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c), we affirm the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption set forth at 20 C.F.R. §718.304. Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

In considering whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge addressed the conflicting CT scan evidence. As previously noted, eleven physicians (Drs. Wiot, Rosenbaum, Spitz, Perme, Cohen, Meyer, Fino, Renn, Castle, Repsher and

“consistent” in that each interpretation is negative for the existence of complicated pneumoconiosis, the relevant issue at 20 C.F.R. §718.304(a).

¹⁵Because there is no biopsy or autopsy evidence in this case, claimant is precluded from establishing the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

¹⁶Dr. Rosenbaum's radiological qualifications are not found in the record.

Hippensteel) rendered interpretations of claimant's October 6, 2000 CT scan.¹⁷ Of these eleven physicians, only Dr. Cohen opined that claimant's October 6, 2000 CT scan revealed opacities consistent with pneumoconiosis. Claimant's Exhibit 11. Because a majority of the physicians found that claimant's October 6, 2000 CT scan was negative for simple pneumoconiosis, the administrative law judge properly found that the CT scan evidence is insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 11.

In considering the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly credited the opinions of Drs. Renn, Repsher, Fino, Hippensteel, Castle, and Dahhan, that claimant did not suffer from simple pneumoconiosis, over the contrary opinions of Drs. Tuteur and Cohen, because their opinions were corroborated by the "overwhelmingly negative CT scan evidence." Decision and Order on Remand at 12. An administrative law judge may properly credit the opinions of physicians that he determines are better supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982). Because it is based upon substantial evidence, the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

¹⁷With the exception of Dr. Rosenbaum, all of the physicians are qualified as B readers and/or Board-certified radiologists.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge