

BRB No. 10-0561 BLA

SYLVIA C. LILLY)
(Widow of RAYMOND M. LILLY))
)
Claimant-Respondent)
)
v.)
)
KENLEY MINING COMPANY)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 06/13/2011
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Petitioners)
)
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 Ralph A. Romano,
Administrative Law Judge, United States Department of Labor.

Timothy MacDonnell and Julie L. Arrington (Washington and Lee
University School of Law), Lexington, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for
carrier.

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

PER CURIAM:

Carrier appeals the Decision and Order on Remand (2005-BLA-5494) of Administrative Law Judge Ralph A. Romano rendered on a survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² This case is before the Board for the second time. In his original Decision and Order, issued on June 22, 2007, the administrative law judge credited the miner with at least thirty-three years of qualifying coal mine employment, and found that the evidence established the presence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but failed to establish that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §718.205(c). The administrative law judge further found, however, that because the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's finding that the medical opinion evidence established the existence of simple pneumoconiosis,³ but vacated the administrative law judge's findings at Sections 718.304(a), (c), and 718.205(c). The case was remanded for the administrative law judge to reconsider the medical acceptability and relevance of the digital x-ray readings of record and to consider and weigh the x-ray evidence contained in the miner's treatment records (treatment x-rays) and the medical opinion evidence on the issue of complicated pneumoconiosis at

¹ Claimant is the widow of the miner, who died on January 1, 2004. Director's Exhibit 9. The miner was awarded lifetime benefits on June 1, 1998, when Administrative Law Judge Daniel F. Sutton found that the evidence established complicated pneumoconiosis and that the miner was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Director's Exhibit 2. No further action was taken on the miner's claim.

² The recent amendments to the Act, which became effective on March 23, 2010, apply to claims filed after January 1, 2005. Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010). The amendments do not apply in this case, as the survivor's claim was filed on February 19, 2004. Director's Exhibit 4.

³ The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis contributed to the miner's death at Section 718.205(c)(1), (2). *Lilly*, slip. op. at 12 n. 19.

Section 718.304(a), (c).⁴ Accordingly, the Board remanded the case for further consideration of the appropriate relevant evidence. *S.L. [Lilly] v. Kenley Mining Co.*, BRB No. 07-0865 BLA (Aug. 12, 2008)(Hall, J., dissenting)(unpub.).

On remand, the administrative law judge addressed the Board's instructions, reconsidered the evidence, and concluded that claimant established the presence of complicated pneumoconiosis at Section 718.304 and, thus, is entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 718.205(c)(3). Consequently, the administrative law judge awarded survivor's benefits.

In the present appeal, carrier challenges the administrative law judge's weighing of the evidence at Section 718.304, alleging that the administrative law judge's findings are contrary to applicable law and that he failed to comply with the Board's directives on remand. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 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).

Carrier contends that the administrative law judge erred in finding complicated pneumoconiosis established at Section 718.304. Specifically, carrier asserts that the administrative law judge's weighing of the digital x-rays, treatment x-rays, and conventional x-rays of record, as well as his discounting of the deposition testimony of Dr. Wiot and the report of Dr. Fino, were irrational, inconsistent with applicable law, and did not comport with the Board's remand instructions. Carrier's Brief at 6-24.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the

⁴ The administrative law judge found that there was no biopsy or autopsy evidence included in the record, and the Board affirmed that finding. *See* 20 C.F.R. §718.304(b). *Lilly*, slip. op. at 10 n.15.

⁵ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

evidence sufficient to establish the existence of complicated pneumoconiosis at Section 718.304, the administrative law judge initially considered, in accordance with the Board's instructions, the digital x-ray evidence of record, and permissibly determined that it was entitled to no weight, as the digital x-rays were of lower quality and contrast than the conventional x-rays of record, and because employer failed to proffer evidence showing the medical acceptability of the digital x-ray evidence. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); 20 C.F.R. §718.107(b); Decision and Order on Remand at 3-4. The administrative law judge also considered the miner's treatment x-rays from 1992 through 2003, and found that the "collection of readings is inconclusive," as the films were interpreted by physicians of unknown qualifications; the quality of the films was not recorded; and it was not clear whether the physicians, some of whom were treating the miner for non-respiratory conditions, were interpreting the x-rays for the purpose of diagnosing either complicated or simple pneumoconiosis. Decision and Order on Remand at 5-6. The administrative law judge concluded, therefore, that while some physicians who read the treatment x-rays described a mass in the left upper lung, the treatment x-rays were entitled to no weight, as the inconclusive interpretations constituted neither "evidence of weight for a complicated pneumoconiosis finding, ... [nor] evidence of weight against such a finding." Decision and Order on Remand at 6; *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984).

With respect to the conventional x-rays, all interpreted by dually-qualified Board-certified radiologists and B readers, the administrative law judge reviewed the interpretations of the November 6, 1996 x-ray by Drs. Wiot and Meyer, diagnosing only simple pneumoconiosis, and the interpretations of the January 13, 1997 x-ray by Drs. Alexander and Marshall, diagnosing complicated pneumoconiosis. Decision and Order at 3-4; Decision and Order on Remand at 4-5; Director's Exhibit 2; Employer's Exhibit 12. The administrative law judge also reviewed Dr. Wiot's subsequent deposition testimony, wherein the physician repudiated his findings on the 1996 x-ray, based on his consideration of the 2003 digital x-rays.⁶ Decision and Order on Remand at 4;

⁶ Dr. Wiot interpreted the November 6, 1996 x-ray as positive for simple pneumoconiosis, with a possible malignancy in the left upper lung. Director's Exhibit 1. Dr. Wiot subsequently interpreted the digital x-rays, dated December 23, 2003 and December 30, 2003, as negative for pneumoconiosis, with a "spiculated nodular density overlying the left second rib anteriorly, which must be considered as a malignancy until proven otherwise." Employer's Exhibit 8. Dr. Wiot then testified that, because the 2003 digital x-rays showed no evidence of pneumoconiosis, his diagnosis of pneumoconiosis on the 1996 x-ray was incorrect. Employer's Exhibit 11 at 50-51.

Employer's Exhibits 8, 11. As the administrative law judge determined that the digital x-rays were unreliable, he permissibly accorded little weight to Dr. Wiot's contradictory findings with regard to the 1996 x-ray. *Id.*; see generally *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). The administrative law judge properly determined that Dr. Meyer's finding on the 1996 x-ray of a less than one centimeter nodule in the left upper lung did not support a finding of complicated pneumoconiosis. However, in view of the uncontradicted diagnoses of complicated pneumoconiosis on the 1997 x-ray by Drs. Alexander and Marshall, the administrative law judge acted within his discretion in finding that Dr. Meyer's interpretation did not constitute "strong evidence" against a finding of complicated pneumoconiosis. Decision and Order at 3; Decision and Order on Remand at 4-5; Director's Exhibit 2; see generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). As directed by the Board, the administrative law judge considered Dr. Alexander's comment, that "a follow-up chest x-ray should be obtained in 6-12 months to insure that the 10mm density in the left upper lung zone does not represent an early lung cancer." Director's Exhibit 2. Since Dr. Alexander diagnosed a Category A large opacity consistent with pneumoconiosis, and no later diagnosis of lung cancer was made, the administrative law judge permissibly concluded that Dr. Alexander's statement was not equivocal, but merely precautionary, and did not detract from his finding of complicated pneumoconiosis. Decision and Order on Remand at 3-4; see generally *Perry v. MYNU Coals Inc.*, 469 F.3d 360, 23 BLR 2-274 (4th Cir. 2006). Lastly, pursuant to the Board's instructions, the administrative law judge reviewed Dr. Fino's opinion, that the miner's radiological findings were inconsistent with complicated pneumoconiosis, but consistent with a granuloma. As Dr. Fino did not personally interpret the miner's x-rays, but merely reviewed an unnamed radiologist's interpretation of a December 12, 1996 treatment x-ray, which the administrative law judge discounted, the administrative law judge reasonably accorded no weight to Dr. Fino's opinion. Decision and Order on Remand at 5; Director's Exhibit 13; Employer's Exhibit 6; see generally *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Accordingly, the administrative law judge acted within his discretion in finding that the weight of the evidence was sufficient to establish complicated pneumoconiosis at Section 718.304(a)-(c). Decision and Order on Remand at 5; see *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his findings pursuant to Section 718.304, and affirm the award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge