BRB No. 99-0492 BLA

BRUCE SEXTON	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED:
v.	)	
	)	
SWITCH COAL CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-0773) of Administrative Law Judge Donald W. Mosser denying benefits with respect to 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on April 1, 1987. Director's Exhibit 59 at 220. The district director denied the claim on August 22, 1989, on the ground that claimant did not establish any of the elements of entitlement. *Id.* at 292. Claimant took no further action until filing a second application for benefits on July 7, 1994. Director's Exhibit 1. Following a determination by the district director that claimant was entitled to benefits, employer requested a hearing and the case was assigned to Administrative Law Judge Donald W. Mosser (the administrative law judge).

In his Decision and Order, the administrative law judge credited claimant with ten years and eight months of coal mine employment. The administrative law judge determined that inasmuch as the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), claimant had demonstrated a material change in conditions in accordance with the standard set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The administrative law judge further found that the x-ray evidence established the existence of complicated pneumoconiosis and, therefore, claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304 and the presumption that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, benefits were awarded.

Employer filed an appeal with the Board, arguing that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis. The Board affirmed the administrative law judge's finding of a material change in conditions pursuant to 20 C.F.R. §725.309, but vacated the administrative law judge's finding under Section 718.304 and remanded the case to the administrative law judge with instructions to determine whether the preponderance of the evidence of record as a whole, when weighed together, supported a finding of complicated pneumoconiosis. *Sexton v. Switch Energy Corp.*, BRB No. 97-1309 BLA (June 17, 1998)(unpub.). On remand, the administrative law judge concluded that the evidence of record did not support a finding of total disability pursuant to 20 C.F.R. §718.204(c) or complicated pneumoconiosis pursuant to Section 718.304(a)-(c). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to the existence of complicated pneumoconiosis. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[1]

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).

Claimant asserts that the administrative law judge's findings under Section 718.304(a)-(c) cannot be affirmed, as the administrative law judge erred in crediting the x-ray readings of Drs. Branscomb and Sargent and the medical opinion of Dr. Broudy. Claimant also maintains that the administrative law judge did not properly characterize the x-ray readings of Drs. Baker and Barret and the narrative report of Dr. Wiot. In addition, claimant argues that the administrative law judge erred in treating the biopsy reports as evidence affirmatively establishing that claimant does not have complicated pneumoconiosis.

Regarding the x-ray readings of Drs. Sargent and Branscomb, both physicians reread the films dated August 25, 1994 and November 1, 1994. Dr. Branscomb, a B reader, did not detect any large opacities on either film. Employer's Exhibit 2. He classified both x-rays as 1/1, but commented that in view of claimant's medical history and in the context of the entire x-ray, the changes seen were caused by tuberculosis and histoplasmosis rather than pneumoconiosis. *Id*. Dr. Sargent, a B reader and Board-certified radiologist, also did not record the presence of any large opacities. Dr. Sargent classified the August 1994 film as 1/0, but noted that there was a need to differentiate between pneumoconiosis and old granulomatous disease. Director's Exhibit 22. Dr. Sargent provided interpretations of two x-rays dated November 1, 1994. In his first reading, he determined that the film was negative for pneumoconiosis and

[1]We affirm the administrative law judge's findings under 20 C.F.R. §718.204(c)(1)-(4), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

questioned whether the film reflected old tuberculosis. Director's Exhibit 24. In his second reading, Dr. Sargent classified the film as 0/1 and indicated in the comment section of the form that the film may contain evidence of old tuberculosis. *Id*.

Claimant asserts that the administrative law judge should have discredited the readings provided by Drs. Branscomb and Sargent, as neither physician diagnosed simple pneumoconiosis in contrast to the administrative law judge's finding under Section 718.202(a)(1). Claimant's contention is without merit. Unlike the situation that is present when a physician's opinion that pneumoconiosis is not a cause of a miner's total disability is affected by his finding, contrary to an administrative law judge's determination, that the miner does not have pneumoconiosis, no clear link exists between the credibility of a physician's opinion regarding the presence of simple pneumoconiosis and his determination that complicated pneumoconiosis is not present. *See generally Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). Thus, the administrative law judge was not required to discredit Dr. Branscomb's and Dr. Sargent's x-ray interpretations on the ground suggested by claimant.

Claimant's contentions regarding the administrative law judge's treatment of the x-ray readings proffered by Drs. Barret and Baker are also without merit. Contrary to claimant's assertion, although both physicians diagnosed large opacities upon viewing the film dated August 25, 1994, both physicians also included comments suggesting that the large opacity could be something other than complicated pneumoconiosis. Dr. Barret, a Board-certified radiologist and B reader, classified the film as 1/2. He further indicated that additional clinical work was required to rule out the existence of a mass in the right upper lobe and that the x-ray reflected old granuloma. Director's Exhibit 23. Dr. Baker, a B reader, classified the x-ray as 2/1, but included the comment: "progressive massive fibrosis v. old granulomatous disease." Director's Exhibits 18, 25. Inasmuch as neither physician indicated conclusively that the large opacity represented complicated pneumoconiosis, the administrative law judge did not err in declining to treat their readings as supportive of claimant's burden under Section 718.304(a).

With respect to Dr. Broudy's opinion, the administrative law judge was not required to discredit it on the ground that Dr. Broudy relied upon the improper assumption that simple pneumoconiosis does not progress in the absence of further coal dust exposure. Dr. Broudy did not rule out the possibility of

progression; rather, in explaining his finding that the x-ray taken on November 1, 1994 contained a Category A large opacity, he stated that:

> The radiographic changes are compatible with silicosis or coal workers' pneumoconiosis although it is quite surprising that the disease apparently manifests itself on x-ray only after the patient had stopped working in the mines. Furthermore, this degree of progression in 7 years is quite unusual. This raises the possibility that some other disease is present, such as sarcoidosis or perhaps recrudescence tuberculosis. I certainly would not rule out the possibility of tuberculosis or histoplasmosis causing these abnormalities.

Director's Exhibit 19. Inasmuch as Dr. Broudy merely indicated that it was "surprising" and "unusual" for complicated pneumoconiosis to appear after claimant ceased his coal mine employment, the administrative law judge did not abuse his discretion in crediting Dr. Broudy's report. *Id*.; *see generally Peabody Coal Co. v. Spese*, 117 F.3d 667, 21 BLR 2-113 (7th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

In addition, the administrative law judge was not required to accord less weight to Dr. Broudy's report because the doctor was unaware that other physicians found x-ray evidence of simple pneumoconiosis in 1987, shortly after claimant's retirement from mining. The administrative law judge properly determined that the primary significance of Dr. Broudy's opinion concerned the rapid development of a condition appearing, on its face, to be complicated pneumoconiosis. Decision and Order on Remand at 11-12; Director's Exhibit 19. Thus, the accuracy of Dr. Broudy's belief concerning the absence of simple pneumoconiosis in 1987 is not relevant to the administrative law judge's consideration of the opinion regarding complicated pneumoconiosis that Dr. Broudy rendered in 1994. Moreover, the administrative law judge did not determine that the x-ray evidence submitted with claimant's initial claim was sufficient to establish the existence of simple pneumoconiosis under Section 718.202(a)(1). The administrative law judge rationally determined, therefore, that Dr. Broudy's opinion does not support a finding of complicated pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Regarding the administrative law judge's consideration of the biopsy evidence, lung tissue samples or other histological material was obtained on February 24, 1988, June 22, 1988, and August 23, 1988. Drs. Mandanas, the attending surgeon, and Bella, the attending pathologist, indicated that the lung

tissue and other samples obtained on February 24, 1988 contained evidence of anthracosilicosis. Director's Exhibit 15. With respect to the material obtained on June 22, 1988, Drs. Mandanas and Bella did not detect the presence of anthracotic pigment or anthracosilicosis. *Id*. Dr. Mandanas later described evidence of histoplasmosis based on bronchial washings performed on August 23, 1988. *Id*. Dr. Crouch reviewed six biopsy slides dated February 24, 1988 and determined that there were "no lesions of coal workers' pneumoconiosis." Director's Exhibit 20. Dr. Crouch also stated that:

> Because of the very limited sampling of lung tissue provided by the endoscopic biopsies, it is not possible to make a definitive assessment regarding the presence or absence of coal workers' pneumoconiosis, or the possible contribution of coal dust exposure to any pulmonary disability.

Id. Dr. Caffrey reviewed the slides from both February and June of 1988 and found that they did not support a diagnosis of coal workers' pneumoconiosis or any other occupational pneumoconiosis. Director's Exhibit 54. Dr. Branscomb reviewed the pathologists' reports and agreed that they indicated that claimant required treatment for tuberculosis and histoplasmosis. Employer's Exhibits 2-3.

As indicated above, the administrative law judge concluded that the lack of biopsy evidence of complicated pneumoconiosis supported a finding that claimant's pulmonary problems were caused by tuberculosis and histoplasmosis. Decision and Order on Remand at 14. Claimant is correct in alleging that the administrative law judge did not address Dr. Crouch's statement that the six biopsy slides obtained on February 24, 1988, did not provide enough material upon which to base a definitive finding regarding the presence or absence of pneumoconiosis. Nevertheless, the administrative law judge's finding is supported by substantial evidence, as none of the other physicians who reviewed the biopsy evidence diagnosed complicated pneumoconiosis nor did any other pathologist indicate that the slides were inadequate.

In addition, claimant's contentions regarding Dr. Caffrey's failure to diagnose simple pneumoconiosis and his reference to his understanding that simple pneumoconiosis does not progress after coal dust exposure ends are inapposite, as the issue before the administrative law judge was whether the biopsy evidence supports a finding of complicated pneumoconiosis. As stated above, failure to diagnose simple pneumoconiosis does not necessarily affect the credibility of a physician's determination that complicated pneumoconiosis is not present. *See Skukan*, *supra*. In addition, Dr. Caffrey's remarks regarding

whether simple pneumoconiosis is a progressive disease in the absence of exposure to coal dust were separate and apart from his observations of what he viewed when he examined the histological slides. Thus, the administrative law judge acted rationally in treating the biopsy evidence, including Dr. Caffrey's findings, as negative for complicated pneumoconiosis. *See Clark*, *supra*.

Finally, claimant asserts that the administrative law judge did not accurately characterize Dr. Wiot's opinion. Dr. Wiot reread the x-ray dated November 1, 1994, and stated that:

> [T]here is a large opacity *within the right upper zone* which would be classified as "B." The left upper lobe is totally collapsed with marked elevation and distortion of the left hilum. [T]here are bullous changes present at both apices. There is old pleural disease on the left which would suggest that the changes at the left upper lobe represent a manifestation of an old inflammatory disease process. The heart is normal in size and pacemaker is in place.
>
> In summary, this patient shows findings compatible with complicated coal workers' pneumoconiosis but in addition, changes consistent with an old inflammatory process *on the left* most likely old pulmonary tuberculosis.

Director's Exhibit 28 (emphasis supplied). As claimant contends, the administrative law judge did not seem to recognize that Dr. Wiot distinguished between the right and left lungs in rendering his x-ray interpretation and that Dr. Wiot did not appear to conclude that the large opacity in the right lung was the product of an old inflammatory process. Decision and Order on Remand at 12, 14. Nevertheless, we affirm the administrative law judge's finding on the ground that it is supported by substantial evidence, inasmuch as claimant bears the burden of establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis and the administrative law judge rationally determined that the preponderance of the evidence of record was insufficient to prove that claimant has complicated pneumoconiosis. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge