

BRB No. 04-0908 BLA

MARTHA L. WATKINS)
(Widow of THOMAS W. WATKINS))
)
Claimant-Respondent)
)
v.)
)
G. M. & W. COAL COMPANY,)
INCORPORATED)
)
and)
) DATE ISSUED: 09/20/2005
OLD REPUBLIC INSURANCE COMPANY)
)
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 – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

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

PER CURIAM:

Employer/carrier (“employer”) appeals the Decision and Order – Awarding Benefits (03-BLA-5676) of Administrative Law Judge Daniel L. Leland in this survivor’s 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 The administrative law judge credited the miner with nineteen years and two months of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge noted that since employer had conceded that the miner had coal workers’ pneumoconiosis, the only issue in this case is the cause of the miner’s death. The administrative law judge found the evidence insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) or (c)(2). However, the administrative law judge found that the evidence established that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §§718.205(c)(3) and 718.304, which the administrative law judge found was due to coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the finding of complicated pneumoconiosis cannot stand. Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief, urging the Board to vacate the award and remand the case for further consideration. The Director, Office of Workers’ Compensation Programs, has not filed a brief in this appeal.²

Section 718.304 provides that there is an irrebuttable presumption that a miner’s death was due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung diagnosed by (a) an x-ray of the miner’s lungs showing an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy showing massive lesions in the lung; or (c) when diagnosed by other means the condition could reasonably be expected to

¹ Claimant is Martha L. Watkins, the widow of Thomas W. Watkins, the miner, who died on April 3, 2001. *See* Director’s Exhibit 9. The administrative law judge noted that the miner had filed two claims for benefits, and that benefits were awarded after employer withdrew its controversion. Decision and Order at 2.

² We affirm the administrative law judge’s finding of nineteen years and two months of coal mine employment, and his finding that the evidence is insufficient to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c)(1) or (c)(2), as well as his finding that the existence of complicated pneumoconiosis is not established at 20 C.F.R. §718.304(b), as these findings have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 Section 718.304. Rather, the administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of complicated pneumoconiosis, as well as the evidence of no pneumoconiosis or no complicated 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).

Employer specifically asserts that in “over-relying” on the x-ray interpretations, the administrative law judge misses the main issue in this case which, it asserts, “is not whether the readings were positive for complicated pneumoconiosis (many of them undoubtedly were) but whether Sjogren’s [s]yndrome explains the abnormalities more convincingly from a medical standpoint.” Employer’s Brief at 9. Employer alleges that the administrative law judge erred by automatically preferring the opinion of treating physician, Dr. Zlupko, by failing to consider Dr. Tuteur’s credentials, and by ignoring the substance of Dr. Tuteur’s opinion. Employer contends that the administrative law judge has not adequately weighed all of the evidence at Section 718.304, and argues that the administrative law judge has not prepared a reasoned Decision and Order.

Administrative Law Judge’s Findings

In considering the evidence pursuant to Section 718.304, the administrative law judge noted nine x-ray interpretations. He found that the three earliest x-rays, from 1979, show simple coal workers' pneumoconiosis, and that five of the six interpretations of the x-rays taken between 1991 and 2000 are positive for simple and complicated pneumoconiosis. The administrative law judge discussed the qualifications of the physicians who interpreted these films, noting that Drs. Wolfe and Mathur are Board-certified radiologists and B-readers, Dr. Gaziano is a B-reader, and Dr. Turco’s qualifications are not in the record. The administrative law judge noted that the only negative interpretation is by Dr. Wheeler, who is dually qualified as a B-reader and a Board-certified radiologist. The administrative law judge stated “Based on the progressive nature of pneumoconiosis and the qualifications of the x-ray interpreters, I find that the x-ray evidence shows large opacities.” Decision and Order at 6. The administrative law judge noted that there is no biopsy evidence of record, and that an autopsy was not performed. The administrative law judge then considered the interpretations of the miner’s CT scan. The administrative law judge noted that Dr. Antico interpreted the CT scan as showing severe pneumoconiosis, but that Dr. Wheeler opined that it showed calcified granulomata; however Dr. Wheeler could not rule out the presence of pneumoconiosis. The administrative law judge found the CT scan evidence to be inconclusive for the presence of complicated pneumoconiosis. Decision and Order

at 6. The administrative law judge concluded his analysis at Section 718.304, stating “After weighing all the evidence, I conclude that the decedent had complicated pneumoconiosis.” Decision and Order at 6.

The administrative law judge next considered the cause of the miner’s pneumoconiosis pursuant to 20 C.F.R. §718.203. Because he had credited the miner with more than ten years of coal mine employment, the administrative law judge found that claimant is entitled to the presumption that the miner’s complicated pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). The administrative law judge considered the opinions of Drs. Tuteur, Schaaf and Zlupko. The administrative law judge noted that Dr. Tuteur concluded that the miner did not have pneumoconiosis, which the administrative law judge noted is contrary to employer’s stipulation that the miner had simple coal workers' pneumoconiosis. He noted that Dr. Tuteur never examined the miner, and found Dr. Tuteur’s opinion to be “unconvincing and not well reasoned.” Decision and Order at 7. The administrative law judge found that because Dr. Zlupko was the miner’s treating physician, his opinion, which the administrative law judge found was well reasoned, is entitled to significant weight pursuant to 20 C.F.R. §718.104(d).³ The administrative law judge, therefore, found that the presumption at Section 718.203(b) is not rebutted.

Medical Evidence

The administrative law judge considered interpretations of a March 16, 1979 x-ray of 2/3 by Dr. Weigle, and 3/2, r by Dr. Greene, and one interpretation of a June 27, 1979 film as 3/3, r by Dr. Kevenk. The next x-ray, taken on March 18, 1991, was interpreted by Dr. Turco as 3/3 C. Dr. Gaziano, a B reader, read an x-ray dated October 20, 1993, as 3/2 B. The April 6, 1994 film was interpreted by two physicians, both of whom are dually qualified as B readers and Board-certified radiologists. Dr. Wolfe read this film as 3/2 B, while Dr. Wheeler read it as 0/1. Dr. Wolfe commented that the “position and configuration may be slightly atypical for conglomerate fibrosis and comparison to prior studies would be valuable to exclude a pulmonary neoplasm.” Director’s Exhibit 1. Dr. Mathur, who is dually qualified as a B reader and a Board-certified radiologist, interpreted the October 1, 1999 film as 3/3 B, and he read the October 24, 2000 film as 3/3 B. Dr. Mathur commented on both of these interpretations that “coalescent opacities aggregate to large ‘B’ opacity. Some opacities show calcification.” Director’s Exhibit

³ Although he identified Dr. Schaaf’s opinion in summarizing the evidence relevant to Section 718.203, the administrative law judge did not make any findings regarding Dr. Schaaf’s opinion that the miner’s progressive massive fibrosis was due to his coal mine employment. Claimant's Exhibit 10; Decision and Order at 6.

14. *See* Decision and Order at 3; Director's Exhibits 1, 14, 17. The administrative law judge's summary of the x-ray evidence of record is unchallenged.

The record also contains medical opinions addressing the existence of pneumoconiosis and complicated pneumoconiosis. Dr. Schaaf, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the miner's medical records and diagnosed complicated pneumoconiosis and progressive massive fibrosis. Dr. Schaaf opined that Dr. Tuteur's diagnosis of Sjogren's syndrome in the lung is inappropriate. Claimant's Exhibits 1, 10. Dr. Zlupko, the miner's treating physician who is Board-certified in Internal Medicine, reviewed the miner's medical records and opined that the x-ray findings were consistent with a diagnosis of coal workers' pneumoconiosis and progressive massive fibrosis. Claimant's Exhibits 8, 10. Dr. Zlupko also opined:

The role that this patient's Sjogren's [S]yndrome played in his roentgenographic presentation is extremely difficult to document. He did not have predominantly basilar findings. In fact, early findings consisted of primarily upper lobe and middle lung findings. In addition, the type of coalescence that was seen on his X-ray to my understanding is not characteristic of Sjogren's syndrome. It is certainly possible that Sjogren's syndrome played some role in the interstitial fibrosis that this patient demonstrated on chest X-ray but to comment on what degree would be pure medical speculation.

Claimant's Exhibit 8. Dr. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed most of the medical evidence and opined that the miner did not suffer from coal workers' pneumoconiosis or complicated coal workers' pneumoconiosis. He agreed that the x-ray changes are consistent with coal workers' pneumoconiosis and even progressive massive fibrosis, but he stated that the x-rays are also consistent with Sjogren's syndrome. Dr. Tuteur opined that the miner did not have pulmonary complications due to coal workers' pneumoconiosis but, instead, he stated his belief that the miner had pulmonary complications due to his Sjogren's syndrome. Director's Exhibit 15; Employer's Exhibit 2. Dr. Turco examined the miner in 1991 and opined that he was disabled as a result of pneumoconiosis due to his exposure to coal dust. Director's Exhibit 17. Dr. Strother, who is Board-certified in Internal Medicine and Pulmonary Medicine, examined claimant in 1994 and reviewed his medical records. He diagnosed dust pneumoconiosis of the lung and he noted a large conglomerate density consistent with complicated pneumoconiosis.⁴ Director's Exhibit 1.

⁴ The record also contains CT scan evidence. The November 11, 1994 CT scan was interpreted by Dr. Antico as showing severe pneumoconiotic disease. Director's Exhibit 1. Dr. Wheeler interpreted the CT scan and stated that most of the nodules are

20 C.F.R. §718.304(a)

We first address the administrative law judge's analysis of the x-ray evidence pursuant to Section 718.304(a). As an initial matter, we hold that the administrative law judge erred in his analysis of the evidence at Section 718.304(a) by not considering the comments made by the physicians who interpreted the miner's x-rays, which may provide alternative causes for the large opacities that these physicians diagnosed, based on their review of the x-rays. *See generally Melnick*, 16 BLR 1-31. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.304(a). In evaluating the evidence on remand, the administrative law judge must consider the comments made by the physicians interpreting the x-rays and determine whether they establish that the miner suffered from a chronic dust disease of the lung, in making a finding as to whether the requirements of Section 718.304(a) are met. He must then consider all of the evidence, including the CT scan evidence, to determine whether the irrebuttable presumption is invoked under Section 718.304.

Although we vacate the administrative law judge's findings at Section 718.304(a), we reject employer's assertion that it was irrational for the administrative law judge to generally rely on the later x-rays due to the progressive nature of pneumoconiosis, in finding the evidence sufficient to demonstrate the existence of complicated pneumoconiosis at Section 718.304(a). By relying on the more recent x-ray evidence of record, the administrative law judge permissibly found this evidence to be most probative of the miner's condition at the time of his death. *See Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Truitt v. North American Coal Corp.*, 2 BLR 1-199, 1-204 (1979); *see generally Coffey v. Director, OWCP*, 5 BLR 1-404 (1982).

well calcified granulomata; he opined that the distribution of the nodules would be "very unusual for silicosis or CWP." Director's Exhibit 17. He concluded that "[A]lthough some of the non-calcified nodules could be pneumoconiosis, the vast majority of disease in this case is heavily calcified granulomata and peripheral inflammatory pseudotumors." Director's Exhibit 17. The administrative law judge found the CT scan evidence inconclusive for the presence of complicated pneumoconiosis. No party has challenged the administrative law judge's finding that complicated pneumoconiosis is not established pursuant to 20 C.F.R. §718.304(c). Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. §718.203(b)

We now turn to employer's assertions regarding the administrative law judge's findings pursuant to Section 718.203(b).⁵ Employer specifically argues that the administrative law judge erred by relying "mostly on an automatic treating-physician preference for Dr. Zlupko's opinion solely because Dr. Tuteur 'never treated the miner.'" Employer's Brief at 9, *quoting* Decision and Order at 6. Inasmuch as the administrative law judge, in according greater weight to the opinion of Dr. Zlupko, has not complied with the requirements of 20 C.F.R. §718.104(d), which state that, in weighing the opinion of the miner's treating physician, the administrative law judge must consider the nature of the relationship, the duration of the relationship, the frequency of treatment and the extent of treatment, 20 C.F.R. §718.104(d), we vacate the administrative law judge's findings at Section 718.203(b). If reached on remand, the administrative law judge must reconsider the medical evidence regarding the cause of the miner's complicated pneumoconiosis in compliance with Section 718.104 and applicable circuit court law. *See* 20 C.F.R. §718.104; *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-85 (3d Cir. 2004).

We also consider employer's challenges to the administrative law judge's findings that Dr. Tuteur's opinion is unconvincing and not well reasoned. Specifically, employer asserts that the administrative law judge failed to consider Dr. Tuteur's credentials and ignored the substance of his opinion regarding the cause of the miner's problems. Employer challenges the administrative law judge's statement that Dr. Tuteur "did not seem to be conversant with the ILO-U/C classification system." Decision and Order at 7. Employer also argues that "no basis exists for demanding that a [B]oard-certified pulmonologist who teaches pulmonology in a medical school must refer to 'medical literature' to cite these medical truisms." Employer's Brief at 10-11. Further, employer asserts that "nothing in the record rebuts or even questions Dr. Tuteur's premise that [the miner's] clinical profile, as opposed to the x-ray films, points to Sjogren's [s]yndrome as the source of any detected abnormalities." Employer's Brief at 11.

We reject employer's assertion that "no basis exists for demanding that a [B]oard-certified pulmonologist who teaches pulmonology in a medical school must refer to 'medical literature' to cite these medical truisms." Employer's Brief at 10-11. While there is no requirement that a physician refer to medical literature to support his opinion,

⁵ The regulations provide that claimant is entitled to the presumption that the miner's pneumoconiosis arose from coal mine employment if the existence of pneumoconiosis has been established and if it is established that the miner had ten or more years of coal mine employment, as in the instant case. 20 C.F.R. §§718.203(b); 718.302.

the administrative law judge did not err by noting that Dr. Tuteur did not provide documentation in support of portions of his opinion. With respect to employer's assertion that the administrative law judge erred by failing to consider Dr. Tuteur's credentials, we note that the administrative law judge did not specifically identify Dr. Tuteur as Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 15; Employer's Exhibit 2 at 6; Decision and Order at 4. Similarly, the administrative law judge did not consider that Dr. Zlupko is Board-certified in Internal Medicine. Claimant's Exhibit 11. On remand, the administrative law judge is instructed to consider the relative qualifications of the physicians whose opinions he otherwise finds creditable. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 210, 22 BLR 2-467, 2-481 (3d Cir. 2002). In addition, the administrative law judge must consider all relevant evidence in making his findings on remand. *See Administrative Procedure Act*, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). Moreover, since the administrative law judge has not provided any basis for his statement, that Dr. Tuteur "did not seem to be conversant with the ILO-U/C classification system," Decision and Order at 7, we vacate this finding. On remand the administrative law judge must explain the basis for this determination. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Finally, on remand the administrative law judge should consider employer's assertion that "nothing in the record rebuts or even questions Dr. Tuteur's premise that [the miner's] clinical profile, as opposed to the x-ray films, points to Sjogren's syndrome as the source of any detected abnormalities." Employer's Brief at 11. Therefore, the administrative law judge must reweigh all of the relevant evidence on remand pursuant to Section 718.203(b).

In sum, on remand, the administrative law judge must reevaluate the evidence pursuant to Section 718.304(a). If he finds it sufficient to establish complicated pneumoconiosis thereunder, he must consider all relevant evidence pursuant to Section 718.304. *See Melnick*, 16 BLR 1-31. If the administrative law judge finds the evidence sufficient to establish invocation of the irrebuttable presumption at Section 718.304, he must then determine whether employer has rebutted the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge