

BRB No. 05-0282 BLA

IRENE ENGLAND)
(Widow of LEONARD ENGLAND))
)
 Claimant-Respondent)
)
 v.)
)
 ROBINSON-PHILLIPS COAL COMPANY)
) DATE ISSUED: 09/15/2005
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Third Remand Awarding Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Irene England, Princeton, West Virginia, *pro se*.

Dorothea A. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Third Remand Awarding Benefits (98-BLA-1214) of Administrative Law Judge Jeffrey Tureck on a survivor's claim¹ filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

¹ Claimant, Irene England, is the widow of Leonard England, the miner, who died on July 2, 1994. Director's Exhibit 22. Claimant filed her application for benefits on August 9, 1994. Director's Exhibit 1.

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² This case is before the Board for the fourth time. The protracted procedural history of this case is as follows.

In his initial Decision and Order, Judge Tureck found that the CT scan evidence was entitled to greater weight than the x-ray evidence of record because a CT scan shows the lungs with greater detail and precision than an x-ray. Judge Tureck's 1996 Decision and Order at 3. In the initial appeal, the Board vacated this determination *inter alia* because Judge Tureck failed to provide a basis for this observation and the record contained no evidence indicating whether CT scans show the lungs with greater detail and precision than x-rays. *England v. Robinson-Phillips Coal Co.*, BRB No. 96-1429 BLA, *slip op.* at 4 (Apr. 30, 1997)(unpub.). The Board vacated Judge Tureck's findings under Section 718.202(a)(1) and (a)(4) and remanded the case to him with instructions to consider evidence omitted from his initial Decision and Order and to provide "a proper rationale for his weighing of the CT scans of record." *England v. Robinson-Phillips Co.*, BRB No. 96-1429 BLA, *slip op.* at 4 (Apr. 30, 1997)(unpub.).

Understanding that the Board required him to provide an evidentiary basis for his finding regarding the superior reliability of CT scans, Judge Tureck issued an Order of Remand sending the case to the district director solely for the purpose of obtaining "appropriate expert medical evidence comparing the relative value of CT scan evidence vs. conventional x-ray evidence in diagnosing coal workers' pneumoconiosis." Director's Exhibit 42. Judge Tureck further stated that "[w]hen this evidence is obtained, the case shall be returned to me for decision on remand."³ Director's Exhibit 42.

However, upon receipt of the district director's additional evidence, the case was assigned to Administrative Law Judge Edward Terhune Miller, who issued a Notice of Hearing. In response, claimant, who has been without counsel at all stages of these

² 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Upon receiving the case from Administrative Law Judge Tureck, the district director sent the CT scans and chest x-rays read as positive for pneumoconiosis by Dr. Ward to Dr. Sargent and asked him to respond to Judge Tureck's inquiry. Dr. Sargent initially provided a report in which he offered negative interpretations of the CT scans and x-rays. Director's Exhibit 44. In response to subsequent correspondence from the district director, Dr. Sargent proffered an opinion stating that CT scans are, in fact, more accurate than chest x-rays. Director's Exhibit 45.

proceedings, requested, with employer's concurrence, that the case be decided on the record. Judge Miller granted claimant's request and issued a Procedural Order in which he admitted the evidence developed by the district director and evidence submitted by employer after the case was returned to the OALJ, including rereadings of the CT scans and x-ray evidence, as well as medical opinions pertaining to the existence of pneumoconiosis and the cause of the miner's death. Judge Miller then issued the Decision and Order - Awarding Benefits.

On appeal, in *England v. Robinson-Phillips Coal Co.*, BRB No. 99-1205 BLA (Aug. 29, 2000) (unpub.); Director's Exhibit 68, the Board vacated Judge Miller's Decision and Order awarding benefits and, consistent with its prior decision in *England v. Robinson-Phillips Coal Co.*, BRB No. 96-1429 BLA (Apr. 30, 1997), the Board remanded the case to Judge Tureck, struck from the record all of the evidence developed by the district director following the Board's 1997 remand order to Judge Tureck, *England v. Robinson-Phillips Coal Co.*, BRB No. 96-1429 BLA (Apr. 30, 1997)(unpub.), and instructed Judge Tureck to base his decision upon the evidence before him in his initial decision and any evidence and exhibits subsequently submitted which relate solely to the accuracy of the CT scan evidence as compared to x-ray evidence. *England v. Robinson-Phillips Coal Co.*, BRB No. 99-1205 BLA (Aug. 29, 2000)(unpub.); Director's Exhibit 68. Additionally, the Board noted that Judge Tureck should analyze the case in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), to determine whether the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

On remand, Judge Tureck (the administrative law judge) admitted into evidence a report from Dr. Gaziano, developed by the Director, regarding the relative value of conventional x-rays as opposed to CT scans in diagnosing pneumoconiosis. Administrative Law Judge's Exhibit 3; Director's Exhibit 74. Prior to considering this evidence, however, the administrative law judge found that, subsequent to his initial 1996 decision, the United States Court of Appeals for the Seventh Circuit and the Board had held that if the five requisite elements of collateral estoppel are satisfied and there is no autopsy evidence filed with the survivor's claim, the issue of whether a miner had pneumoconiosis could not be relitigated in the survivor's claim, if it had been determined in the miner's claim, *citing Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Young v. Sewell Coal Co.*, BRB No. 98-1000 BLA (Aug. 26, 1999) (unpub.). Judge Tureck's 2003 Decision and Order at 4. Consequently, the administrative law judge determined that employer had stipulated to the presence of pneumoconiosis in the miner's claim and that all the requisite elements of issue preclusion were established; therefore, Administrative Law Judge Richard H. Beddow, Jr.'s finding in the miner's claim

that the miner had had pneumoconiosis was binding⁴ and barred the relitigation of the existence of pneumoconiosis in this survivor's claim. The administrative law judge found further that, because the Board had affirmed his prior determination that the miner's death was due to pneumoconiosis, contingent upon an affirmable finding of pneumoconiosis on remand, claimant was entitled to benefits commencing in July 1994, the month of the miner's death. Accordingly, benefits were again awarded.

Employer appealed, and in its most recent decision, *England v. Robinson-Phillips Coal Co.*, BRB No. 03-0552 BLA (Apr. 29, 2004) (unpub.), the Board held that the doctrine of collateral estoppel is inapplicable to the instant case, vacated the administrative law judge's finding and remanded the case for the administrative law judge to determine whether claimant affirmatively established the existence of pneumoconiosis pursuant to Section 718.202(a) in accordance with *Compton*, 211 F.3d 203, 22 BLR at 2-162.

On remand, the administrative law judge again found that claimant had established the existence of pneumoconiosis by positive CT scan and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings at 20 C.F.R. 718.202(a)(1) and (a)(4). Neither claimant, who is without the assistance of counsel, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a reply brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis by automatically crediting the two CT scans of record, which were interpreted by Dr. Ward as positive for the existence of pneumoconiosis,⁵ over the numerous negative x-ray interpretations of record submitted by

⁴ By Decision and Order dated September 22, 1987, Administrative Law Judge Richard H. Beddow, Jr. awarded benefits to the miner, Leonard England, based on a finding of entitlement on an application filed on September 15, 1983.

⁵ Dr. Ward interpreted a CT scan performed on August 10, 1992 as showing "[e]mphysema and upper lobe fibronodular scarring consistent with coal workers' pneumoconiosis." Director's Exhibit 26. He also interpreted a second CT scan,

highly qualified readers. Employer's Brief at 8-9. Employer specifically asserts that the administrative law judge erred in several respects: at Section 718.202(a)(1), in failing to consider the x-ray evidence of record and ignoring some x-ray readings; at Section 718.202(a)(4) in crediting the opinion of Dr. Gaziano, regarding the accuracy of CT scans, over employer's experts; in crediting the CT readings by Dr. Ward, which employer contends were equivocal; and in failing to weigh the x-ray evidence of record together with the CT scans, as required by *Compton*.

We disagree. As noted above, following the Board's second remand, the district director obtained a medical opinion from Dr. Gaziano, a Board-certified internist and pulmonologist, regarding the accuracy of CT scan evidence as compared to x-ray evidence. In an opinion dated October 10, 2001, Dr. Gaziano opined that CT scans are more sensitive than x-rays, and thus superior for diagnosing early or minimal occupational pneumoconiosis. Director's Exhibit 74. In addition, Dr. Gaziano stated that while the CT scans read by Dr. Ward were probably not high resolution scans, even as standard scans they were "quite capable" of showing changes of pneumoconiosis, especially the rounded type of pneumoconiosis seen in black lung disease. Director's Exhibit 74.

In finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted "since virtually all of the multitude of x-ray readings in the record either find no pneumoconiosis or category I pneumoconiosis," the miner's pneumoconiosis was either minimal or in its early stages, which is "precisely the situation where Dr. Gaziano states CT scans are clearly superior to conventional x-rays." Decision and Order at 3. The administrative law judge thus concluded, having considered both the x-ray and CT scan evidence together with Dr. Gaziano's "expert" opinion, that the CT scans were more probative than the x-rays in this case. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 3.

Contrary to employer's arguments, the administrative law judge was not required to weigh Dr. Gaziano's opinion together with the opinions from employer's experts, Drs. Wiot and Castle, regarding the probative value of CT scans. The administrative law judge noted that while employer had originally submitted reports from Drs. Wiot and Castle pertaining to, among other things, the question of whether CT scans provided more probative evidence of pneumoconiosis than conventional x-rays, these reports had been previously excluded from the record pursuant to the Board's second remand Order. Decision and Order at 2.

performed on December 13, 1993, as showing "[e]mphysema and bilateral small nodular opacities compatible with coal workers' pneumoconiosis," and noted that there was no significant change when compared with the earlier CT scan. Director's Exhibit 26.

The administrative law judge explained that while he had suggested that employer might offer excerpts of these exhibits limited to the relative probative value of CT scans, employer failed to do so and instead chose to resubmit the reports in their entirety. Therefore, the administrative law judge, as was within his discretion, again permissibly excluded the reports from the record. 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 and 13 BLR 1-57 (1989)(*en banc recon.*)(McGranery, J., concurring); Decision and Order at 2.

In addition, contrary to employer's arguments, while the administrative law judge noted that further support for the superiority of CT scans as compared to conventional x-rays was contained in several articles submitted into the record by employer, the administrative law judge did not discuss the content of these articles or accord them any determinative weight in his decision. Decision and Order at 3. Finally, in crediting Dr. Ward's CT readings, the administrative law judge acted within his discretion in finding that Dr. Ward's statements, that the changes seen on the CT scans were "consistent with" or "compatible with" pneumoconiosis, did not render his opinion equivocal. *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501 (1984); Decision and Order at 3. Thus, as the administrative law judge permissibly relied on the opinion of Dr. Gaziano, that CT scans are superior to conventional x-rays for diagnosing early pneumoconiosis, and further acted within his discretion as trier of fact in crediting Dr. Ward's positive CT scan readings, the administrative law judge permissibly accorded greater weight to the CT scan evidence of record in finding the evidence sufficient to establish the existence of pneumoconiosis.

Employer further asserts that in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge erred in crediting the diagnosis of pneumoconiosis by Dr. Cardona, the miner's treating physician, over the contrary opinion of Dr. Crisalli, whom employer asserts the administrative law judge failed to even consider. Employer's Brief at 14-15. Again, we disagree. Contrary to employer's arguments, the administrative law judge specifically discussed the opinion of Dr. Crisalli, the only physician to opine that the miner did not have pneumoconiosis or any dust-related pulmonary disease, and permissibly found Dr. Crisalli's opinion outweighed by the opinions of Drs. Cardona, Argawal, Lowe, Hatfield, O' Leary, Nestmann and Daniel, each of whom diagnosed the existence of pneumoconiosis, and were supported by the opinions of Drs. Ahmad, Cook, Carr, Najjar, and Van Dyke, each of whom noted the miner had a history of coal workers' pneumoconiosis. *Underwood*, 105 F.3d at 949; Decision and Order at 3. Finally, considering all of the relevant evidence together as required by *Compton*, the administrative law judge permissibly concluded that based on the more probative CT scans, as interpreted by Dr. Ward, and which are consistent with the majority of the physician's opinions in the record, claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, thus, is entitled to survivor's benefits pursuant to 20 C.F.R. §718.205(c).

Accordingly, the Decision and Order on Third Remand Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge