BRB No. 90-0994 BLA

THOMAS F. BURKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LTV STEEL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
	)	
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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Gary D. Monaghan (Davis & Davis), Uniontown, Pennsylvania, for claimant.

Donna M. Lowman (Grigsby, Gaca & Davies, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and NEUSNER, Administrative Law Judge.*

STAGE, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (88-BLA-1520) of Administrative Law Judge Gerald M. Tierney awarding 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 *Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

et seq. (the Act). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with forty-six years of qualifying coal mine employment as stipulated to by the parties and supported by the record. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and further found that although claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c), the evidence established the existence of complicated pneumoconiosis, and thus claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings pursuant to Section 718.304. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

[1] The administrative law judge's findings pursuant to Sections 718.202(a)(1) and (a)(4), 718.204, and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

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 this Board and may not be disturbed. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Employer contends that the administrative law judge erred in his analysis of the evidence in finding the existence of complicated pneumoconiosis established

pursuant to Section 718.304. Specifically, employer argues that the administrative law judge mischaracterized or misinterpreted the conclusions of Drs. Gardner, Sargent, Behun, Cole, Wald and McMahon with respect to the etiology of the "large opacity" which they all recorded as measuring in excess of one centimeter radiographically. We agree. The administrative law judge found that the two reports and the deposition testimony of Dr. Gardner were consistent and definite in ruling out cancer. The administrative law judge further found that Dr. Gardner only ruled out complicated pneumoconiosis with certainty in his deposition, which was inconsistent with his much less definite opinion as expressed in the second report. See Decision and Order at 5. Employer argues that, when read in their entirety, the reports and deposition testimony of Dr. Gardner are not contradictory, as the second report supplements and clarifies the earlier report, and Dr. Gardner's deposition testimony sets forth his findings and explains his conclusions in depth. A review of the record indicates that in his initial report of January 2, 1986, Dr. Gardner interpreted two films and ten tomograms taken between August and October of 1986. Dr. Gardner diagnosed simple pneumoconiosis, noted the existence of a large mass which had three possible etiologies, namely, lung cancer, complicated pneumoconiosis, or old tuberculosis, and requested earlier or later films for comparison, as each of the potential etiologies could be radiologically confused with the others. See Employer's Exhibit 1, Report of January 2, 1988. Dr. Gardner subsequently reviewed films of January 11, 1982, and September 11, 1987, re-read the 1986 films, and determined

in his second report of December 16, 1988, that they reflected no radiographic change between 1982 and 1987. Consequently, he ruled out lung cancer and active tuberculosis, and concluded that the "large opacity" more than likely was a large, calcified, postinflammatory granuloma as opposed to the progressive massive fibrosis of coal workers' pneumoconiosis, because its characteristics were compatible with the former but atypical of the latter condition. Dr. Gardner also reviewed a film taken on August 11, 1988, again noted no radiographic change, and stated in his memorandum of December 16, 1988, that this supplemented the basis for the conclusions he derived from that observation, as expressed in his second report. See Employer's Exhibit 1, Report and Memorandum of December 16, 1988. Finally, in his deposition, Dr. Gardner discussed his sequential interpretations and stated that there was no conclusive radiologic support for a diagnosis of complicated pneumoconiosis. See Employer's Exhibit 1, Deposition at 19, 20, 23-29. While the conclusions expressed in Dr. Gardner's two reports may not be as definite, they are by no means inconsistent with his deposition findings. As the administrative law judge did not adequately explain why he found that the opinion of Dr. Gardner was inconsistent, thereby meriting little weight, we must vacate the administrative law judge's findings pursuant to Section 718.304, and remand this case for the administrative law judge to re-evaluate this evidence. See generally Tackett v. Director, OWCP, 7 BLR 1-703 (1985).

Employer further contends that the administrative law judge mischaracterized the opinions of Drs. Sargent, Behun, Cole, Wald and McMahon concerning the etiology of the "large opacity." We agree. Having ruled out cancer through Dr. Gardner's analysis, the administrative law judge found that five out of the six physicians opined that claimant suffered from complicated pneumoconiosis. Decision and Order at 5. Employer correctly notes, however, that none of the physicians explicitly and unequivocally diagnosed complicated pneumoconiosis. Moreover, Dr. Cole stated that although the lesion may be a large opacity of coal workers' pneumoconiosis, further tests were indicated as carcinoma was most likely, and Drs. Sargent, Behun, Wald and McMahon all expressed a desire to compare the films they interpreted with older films. See Director's Exhibits 15, 16, 18-20, 28. Consequently, on remand, the administrative law judge must re-evaluate all of the probative evidence of record pursuant to Section 718.304.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

I concur.

NANCY S. DOLDER
Administrative Appeals Judge

NEUSNER, Administrative Law Judge, dissenting:

I must respectfully dissent. The pertinent regulation refers solely to the size of opacities and their classification according to size, and provides for invocation of the irrebuttable presumption of total disability due to pneumoconiosis based on that criterion alone. See 20 C.F.R. §718.304. The administrative law judge weighed the opinions of the equally qualified experts on this issue, and his exercise of discretion was appropriate. See 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). Although Dr. Gardner interpreted films taken between 1982 and 1988, and Drs. Cole, Sargent and Behun interpreted 1986 films, the time difference was inconsequential, as the dates overlap and were clearly treated as contemporaneous by the administrative law judge. There is no question that claimant's large opacities satisfied the regulatory specifications as to size, thus I would affirm the administrative law judge's finding of complicated pneumoconiosis based on a literal reading of Section 718.304(a).

FREDERICK D. NEUSNER
Administrative Law Judge