BRB No. 04-0623 BLA

MACK ARTHUR CANTRELL	)	
	)	
Claimant- Petitioner	)	
	)	
v.	)	
	)	
SCOTTS BRANCH COAL COMPANY	)	DATE ISSUED: 03/30/2005
	)	
and	)	
	)	
MAPCO, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5633) of Administrative Law Judge Robert L. Hillyard on a subsequent 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 administrative law judge initially credited the parties' stipulation that claimant worked in qualifying coal mine employment for fifteen years.

Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, demonstrated that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final under 20 C.F.R. §725.309(d). Further, in considering the x-ray evidence, the administrative law judge also found that the evidence in this case was insufficient to establish the existence of complicated pneumoconiosis because the evidence showed that the category A or B opacities seen on some of claimant's x-rays were related to healed tuberculosis, not complicated pneumoconiosis. Considering the evidence as a whole, the administrative law judge found that it established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(1), that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), but that it failed to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find him entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, since at least three Board-certified, B-readers diagnosed the presence of category A or B complicated pneumoconiosis. Claimant contends that the administrative law judge erred in according controlling weight to the opinion of Dr. Branscomb, who determined that the large opacities found on x-ray were caused by tuberculosis, not complicated pneumoconiosis. Specifically, claimant contends that the administrative law judge's accordance of determinative weight to Dr. Branscomb's opinion is unsupported by the record: the opacities Dr. Branscomb diagnosed as scarring from tuberculosis did not appear until almost twenty years after claimant was diagnosed and treated for tuberculosis; Dr. Branscomb was not a B-reader or a Board-certified radiologist; the almost forty x-rays taken between 1983, when claimant was first diagnosed with tuberculosis, and 1994, were overwhelmingly read as showing no opacities of any kind; and Dr. Branscomb never examined claimant. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal.[1]

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 the applicable law, they are binding upon this Board and may not be

[1] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), and 725.309 because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 16.

disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In analyzing the x-ray evidence of record, particularly the more recent x-ray films dated from April 2001 to October 2003, the administrative law judge noted that the majority of the comments and opinions associated with the x-ray interpretations focused on whether the large opacity found was consistent with a mass of complicated pneumoconiosis or scarring as a result of claimant's healed tuberculosis. The administrative law judge was persuaded by the narrative opinion rendered by Dr. Branscomb that claimant's "A or B size opacity appeared abruptly and did not grow gradually out of a field of simple coal workers' pneumoconiosis." Decision and Order at 15. The administrative law judge was particularly persuaded by Dr. Branscomb's opinion because it was based, not only on at least three independent reviews of claimant's medical records over a period of time in excess of twenty years, but also because it was corroborated by the x-ray interpretations of Drs. Patel, Wheeler, and Deponte, Board-certified radiologists and B-readers, who diagnosed a category A or B large opacity but opined that the opacity may be related to healed tuberculosis.

X-ray evidence of opacities larger than one centimeter does not automatically trigger the irrebuttable presumption when conflicting evidence exists. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). In determining whether a miner is suffering or suffered from a chronic dust disease of the lung commonly known as complicated pneumoconiosis at Section 718.304, the administrative law judge must first evaluate the evidence in each category, and then weigh together the categories at Section 718.304(a), (b) and (c), prior to finding the existence of complicated pneumoconiosis established. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*). Evidence under one prong of Section 718.304 can diminish the probative value of evidence under another prong if the two forms conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), *citing Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *see Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244, 22 BLR 2-554, 2-561-562 (4th Cir. 1999). Therefore, the administrative law judge must, in every case, consider and evaluate all relevant evidence. Because the administrative law judge, in the instant case, did not render specific determinations with respect to the x-ray and medical opinion evidence, we vacate the administrative law judge's determination that claimant failed to establish the existence of complicated pneumoconiosis and remand the case for him to consider and discuss fully all the evidence relevant to the existence of complicated pneumoconiosis. 20 C.F.R. §718.204(a)-(c); *see Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-310 (2003); *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); Decision and Order at 15.

In evaluating that evidence, the administrative law judge must compare the radiological expertise of Dr. Branscomb, if any, with the expertise of Drs. Patel, Deponte, and Wheeler, who possess the dual qualifications of Board-certification in radiology and B-reader status. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Further, the administrative law judge should consider whether evidence stating that claimant's large opacity "may" be due to tuberculosis is sufficient to support Dr. Branscomb's opinion. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).[2]

Additionally, although the administrative law judge found that Dr. Branscomb effectively dismissed the diagnoses of large opacities when he stated that physicians who diagnosed these opacities as complicated pneumoconiosis would have been unaware of claimant's past tuberculosis, the record reflects that both Drs. Patel and Deponte were aware of claimant's history of tuberculosis. Employer's Exhibit 4 at 9. Likewise, a review of Dr. Branscomb's opinion reveals that he consistently concluded that claimant did not have simple pneumoconiosis, a conclusion contrary to the administrative law judge's finding that the newly submitted x-ray evidence, post-2000, showed the existence of simple pneumoconiosis. Further, the administrative law judge should consider whether other evidence of record, *i.e.*, earlier x-rays and other medical opinions show evidence of tuberculosis which would support Dr. Branscomb's opinion. An opinion of a physician may not be discredited solely because he has not examined claimant, however. *See Island Creek Coal Co. v. Compton*, 211 F.2d 203, 22 BLR 2-162 (4th Cir. 2000).

Based on the foregoing, therefore, we vacate the administrative law judge's finding that the existence of complicated pneumoconiosis was not established and we remand the case for the administrative law judge to reconsider the evidence relevant to complicated pneumoconiosis and whether claimant is entitled to the irrebuttable presumption that his pneumoconiosis is totally disabling.

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[2] When reading the May 10, 2001 film, Dr. Wheeler found no evidence of simple pneumoconiosis or large opacities, but opined that the apical pleural thickening that was evident was due to tuberculosis of unknown activity, "probably" healed. Director's Exhibit 30. When reading this same film, Dr. Deponte diagnosed the presence of a category A large opacity with "volume loss, pleural thickening, and fibronodular changes in lung apices [that] suggest old tuberculosis." Claimant's Exhibit 2. Similarly, when Dr. Patel interpreted the May 10, 2001 film, he found a category A large opacity of "complicated pneumoconiosis or healed tuberculosis." Claimant's Exhibit 1.

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge