BRB No. 98-0112 BLA

JIMMY C. ARTRIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Jimmy C. Artrip, Abingdon, Virginia, *pro se*.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order on Remand - Denying Benefits (91-BLA-2501) of Administrative Law Judge Clement J. Kichuk 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 March 31, 1989. Director's Exhibit 1. The district director

denied this claim in a letter issued on December 8, 1989, on the grounds that claimant did not establish that his pneumoconiosis arose out of coal mine employment or that he was totally disabled due to pneumoconiosis. Director's Exhibit 19. Claimant subsequently requested modification of the denial of benefits on December 5, 1990, and submitted additional evidence. Director's Exhibit 25. After the district director informed claimant that the new evidence did not alter the previous determination, claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges.

In a Decision and Order issued on November 3, 1992, Administrative Law Judge Julius A. Johnson credited claimant with thirty years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718. Judge Johnson found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Judge Johnson also determined, based upon this finding, that claimant established a change in conditions pursuant to 20 C.F.R. §725.310 and was, therefore, entitled to modification of the district director's finding of nonentitlement. Accordingly, Judge Johnson awarded benefits. Judge Johnson further found that benefits were payable from May, 1989, the month in which claimant was first diagnosed as suffering from complicated pneumoconiosis.

On appeal, the Board vacated the award of benefits, holding that Judge Johnson erred in neglecting to consider the relevant evidence under each subsection of Section 718.304 in accordance with the Board's decision in *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). *Artrip v. Island Creek Coal Co.*, BRB No. 93-0598 BLA (Mar. 17, 1994)(unpublished). The Board also vacated Judge Johnson's findings with respect to the medical opinions of record under Section 718.304(c) on the ground that Judge Johnson substituted his opinion for that of the medical experts. *Id.*. Finally, the Board vacated Judge Johnson's determination regarding the date of onset of claimant's total disability in light of its decision to vacate Judge Johnson's findings under Section 718.304. *Id.*.

On remand, Judge Johnson found that the majority of the physicians of record, through x-ray interpretations or medical opinions, determined that claimant has simple pneumoconiosis. Judge Johnson further determined, however, that the weight of the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Judge Johnson also found that the evidence of record was insufficient to support a finding of total disability due to pneumoconiosis under 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were denied.

On appeal, claimant filed a Petition for Review and brief, without the assistance of counsel, and asserted that Judge Johnson did not properly weigh the evidence of record. In a Decision and Order issued on November 26, 1996, the Board affirmed Judge Johnson's finding that the weight of the x-ray readings, as well as the medical opinion evidence, established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), as the parties did not challenge this finding on appeal. *Artrip v.*

Island Creek Coal Co., BRB No. 95-1528 BLA (Nov. 26, 1996)(unpublished). However, the Board vacated Judge Johnson's finding under Section 718.304(a) on the ground that he did not consider all of the relevant x-ray interpretations. *Id.*. The Board also held that Judge Johnson erred in weighing the objective studies of record under Section 718.304(c), as these studies are not pertinent to the existence of pneumoconiosis. *Id.*. In addition, the Board determined that Judge Johnson's findings with respect to the medical opinions pursuant to Section 718.304(c) could not be affirmed in light of the fact that Judge Johnson impermissibly substituted his judgment for that of the medical professionals by interpreting the significance of the pulmonary function studies. *Id.*. The Board further held, however, that inasmuch as Judge Johnson's finding that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(b) and (c) was rational and supported by substantial evidence, it was affirmed. *Id.*. Thus, the Board instructed Judge Johnson that if he determined on remand that claimant was not entitled to the irrebuttable presumption set forth in Section 718.304, entitlement to benefits would be precluded.[1] *Id.*.

On remand, after notice to the parties, the case was transferred to Administrative Law Judge Clement J. Kichuk (the administrative law judge) due to Judge Johnson's unavailability. The administrative law judge considered the x-ray readings and medical opinions of record and determined that the preponderance of the evidence did not support a finding of complicated pneumoconiosis pursuant to Section 718.304(a) and (c). Accordingly, benefits were denied. Claimant has filed a brief on appeal, without the assistance of counsel, and asserts that the administrative law judge did not properly weigh the relevant evidence, inasmuch as he relied upon the numerical superiority of the negative evidence and did not take into account the bias of the physicians who submitted evidence on behalf of employer. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and contends that the Board must vacate the denial of benefits on the ground that the administrative law judge erred in crediting some of the x-ray interpretations of Drs. Wiot, Scott, Wheeler, Sargent, and Fino under Section 718.304(a).

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The

[1]The Board also indicated that Judge Johnson properly determined that 20 C.F.R. §718.304(b) was not relevant in the present case, as the record does not contain any biopsy or autopsy evidence. *Artrip v. Island Creek Coal Co.*, 95-1528 BLA (Nov. 26, 1996)(unpublished), *slip opinion at 7, n.6*.

Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 his Decision and Order on Remand, the administrative law judge first considered the x-ray evidence pursuant to Section 718.304(a). The administrative law judge determined that four films, dated May 19, 1989, March 6, 1991, April 30, 1991, and December 3, 1991, were read as positive for complicated pneumoconiosis. The administrative law judge then proceeded to weigh the positive readings of these films against the negative interpretations of record. The administrative law judge noted that the film obtained in May of 1989 was read as positive for complicated pneumoconiosis by one physician who is a B reader and was not found to be positive for complicated pneumoconiosis by two physicians, both of whom are B readers. Decision and Order on Remand at 8; Claimant's Exhibit 1; Employer's Exhibits 4, 16. The administrative law judge concluded that the majority of evidence regarding the May, 1989 film was insufficient to support a finding of complicated pneumoconiosis. Decision and Order on Remand at 8.

With respect to the x-ray dated March 6, 1991, the administrative law judge indicated that Drs. Bassali and Fisher, both of whom are Board-certified radiologists and B readers, interpreted the film as positive for complicated pneumoconiosis. Decision and Order on Remand at 8; Claimant's Exhibits 5, 6. The administrative law judge noted that Drs. Wiot, Scott, Wheeler, Spitz, and Shipley, all of whom are Board-certified radiologists, B readers, and professors of radiology, found that this x-ray did not demonstrate the presence of complicated pneumoconiosis. Decision and Order on Remand at 8; Director's Exhibit 44; Employer's Exhibits 3, 5. The administrative law judge determined that the two complicated pneumoconiosis readings were outweighed by the five negative readings of the physicians who are professors of radiology in addition to being Board-certified radiologists and B readers. Decision and Order on Remand at 9.

Regarding the film obtained on April 30, 1991, the administrative law judge stated that it was read by seven physicians, three of whom found complicated pneumoconiosis. *Id.*. The administrative law judge noted that these three physicians, Drs. Bassali, Fisher, and Aycoth, are Board-certified radiologists and B readers. *Id.*. The administrative law judge also indicated that Dr. Aycoth qualified his diagnosis of a Category A large opacity by noting that a neoplasm could not be ruled out without comparing other films. Decision and Order on Remand at 9; Claimant's Exhibit 4. The administrative law judge determined that the negative readings of Drs. Wiot, Shipley, and Spitz were more persuasive than the positive interpretations, based upon the status of these physicians as radiology professors and the uniformity of their findings. Decision and Order on Remand at 10; Employer's Exhibit 12. The administrative law judge also noted the fact that Dr.

Aycoth expressed reservations as to his diagnosis of complicated pneumoconiosis.[2] Decision and Order on Remand at 10; Claimant's Exhibit 4.

With respect to the x-ray dated December 3, 1991, the administrative law judge indicated that it was interpreted as positive for complicated pneumoconiosis by two physicians and negative for the disease by ten physicians. Decision and Order on Remand at 10. The administrative law judge noted that the physicians who found complicated pneumoconiosis, Drs. Aycoth and Fisher, are Board-certified radiologists and B readers, while seven of the physicians who submitted negative readings, Drs. Wiot, Shipley, Spitz, Gayler, Scott, Wheeler, and E.N. Sargent, are Board-certified radiologists, B readers, and professors of radiology. Decision and Order on Remand at 10; Claimant's Exhibits 2, 7, 8; Employer's Exhibits 8, 10, 14, 17. The administrative law judge also indicated that Drs. J.D. Sargent and Fino, both of whom are B readers, found no complicated pneumoconiosis on this x-ray. Decision and Order on Remand at 10; Employer's Exhibits 16, 18. The administrative law judge concluded that the December 1991 film does not establish the existence of complicated pneumoconiosis, as the readings by highly qualified physicians, including all of the professors of radiology, were overwhelmingly negative. Decision and Order on Remand at 10. Finally, based upon his weighing of all of the readings of the four films which were interpreted as positive for complicated pneumoconiosis, the administrative law judge found that the x-ray evidence of record was insufficient to support a finding of the disease under Section 718.304(a). *Id.*.

[2]Dr. Aycoth diagnosed size "A" large opacities on the x-rays dated April 30, 1991, and December 3, 1991. Claimant's Exhibits 2, 4. He also indicated, however, that he could not rule out the possibility that the opacity represented a neoplasm without performing a comparison with other films. *Id.*.

Claimant asserts that the administrative law judge's findings under Section 718.304(a) must be vacated on the grounds that the administrative law judge merely counted heads in resolving the conflict in the evidence and erred in crediting the interpretations offered on behalf of employer.[3] The Director maintains that in light of the fact that the Board affirmed Judge Johnson's finding that the evidence of record is sufficient to establish the existence of simple pneumoconiosis, the administrative law judge was required to reject x-ray interpretations which are completely negative for pneumoconiosis. The Director alleges specifically that the administrative law judge should have ignored the negative readings of the March 6, 1991 film proffered by Drs. Wiot, Scott, and Wheeler, the negative reading of the April 30, 1991 x-ray submitted by Dr. Wiot, and the negative readings of the December 3, 1991 film made by Drs. Wiot, Scott, Wheeler, E.N. Sargent, and Fino. We hold that the contentions made by claimant and the Director are without merit.

Regarding claimant's arguments, the administrative law judge did not rely solely upon the numerical superiority of the negative readings submitted by employer. In addition to noting the numerical superiority of the readings that were negative for complicated pneumoconiosis, the administrative law judge considered the qualifications of the various physicians and acted within his discretion in additionally relying upon the fact that Drs. Wiot, Shipley, Spitz, Wheeler, E.N. Sargent, and Gayler are professors of radiology. *See Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). The administrative law judge also did not err in declining to consider the party affiliations of the physicians who submitted x-ray interpretations, inasmuch as the record does not contain, nor has claimant identified, any evidence supporting a finding of bias. *See Urgolites v. Director, OWCP*, 17 BLR 1-20 (1992); *Melnick supra*; *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984).

In addition, the administrative law judge rationally relied upon the opinions of the highly qualified physicians who attributed the changes in the upper lobe of claimant's right lung to healed tuberculosis rather than complicated pneumoconiosis. Decision and Order on Remand at 8-10, 15; *see Adkins*, *supra*; *Worhach*, *supra*. Contrary to claimant's suggestion, the administrative law judge acknowledged claimant's testimony that his

[3]Claimant also asserts that the administrative law judge should have excluded Dr. Renn's second reading of the film dated May 19, 1989, as Dr. Renn initially indicated that this film was not readable. Director's Exhibit 35; Employer's Exhibit 4. This contention is without merit. Dr. Renn noted that the first version of the May 1989 film that he attempted to interpret was unreadable because it was a copy of the original film and was overexposed. Director's Exhibit 35. Upon performing his second reading of this film, Dr. Renn did not identify the film as a copy, but rather denoted its quality as "2" and classified the film as 1/1 q, r. Employer's Exhibit 4. Inasmuch as Dr. Renn's second reading conformed to the quality standards relevant to x-ray evidence, *see* 20 C.F.R. §§410.428, 718.102, the administrative law judge did not err in considering this reading.

doctor never diagnosed tuberculosis. Decision and Order on Remand at 15; Hearing Transcript at 34. Claimant's assertion regarding the requirement to report a diagnosis of tuberculosis to the person suspected of having the disease and to public health officials does not provide a basis for reversing the administrative law judge's finding in this regard, inasmuch as the administrative law judge's finding does not represent an abuse of the discretion afforded him as fact-finder in assessing the medical evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

With respect to the Director's contentions regarding the completely negative x-ray readings submitted by Drs. Wiot, Wheeler, Fino, Scott, and E.N. Sargent, we hold that the administrative law judge was not required to discredit these readings on the ground that they contradicted Judge Johnson's finding of simple pneumoconiosis under Section 718.202(a)(1). Although it would have been within the administrative law judge's discretion to consider such a factor when determining the credibility of these interpretations under Section 718.304(a), *see generally Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985), the administrative law judge was not required to do so. *See generally Clark*, *supra*; *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985); *Casey v. Director, OWCP*, 7 BLR 1-873 (1984). We, therefore, affirm the administrative law judge's finding that the x-ray evidence does not support a finding of complicated pneumoconiosis under Section 718.304(a).

We also affirm the administrative law judge's determination that the medical opinion evidence does not support a finding of complicated pneumoconiosis under Section 718.304(c), as it is rational and supported by substantial evidence. The administrative law judge determined correctly that Dr. Chithambo was the only physician to opine in a medical report that claimant is suffering from complicated pneumoconiosis. Decision and Order on Remand at 13; Claimant's Exhibit 2. However, claimant's assertion that the administrative law judge relied upon the numerical superiority of the opinions in which the physicians determined that claimant does not have complicated pneumoconiosis is without merit. The administrative law judge acted within his discretion in finding that Dr. Chithambo's opinion was entitled to little weight on the grounds that Dr. Chithambo relied upon Dr. Aycoth's interpretation of the x-ray dated December 3, 1991, which was outweighed by the readings of physicians possessing superior qualifications, and failed to explain adequately the basis of his diagnosis. Decision and Order on Remand at 13-14; *see Clark*, *supra*.

In addition, contrary to claimant's argument, the administrative law judge rationally determined that the credibility of Dr. Chithambo's opinion, regarding the existence of complicated pneumoconiosis, was diminished by his reliance upon a pulmonary function study that was invalidated by Dr. Fino, a physician who is Board-certified in Internal Medicine and Pulmonary Disease.[4] Decision and Order on Remand at 14; *see Trent v.*

[4]Dr. Chithambo is Board-certified in Internal Medicine. Claimant's Exhibit 2; Employer's Exhibit 13.

Director, OWCP, 11 BLR 1-26 (1987); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge also acted within his discretion in finding that the opinions in which Drs. Fino, Endres-Bercher, Wiot, J.D. Sargent, and Dahhan concluded that claimant does not have complicated pneumoconiosis were entitled to greater weight, as they were better supported by the objective evidence of record and were more thoroughly explained. Decision and Order on Remand at 14-15; Director's Exhibit 35; Employer's Exhibits 2, 6, 8, 9, 15, 16; *see Clark*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Finally, although claimant alleges that the administrative law judge should have considered the bias of the physicians who offered their opinions at employer's request, the administrative law judge did not err in declining to consider this factor, inasmuch as claimant has not identified any specific evidence in support of this argument. *See Urgolites*, *supra*; *Melnick*, *supra*. Thus, the administrative law judge concluded permissibly that the medical opinions of record do not support a finding of complicated pneumoconiosis under Section 718.304(c).

Inasmuch as we have affirmed the administrative law judge's findings under Section 718.304, and in light of our prior affirmance of Judge Johnson's finding that claimant did not demonstrate that he is totally disabled due to pneumoconiosis under Section 718.204(b) and (c), we must also affirm the denial of benefits under Part 718. *See Trent*, *supra*; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

Administrative Appeals Judge