BRB No. 00-0692 BLA

TEDDY J. WHITED	)	
	)	
Claimant-	)	
Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
RHONDA COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order-Award of Benefits of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd, and Lloyd PLLC), Washington, D.C., for employer.

Edward Waldman (Judith E. Kramer, Acting Solicitor of Labor; 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (99-BLA-0846) of Administrative Law Judge Stuart A. Levin 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 October 25, 1994. Director's Exhibit 1. In a Decision and Order issued on December 5, 1996, Administrative Law Judge Edith Barnett determined that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(1) and (a)(4).[1] Judge Barnett further found, however, that claimant did not prove that he was totally disabled pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 49. Both claimant and employer filed appeals with the Board. The Board affirmed the denial of benefits, holding that Judge Barnett's finding that claimant failed to establish total respiratory or pulmonary disability was rational and supported by substantial evidence. Therefore, the Board did not reach employer's arguments concerning Judge Barnett's admission of certain evidence and her findings under Section 718.202(a)(1) and (a)(4). *Whited v. Rhonda Coal Co.*, BRB Nos. 97-0538 BLA and 97-0538 BLA-A (Dec. 4, 1997)(unpub.); Director's Exhibit 59.

Claimant filed a request for modification on October 15, 1998 and submitted newly developed evidence. The district director issued a Proposed Decision and Order Granting Request for Modification on March 3, 1999. Director's Exhibit 70. Employer requested a hearing which was conducted by Administrative Law Judge Stuart A. Levin (the administrative law judge). In the Decision and Order that is the subject of the present appeal, the administrative law judge determined that although the prior denial of benefits did not contain a mistake in a determination of fact, the newly submitted evidence was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Section 718.304 and did not properly determine whether claimant had established modification pursuant to 20 C.F.R. §725.310.[2] The Director, Office of Workers'

[1]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

[2]The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

Compensation Programs (the Director), has not filed a brief in response to employer's appeal.

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The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

Inasmuch as the record developed prior to claimant's request for modification does not contain evidence indicating that claimant has complicated pneumoconiosis, the administrative law judge referred to the newly submitted evidence and accorded greatest weight to the report in which Dr. Navani diagnosed complicated pneumoconiosis based upon his interpretation of a CT scan of claimant's chest obtained on March 11, 1998.[4] Decision and Order at 6-7; Director's Exhibit 61. The administrative law judge determined that the contrary opinions of Drs. Scott, Wheeler, and Castle were entitled to little weight as these physicians were not aware that claimant had tested negative for tuberculosis. *Id*.; Employer's Exhibits 2, 4, 6. The administrative law judge concluded, therefore, that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis.

Employer argues that the administrative law judge should have weighed the different types of evidence relevant to Section 718.304 together prior to rendering a finding as to whether claimant has established the presence of complicated pneumoconiosis. In addition, employer asserts that the administrative law judge failed to make a finding as to whether Dr. Navani's CT scan interpretation set forth findings equivalent to those described in Section 718.304(a). Finally, employer contends that the administrative law judge did not consider the newly submitted evidence in conjunction with the previously submitted evidence in order to determine whether claimant had demonstrated at least one of the prerequisites for modification.[5]

Employer's contentions have merit. Turning first to the administrative law judge's treatment of claimant's request for modification, the administrative law judge initially found that the previous denial of benefits did not contain a mistake in a determination of fact. The administrative law judge then addressed the newly submitted evidence, noting that benefits were previously denied on the ground that claimant did not prove that he is totally disabled. The administrative law judge determined that claimant demonstrated a change in conditions by establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis. In assessing the evidence on modification, however, the administrative law judge should perform an independent assessment of the newly

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[4]Judge Barnett found that the presumption set forth in 20 C.F.R. §718.304 was not invoked. The Board affirmed this finding. *Whited v. Rhonda Coal Co.*, BRB Nos. 97-0538 BLA and 97-0538 BLA-A (Dec. 4, 1997)(unpub.), slip op. at 3 n.3; Director's Exhibit 59.

[5]We affirm the administrative law judge's finding that the prior Decision and Order denying benefits did not contain a mistake in a determination of fact, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element of entitlement adjudicated against claimant in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In the present case, the administrative law judge did not refer to the previously submitted evidence when considering the credibility of the newly submitted evidence pertaining to the existence of complicated pneumoconiosis. This omission is particularly relevant in the present case in which Drs. Castle and Wheeler characterized the sudden appearance of apical masses in claimant's lungs as inconsistent with a diagnosis of complicated pneumoconiosis. Employer's Exhibits 8 at 26, 9 at 38-39. Accordingly, we vacate the administrative law judge's finding that claimant established a change in conditions pursuant to Section 725.310 and remand the case to the administrative law judge for reconsideration of this issue.

With respect to the administrative law judge's findings under Section 718.304, the United States Court of Appeals for the Fourth Circuit held, in a case published subsequent to the administrative law judge's Decision and Order, that an administrative law judge must weigh the evidence at Section 718.304(a), (b), and (c) together before determining whether the irrebuttable presumption of total disability due to pneumoconiosis has been invoked.[6] *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The Fourth Circuit also requires the administrative law judge to consider whether the types of evidence referenced in Section 718.304(b) and (c) would produce results equivalent to opacities greater than one centimeter in size on a chest x-ray as described in Section 718.304(a). *See Double B Mining Co. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *see also Scarbro, supra*.

In the present case, the administrative law judge stated that once the existence of complicated pneumoconiosis is established by x-ray, its presence cannot be rebutted. Decision and Order at 7. The administrative law judge, however, found the existence of complicated pneumoconiosis established based upon Dr. Navani's CT scan interpretation rather than x-ray evidence and did so without making the requisite equivalency determination. In addition, the administrative law judge's statement of the law is not consistent with the Fourth Circuit's recent decision in *Scarbro*, in which the court discusses the ways in which other evidence may negate the probative value of x-ray

[6]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in the Commonwealth of Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evidence.[7] *See Scarbro, supra*. Inasmuch as the administrative law judge did not have the court's decision in *Scarbro* before him at the time he rendered his Decision and Order, we vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption pursuant to Section 718.304 and remand the case to the administrative law judge for reconsideration of the medical evidence relevant to this issue.

[7]The court explained:

> [T]he x-ray evidence can lose force only if the other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Eastern Associated Coal Corp. v. Director, OWCP [Scarbro], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).

On remand, in addressing claimant's request for modification, the administrative law judge should consider whether reopening the present case would render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254, 255-56 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *Branham v. Bethenergy Mines, Inc. [Branham II]*, 21 BLR 1-79 (1998). Regarding the issue of change in conditions, the administrative law judge must perform an independent assessment of all of the newly submitted evidence, in conjunction with the previously submitted evidence, in order to determine whether claimant has demonstrated that his condition has changed since the prior denial.[8] *See Nataloni, supra*; *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In reconsidering whether the evidence of record supports a finding of complicated pneumoconiosis under Section 718.304, the administrative law judge should determine whether the CT scan evidence which he deems supportive of a finding of complicated pneumoconiosis under Section 718.304(c), would produce results equivalent to opacities on a chest x-ray greater than one centimeter in size as described in Section 718.304(a). *See Blankenship, supra*; *see also Scarbro, supra*. The administrative law judge should also weigh the evidence relevant to Section 718.304(a) and (c) together before determining whether the irrebuttable presumption of total disability due to pneumoconiosis has been invoked by a preponderance of the evidence.

In this regard, employer argues that the administrative law judge did not fully address the contrary evidence presented in the opinions of Drs. Castle, Wheeler, and Scott, inasmuch as these physicians did not exclude the possibility that the disease process observed was histoplasmosis or a noninfectious granulomatous disease rather than tuberculosis. Director's Exhibits 37, 41, 42 at 35, 47; Employer's Exhibits 2, 4, 6, 8, 9 at 21-22, 33. Employer also asserts that the administrative law judge did not fully consider the variety of data that Dr. Castle relied upon, in addition to the CT scan interpretations of Drs. Wheeler and Scott, in determining that complicated pneumoconiosis is not present. In order to address these concerns, when reconsidering the medical opinions of record on remand, the administrative law judge should address the qualifications of the respective physicians, the explanation of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269

[8]The administrative law judge did not indicate whether he treated Dr. Naik's interpretation of the March 11, 1998 CT scan as evidence supportive of a finding of complicated pneumoconiosis under Section 718.304(c). Director's Exhibit 60. Dr. Naik stated that the CT scan showed a progressive massive fibrosis type formation in the right apical region consistent with pneumoconiosis and noted that the conglomerate mass measured at least two centimeters by five centimeters. Director's Exhibit 60.

(4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In rendering his findings, the administrative law judge must identify the evidence that he is weighing, the regulatory section under which he is weighing it, and the rationale underlying his determinations as is required under the 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). *See Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983).

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge