BRB No. 04-0696 BLA

DENZEL RICHARDSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY	)	DATE ISSUED: 04/28/2005
	)	
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (PennStuart), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-BLA-06026) of Administrative Law Judge Linda S. Chapman 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 *et seq.* (the Act). The administrative law judge credited claimant with at least twenty-two years of coal mine employment and noted that the claim before her, filed on May 21, 2000, was a subsequent claim pursuant to 20 C.F.R.

§725.309.[1] The administrative law judge determined that 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 contends on appeal that the administrative law judge did not properly weigh the evidence relevant to Section 718.304. Employer also argues that the administrative law judge erred in finding that Dr. Scott's x-ray rereading did not constitute rebuttal evidence under 20 C.F.R. §725.414(c)(3)(ii). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a response.

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).

Employer argues initially that the administrative law judge erred in determining that claimant invoked the irrebuttable presumption set forth in Section 718.304. Employer alleges specifically that the administrative law judge misinterpreted Section 718.304(a) and the decision of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), by giving claimant the benefit of a rebuttable presumption that the x-ray evidence of record was sufficient to establish the presence of opacities greater than one centimeter in diameter.[2] This contention has merit. In her Decision and Order, the administrative law judge noted that in *Scarbro*, the court held that x-ray evidence satisfying prong (A) of the statutory presumption could lose force only if other evidence

[1] Claimant filed an application for benefits on June 22, 1992. Director's Exhibit 1. On September 30, 1994, Administrative Law Judge Ralph A. Roman issued a Decision and Order in which he accepted the parties' stipulation to the existence of simple pneumoconiosis, but denied benefits on the ground that claimant failed to establish that he is totally disabled. *Id.* The Board affirmed the denial of benefits. *Richardson v. Paramont Coal Co.*¸ BRB No. 95-0388 BLA (Sept. 29, 1995)(unpub.); Director's Exhibit 1. Claimant took no further action until filing a second claim on May 21, 2000. Director's Exhibit 9.

[2] 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 Exhibits 1, 9; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

shows that the opacities are not there or are not what they appear to be.[3] Decision and Order at 6-8. The administrative law judge interpreted this holding as providing that if a claimant introduces any x-ray evidence supportive of a finding of complicated pneumoconiosis, the burden shifts to the party opposing entitlement to affirmatively establish that the x-ray evidence is flawed in some way. *Id*. at 8.

This analysis is not correct. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge is required to weigh all of the evidence relevant to this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *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). Because the administrative law judge did not perform this task, we vacate her finding that claimant established invocation of the irrebuttable presumption set forth in Section 718.304. On remand, the administrative law judge must first determine whether the relevant evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh the evidence at subsections (a), (b) and (c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

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[3] Section 411(c)(3) of the Act provides that:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that at the time of death he was totally disabled by pneumoconiosis, as the case may be.

30 U.S.C. §921(c)(3).

Employer also argues that the administrative law judge erred in discrediting the x-ray interpretations in which Drs. Scott, Wheeler, and Scatarige attributed the large opacity in the right upper lobe of claimant's lung to tuberculosis (TB) or cancer because they did not cite corroborating evidence in the record. Decision and Order at 8; Director's Exhibits 28, 34; Employer's Exhibit 1. The Board has long held that the interpretation of the objective data is a medical determination for which an administrative law judge cannot substitute her own opinion. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Many of the physicians interpreted claimant's x-rays as revealing other abnormalities. The fact that the record does not contain evidence regarding whether claimant suffered from TB does not undermine the interpretations of those physicians who found that claimant's x-rays revealed abnormalities consistent with the disease. We must vacate, therefore, the administrative law judge's findings with respect to the x-ray interpretations proffered by Drs. Scott, Wheeler, and Scatarige. On remand, the administrative must reconsider this evidence.

Employer also maintains that the administrative law judge did not properly weigh Dr. DePonte's x-ray reading. On an ILO form, Dr. DePonte reported that the film dated December 4, 2001 revealed that claimant has 1/1 simple pneumoconiosis. She also checked a box indicating that a Category B large opacity was present. Dr. DePonte stated in the "comments" section that the large opacity in the right upper lobe of claimant's lung may represent cancer or a pleural lesion and stated that a CT scan was recommended. Director's Exhibit 27. In her deposition testimony, Dr. DePonte reiterated her opinion that the condition visualized on x-ray could be something other than complicated pneumoconiosis. Claimant's Exhibit 4 at 7, 10-11.

The administrative law judge determined that because Dr. DePonte clearly diagnosed pneumoconiosis and checked the box indicating that there is a size B large opacity in claimant's right lung, her comments regarding other possible disease processes and the desirability of obtaining a CT scan were irrelevant. Decision and Order at 9. As employer asserts, the administrative law judge did not fully address Dr. DePonte's comments. The physician's own statements regarding whether the large opacity was attributable to a chronic dust disease of the lung, as required under Section 718.304, are relevant and should have been addressed by the administrative law judge. *See U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

With respect to Section 718.304(c), employer contends that the administrative law judge did not properly weigh the CT scan evidence and did not consider the entirety of Dr. Hippensteel's opinion regarding the CT scan dated August 20, 2002. These contentions have merit. In discussing the CT scan evidence, the administrative law judge did not independently evaluate whether it was sufficient to establish the existence of

complicated pneumoconiosis pursuant to Section 718.304(c). Rather, the administrative law judge only addressed whether the CT scan evidence called into question the x-ray evidence of complicated pneumoconiosis. Consequently, on remand, the administrative law judge must assess separately whether the CT scan evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c) and then weigh this evidence with the evidence relevant to Section 718.304(a). *Melnick*, 16 BLR 1-31, 1-34.

Regarding Dr. Hippensteel's opinion, the administrative law judge confined her discussion to noting that the doctor's reference to the absence of evidence demonstrating a totally disabling respiratory or pulmonary impairment was not relevant to the inquiry under Section 718.304. Decision and Order at 9; Director's Exhibit 28; Employer's Exhibit 4. Although the administrative law judge's finding in this regard is correct, she must also consider the additional rationale that Dr. Hippensteel provided for his opinion that claimant has sarcoidosis rather than complicated pneumoconiosis and determine whether it is entitled to probative weight pursuant to Section 718.304(c).[4] *Melnick*, 16 BLR 1-31, 1-34.

The final issue raised by employer on appeal concerns the administrative law judge's determination that Dr. Scott's x-ray rereading of a film dated March 12, 2003 does not constitute rebuttal evidence under Section 725.414(c)(3)(ii). The administrative law judge determined that because claimant did not submit a reading of an x-ray taken on that date, Dr. Scott's interpretation was not in rebuttal of evidence proffered by claimant in his affirmative case. Decision and Order at 2 n.2; Employer's Exhibit 2.

Employer maintains that Dr. Scott's reading was of a film that was initially interpreted by Dr. Patel and that Dr. Patel erroneously reported that the x-ray was obtained on March 11, 2003. In support of its position, employer notes that Dr. Rasmussen examined claimant on March 12, 2003 and obtained a pulmonary function study, blood gas study, and EKG on that date. Claimant's Exhibit 1. Employer also asserts that claimant's testimony at the hearing tends to establish that the x-ray was procured on the same day as the other objective tests obtained by Dr. Rasmussen.

Employer's allegation of error has merit. The administrative law judge rendered her finding with respect to Dr. Scott's x-ray reading without addressing the evidence in the record tending to establish that the film that Dr. Scott read was the same film read by Dr. Patel and was obtained on March 12, 2003. As employer has noted, its counsel raised

[4] Dr. Hippensteel stated that the results of a blood test performed in conjunction with his examination of claimant supported his diagnosis of sarcoidosis. Director's Exhibit 28; Employer's Exhibit 4.

this issue at the hearing and sought clarification by asking claimant to describe Dr. Rasmussen's examination. Although claimant's responses to counsel's questions were not transcribed due to an apparent failure in the recording equipment, the exchange suggests that claimant agreed that all of the objective tests, including the x-ray, were obtained on March 11, 2003. Hearing Transcript at 21. We vacate the administrative law judge's finding that Dr. Scott's x-ray reading does not constitute rebuttal evidence pursuant to Section 725.414(c)(3)(ii). The administrative law judge must consider the evidence regarding the date of the x-ray and render a finding based upon this evidence.

If the administrative law judge determines on remand that claimant has not established invocation of the irrebuttable presumption of total disability due to pneumoconiosis, she must consider whether the newly submitted evidence supports a finding of a material change in conditions under Section 718.204.[5] *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *cert. denied*, 117 S.Ct. 763 (1997).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[5] In the prior claim, the parties stipulated that claimant was suffering from simple pneumoconiosis. Director's Exhibit 1.