BRB No. 10-0434 BLA

DAVID E. NAPIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/15/2011
	)	
and	)	
	)	
PROGRESS FUELS CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5186) of Administrative Law Judge Paul C. Johnson, Jr., with respect to a miner's claim filed on February 27, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). After crediting claimant with twenty-nine years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(3), 718.203(b), 718.304(a), and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the evidence of record relevant to 20 C.F.R. §718.304. Specifically, employer asserts that the administrative law judge did not sufficiently consider and weigh the x-ray evidence, diagnosing the existence of complicated pneumoconiosis, with the contrary CT scan and medical opinion evidence in the record, before finding that the existence of complicated pneumoconiosis was established. Employer also asserts that the administrative law judge's decision fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Finally, employer asserts that the new amendments apply to this claim, based on its filing date. Employer contends, therefore, that the administrative law judge's decision should be vacated and the case remanded for further proceedings.[1] The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to employer's appeal, limited to the applicability of the recent amendments to the Act. The Director submits that, if the Board affirms the award of benefits, the amendments will have no impact on this claim, based on claimant's successful invocation of the irrebuttable presumption of total disability due to pneumoconiosis. If, however, the Board vacates the administrative law judge's finding of complicated pneumoconiosis and the consequent award of benefits, the Director contends that this case must be remanded for consideration under the new

[1] The new amendments, in part, reinstated the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

amendments, namely for consideration under Section 411(c)(4). Claimant has not filed a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Complicated Pneumoconiosis – 20 C.F.R. §718.304

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, the administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33 (1991)(*en banc*).

We agree with employer that the administrative law judge did not sufficiently weigh together the x-ray evidence, which was positive for complicated pneumoconiosis, with the medical opinion evidence, which found the existence of only simple pneumoconiosis. In considering the relevant evidence, the administrative law judge found complicated pneumoconiosis established under Section 718.304(a), based on the fact, in part, that the most recent x-ray was read as positive for complicated

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established twenty-nine years of coal mine employment and that he was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis and because it was read as positive for complicated pneumoconiosis by physicians with superior radiological credentials.[3] Decision and Order at 5. In addition, in assessing the probative value of the x-ray readings of complicated pneumoconiosis, the administrative law judge erred in finding that the readings of complicated pneumoconiosis by Drs. Miller and Wiot of the August 2008 x-ray were buttressed by the fact that a 2006 x-ray was read as showing small nodular densities. The administrative law judge concluded that "in light of the progressive nature of [pneumoconiosis], the small opacities in [c]laimant's lungs, noted at least since 2006, coalesced over time until they formed the large opacity noted by Drs. Miller and Wiot." *Id.* at 6. The administrative law judge may not, however, act as a medical expert in evaluating the medical evidence. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Rather, the administrative law judge must determine whether there is *medical evidence* which concludes that the small opacities seen in 2006 coalesced to form the large opacity seen in 2008.[4]

Further, the administrative law judge's failure to weigh all the relevant evidence together in making his ultimate finding of complicated pneumoconiosis requires remand of the case. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Lester*, 993 F.2d at 1145-46, 17 BLR 2-117-18. While the administrative law judge found that there was "no evidence of

[3] The administrative law judge credited the readings of complicated pneumoconiosis by Drs. Miller and Wiot over the reading of simple pneumoconiosis by Dr. Vaezy, based on their superior qualifications and the fact that they read the most recent x-ray. The administrative law judge noted that Drs. Miller and Wiot, Board-certified radiologists and B readers, interpreted the August 8, 2008 x-ray, while Dr. Vaezy, B reader, interpreted the April 8, 2008 x-ray. Claimant's Exhibits 1, 3; Director's Exhibit 11. The administrative law judge further noted that Dr. Wiot had been extensively involved with the "Black Lung program[,]" holding leadership and representative positions in several organizations crucial to the development of the system for classifying x-rays for the existence of pneumoconiosis. Decision and Order at 5-6.

[4] We reject, however, employer's argument that the administrative law judge should have accorded little weight to the x-ray interpretations of Drs. Miller and Wiot because they did not examine or treat claimant. While all of the evidence relevant to the existence of complicated pneumoconiosis must be weighed together, in reaching a finding that complicated pneumoconiosis is established, *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993), such a finding may ultimately be based on x-ray evidence. *See Eastern Assoc. Coal Corp. v. Scarbro*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). The fact that Drs. Miller and Wiot provided x-ray readings and did not examine or treat claimant does not detract from the reliability of their x-ray readings on the issue of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

complicated pneumoconiosis apart from the x-ray evidence," he failed to adequately weigh this other evidence. The record contains, in addition to Dr. Vaezy's opinion, the opinions of several doctors, contained in the miner's treatment records, namely Drs. Almusaddy, Dahhan, and Alam, who diagnosed only simple pneumoconiosis. Director's Exhibits 13-85, 13-87, and 13-120. In determining whether complicated pneumoconiosis was established overall, the administrative law judge must weigh these opinions along with the x-ray evidence. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33. In weighing all the relevant evidence together, on remand, the administrative law judge must fully discuss the reasons for his findings in compliance with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, we vacate the administrative law judge's finding of complicated pneumoconiosis at Section 718.304 and remand the case for reconsideration thereunder.[5] On remand, the administrative law judge must weigh together all of the relevant evidence, before making a determination as to the existence of complicated pneumoconiosis.

Section 411(c)(4)

If, on remand, the administrative law judge finds that claimant is not entitled to the irrebuttable presumption at Section 411(c)(3), 30 U.S.C. §921(c)(3), he must consider whether claimant is entitled to benefits pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4). If the administrative law judge credits claimant with at least fifteen years of qualifying coal mine employment and finds that he is entitled to invocation of the Section 411(c)(4) presumption, the administrative law judge must then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge must allow the parties the opportunity to submit additional evidence to address the change in law, *see Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*,

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that complicated pneumoconiosis was not established at 20 C.F.R. §718.304(b), as there was no biopsy evidence in the record. Further, we affirm the administrative law judge's finding that complicated pneumoconiosis was not established at 20 C.F.R. §718.304(c), as "there [was] no evidence of complicated pneumoconiosis apart from the x-ray evidence." *Skrack*, 6 BLR at 1-711; Decision and Order at 5.

Contrary to employer's argument, the administrative law judge acted properly in not considering the CT scans readings, which were contained in the treatment records, because he found that there was no evidence in the record to show that they were a medically relevant and acceptable means of diagnosing pneumoconiosis. *See* 20 C.F.R. §718.107; *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); Decision and Order at 4; Director's Exhibit 13.

806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986), in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is proffered, its admission must be justified by a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge