BRB No. 12-0337 BLA

EDNA B. BLANEY (o/b/o and Widow of LESTER F. BLANEY)	)	
Claimant-Respondent	)	
v.	)	
LAUREL RUN MINING COMPANY	)	
and	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 04/26/2013
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 – Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim (2010-BLA-5295 and 2010-BLA-5267) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered on a miner's subsequent claim and on a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] The administrative law judge credited the miner with 12.94 years of coal mine employment[2] and adjudicated both claims pursuant to the regulatory provisions at 20 C.F.R. Part 718. With respect to the miner's subsequent claim, the administrative law judge found that the newly submitted evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Turning to the merits of entitlement, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, accordingly, denied benefits in the miner's claim. With respect to the survivor's claim, the administrative law judge determined that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby entitling claimant to the

[1] Claimant is the widow of the miner, who died on April 1, 2009. The miner's initial claim for benefits, filed on November 18, 1976, was finally denied by the district director on March 6, 1980, because the evidence was insufficient to establish pneumoconiosis or total respiratory disability. Miner's Claim Director's Exhibit 1-A.

The miner filed the current claim on June 19, 2007, which was pending at the time of his death. Miner's Claim Director's Exhibit 2. Claimant filed her survivor's claim on April 24, 2009, Survivor's Claim Director's Exhibit 2, and requested that the miner's claim be remanded to the district director for consolidation with the survivor's claim. On November 4, 2009, Administrative Law Judge Daniel L. Leland cancelled the hearing in the miner's claim and ordered that the case be remanded to the district director for consolidation. Miner's Claim Director's Exhibits 35, 36.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). Because the evidence did not establish that the miner had at least fifteen years of underground coal mine employment, claimant cannot establish invocation of the rebuttable presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), in either the miner's claim or the survivor's claim. Further, because claimant did not appeal the denial of benefits in the miner's claim, claimant is not entitled to the automatic entitlement provisions at amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

irrebuttable presumption that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis pursuant to Section 718.304 in the survivor's claim. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, but maintains that the Board should reject employer's assertion that collateral estoppel precludes a finding of complicated pneumoconiosis in the survivor's claim.[3]

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.[4] 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).

Initially, we reject employer's contention that, because the administrative law judge found that complicated pneumoconiosis was not established in the miner's claim, the doctrine of collateral estoppel precludes a finding of complicated pneumoconiosis in the survivor's claim.[5] Employer's Brief at 17-19. To successfully invoke the doctrine of collateral estoppel, employer must establish the following criteria:

> (1) the issue sought to be precluded is identical to the one previously litigated;
> (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;

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[3] We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of the miner's coal mine employment, his finding that the evidence in the miner's claim is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and his denial of benefits in the miner's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Miner's Claim Director's Exhibit 4.

[5] The administrative law judge noted that the evidence designated in the miner's claim was different from that designated in the survivor's claim. Decision and Order at 24 n. 57.

(3) determination of the issue must have been necessary to the outcome of the prior determination;
(4) the prior proceeding must have resulted in a final judgment on the merits; and
(5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Westmoreland Coal Co. v. Sharpe, 692 F. 3d 317, 25 BLR 2-157 (4th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3414 (U.S. Jan. 11, 2013)(No. 12-865), citing *Collins v. Pond Creek Mining Co*., 468 F.3d 213, 218-19, 23 BLR 2-394, 2-403-06 (4th Cir. 2006); *Sedlack v. Braswell Services Group, Inc*., 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (1999)(en banc). Because the two claims were consolidated for contemporaneous adjudication, there was no prior proceeding or final judgment on the merits in the miner's claim. *See Hughes*, 21 BLR at 1-137-38. Consequently, a requisite element for application of the doctrine of collateral estoppel was not established. *Collins*, 468 F.3d at 217, 23 BLR at 2-401.

Turning to the merits of the survivor's claim, in order to establish entitlement to survivor's benefits, without benefit of the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4), claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered 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. In addition, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "[b]ecause prong (a) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge

must determine whether a condition which is diagnosed by biopsy or autopsy under prong (b), or by other means under prong (c), would appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56, 22 BLR 2-93, 2-100 (4th Cir. 2000); *see Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

However, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. Thus, in determining whether the evidence establishes complicated pneumoconiosis, the administrative law judge must examine all of the evidence on the issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, and resolve any conflicts in the evidence. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc).

Employer challenges the administrative law judge's finding that the x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304(a) and outweighed the CT scan evidence and medical opinion evidence at Section 718.304(c). Employer argues that the administrative law judge improperly "counted heads," relying solely on the numerical superiority of the positive interpretations to find complicated pneumoconiosis established. Further, employer asserts that the administrative law judge erred in considering Dr. Ahmed's interpretation of the September 17, 2007 x-ray as affirmative evidence, a purpose beyond which it was designated by claimant. Employer notes that claimant submitted Dr. Ahmed's interpretation as rebuttal evidence in response to the Department of Labor (DOL)-sponsored film. However, because the Director has no regulatory authority to be the proponent of evidence in a survivor's claim, employer maintains that the present survivor's claim contains no DOL-sponsored x-ray, and therefore Dr. Ahmed's rebuttal interpretation has no application in this claim. Lastly, employer contends that the administrative law judge failed to weigh all relevant evidence together in finding complicated pneumoconiosis established at Section 718.304. Employer's Brief at 10-17. Some of employer's contentions have merit.

In the survivor's claim, the administrative law judge considered five interpretations of x-rays dated September 17, 2007 and November 12, 2008, as well as several x-ray interpretations from the miner's treatment records. The September 17, 2007 x-ray was read as positive for simple and complicated pneumoconiosis, Category A, by Dr. Jaworski, a B reader, and by Dr. Ahmed, who is dually qualified as a Board-certified

radiologist and B reader.[6] Survivor's Claim Claimant's Exhibit 1; Director's Exhibit 15. Dr. Wiot, also dually qualified, read the x-ray as negative for both simple and complicated pneumoconiosis. Survivor's Claim Employer's Exhibit 3. The November 12, 2008 x-ray was read as positive for simple and complicated pneumoconiosis, Category A, by Dr. Ahmed, while Dr. Renn, a B reader, interpreted the x-ray as negative for simple and complicated pneumoconiosis. Survivor's Claim Claimant's Exhibit 2; Employer's Exhibit 1.

In weighing the x-ray evidence of record, the administrative law judge considered both the quantitative and the qualitative nature of the conflicting x-ray readings and sought to resolve the conflict by considering the readers' qualifications. Decision and Order at 14, 24. The administrative law judge found, therefore, that the November 12, 2008 x-ray is positive for complicated pneumoconiosis, based on Dr. Ahmed's superior qualifications, and that the September 17, 2007 x-ray is also positive, based on the positive interpretations of "one B reader and one dually qualified physician against just a dually qualified physician." Decision and Order at 24. The administrative law judge assigned no probative value to the treatment x-rays because the qualifications of the interpreting physicians were not contained in the record. Thus, the administrative law judge found that the x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304(a). Decision and Order at 24.

We reject employer's argument that the administrative law judge relied solely on a head count of the x-ray interpretations, as the administrative law judge permissibly considered the readers' radiological qualifications and the quantitative and qualitative nature of the conflicting x-ray readings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). However, employer is correct that claimant designated Dr. Ahmed's interpretation of the September 17, 2007 x-ray as evidence in the survivor's claim "for rebuttal to the Department-sponsored chest x-ray only." Claimant's Evidence Summary form dated Sept. 20, 2010. Whether or not Dr. Ahmed's report was properly submitted by claimant as a rebuttal x-ray is a factual issue to be resolved by the administrative law judge, who must rule on the admissibility of Dr. Ahmed's

[6] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A "Board-certified radiologist" is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

interpretation of the 2007 x-ray for the purpose designated, or allow the re-designation of evidence in accordance with the evidentiary limitations at 20 C.F.R. §725.414. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(en banc); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983)(remand to fact-finder necessary where additional factual findings are needed, as Board does not have jurisdiction to make factual findings); *Clark v. Karst-Robbins Coal Co.* 12 BLR 1-149, 1-153 (1989)(en banc). Accordingly, we conclude that it is necessary to vacate the administrative law judge's findings at Section 718.304 and the award of benefits in the survivor's claim, and to remand this case for the administrative law judge to render further findings regarding the appropriate content of the evidentiary record. Furthermore, we note that Dr. Ahmed identified the November 12, 2008 x-ray, taken by Dr. Renn, as a digital x-ray. Survivor's Claim Claimant's Exhibit 2. The Board has held that because the quality standards for analog x-rays, set forth at Appendix A to Part 718, do not apply to digital x-rays, the admission of digital x-rays is properly considered under 20 C.F.R. §718.107, and the administrative law judge must determine on a case-by-case basis whether the party proffering the digital x-ray, or "other medical evidence," has established its medical acceptability. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006)(en banc)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007)(en banc). Digital x-rays are then weighed with the CT scans and medical opinions at Section 718.304(c). Thus, on remand, after determining the content of the evidentiary record, the administrative law judge must reassess and weigh the evidence in each category at Section 718.304(a), (c) to determine whether it is sufficient to establish complicated pneumoconiosis.

Lastly, we find merit in employer's contention that the administrative law judge failed to weigh all relevant evidence pursuant to subsections (a) and (c) together in determining whether a preponderance of the evidence establishes the existence of complicated pneumoconiosis at Section 718.304. The administrative law judge concluded that the x-ray evidence was the most probative and was entitled to determinative weight because the Fourth Circuit has recognized that "prong (a) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis. *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100; Decision and Order at 25. However, as the "objective scientific standard" relates to the size of an opacity observed on x-ray, the evidence under prong (c) is also relevant in determining whether the opacity represents complicated pneumoconiosis. Thus, on remand, the administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, explain how he resolved any conflicts, and make a finding of fact as to whether the record as a whole supports invocation of the irrebuttable presumption at Section 718.304. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Melnick*, 16 BLR at 1-33, 1-34.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim is affirmed in part and vacated in part, and the case is remanded for further consideration 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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BETTY JEAN HALL
Administrative Appeals Judge