BRB No. 12-0466 BLA

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| LASANDRA HAYNES, on behalf of JAMES R. HAYNES (Deceased Miner) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| J & N TRUCKING, INCORPORATED | ) | DATE ISSUED: 04/26/2013 |
| and | ) | |
| KENTUCKY EMPLOYERS MUTUAL INSURANCE | ) | |
| 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 on Modification of an Initial Claim and the Decision and Order Denying Reconsideration of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Modification of an Initial Claim and the Decision and Order Denying Reconsideration (2010-BLA-05153) of Administrative Law Judge Lystra A. Harris, rendered on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The relevant procedural history of this claim is as follows: The miner filed a claim for benefits on January 14, 2004, which was awarded by the district director on November, 1, 2004.[1] Director's Exhibit 54. Employer requested a hearing and while the case was pending before the Office of Administrative Law Judges (OALJ), the miner died on September 13, 2005. Director's Exhibits 55, 63. The miner's widow (claimant) filed a survivor's claim, which was awarded by the district director on August 29, 2006. Director's Exhibits 66, 68, 97. Both claims were consolidated for a hearing that was held before Administrative Law Judge Thomas F. Phalen, Jr., on June 13, 2007. Director's Exhibits 101, 110, 113. In a Decision and Order dated September 9, 2008, Judge Phalen accepted the parties' stipulation of twenty-three years of coal mine employment, but found that the evidence was insufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he suffered from complicated pneumoconiosis under 20 C.F.R. §718.304. Accordingly, benefits were denied in both claims.

On July 6, 2009, claimant filed a request for modification in the miner's claim. Claimant took no action with regard to the denial of her survivor's claim. In her Decision and Order Awarding Benefits on Modification, issued on May 14, 2012, Judge Harris (the administrative law judge) determined that the evidence on modification, considered in conjunction with the previously submitted evidence, established that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and, therefore demonstrated a mistake in a determination of fact under 20 C.F.R. §725.310. The administrative law judge awarded benefits as of January 2004, the month in which the miner's claim was filed. On May 23, 2012, employer filed a motion for reconsideration, arguing that the proper date for commencement of benefits in the miner's claim is the month in which claimant filed her request for modification. The administrative law judge issued a Decision and Order Denying Reconsideration on June 12, 2012.

On appeal, employer asserts that the administrative law judge erred in finding that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Specifically, employer asserts that the administrative law judge erred in re-designating its evidence and in weighing Dr. Caffrey's autopsy report at 20 C.F.R. §718.304(c), and not

[1] Based on the January 14, 2004 filing date, the amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, are not applicable to the miner's claim. 30 U.S.C. §921(c)(4), Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

at 20 C.F.R. §718.304(b). Employer argues that the administrative law judge erred in finding a mistake in a determination of fact under 20 C.F.R. §725.310 and in determining the date for commencement of benefits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965)

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated entitlement in the prior decision.[3] *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet-General*

[2] Because the record indicates that the miner's last coal mine employment was in Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 9, 14. Although the administrative law judge applied the law of the United States Court of Appeals for the Sixth Circuit, her findings in this case are consistent with relevant law in both circuits.

[3] In order to establish entitlement to benefits in the miner's claim, filed pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that it arose out of coal mine employment, that the miner was totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

*Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993)*; King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

**I. Procedural Challenge**

Initially, we address employer's assertion that the administrative law judge erred in re-designating Dr. Caffrey's opinion pursuant to 20 C.F.R. §725.414. In an Order dated January 27, 2012, the administrative law judge stated:

> As the parties are aware, a hearing was held in this matter in Pikeville, Kentucky on June 15, 2011. At the hearing, Employer's Exhibit 4 and Director's Exhibit 105 were entered into the record. Employer's Exhibit 4 is a report from Dr. Caffrey dated June 27, 2006 while Director's Exhibit 105 is a supplemental report from Dr. Caffrey dated November 22, 2006. On its May 25, 2011 evidence summary form, [e]mployer designated Dr. Caffrey's initial and supplemental report[s] as autopsy evidence. Dr. Caffrey reviewed multiple x-ray interpretations and numerous treatment records in addition to the autopsy slides. Thus, his opinion is properly classified as a physician's opinion . . . . However, [e]mployer has already reached its [three] allotted physicians' opinions with the reports of Drs. Dahhan, Broudy, and Vuskovich.
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> In light of the above, [e]mployer is hereby given [seven] days from the date of this Order to resubmit its evidentiary summary form containing an appropriate designation of physicians' opinions and autopsy evidence. Should [e]mployer fail to respond to this Order as directed herein, I will not consider Dr. Caffrey's opinion in this matter.

Order at 1-2.

On February 2, 2012, employer submitted a "final" evidence summary form, wherein it designated Dr. Caffrey's initial and supplemental reports as both a medical report and an autopsy report.[4] The administrative law judge rejected employer's

[4] Under the heading "Medical reports" employer listed Dr. Broudy's April 5, 2004 report, Dr. Caffrey's June 27, 2006 report (wherein he reviewed various medical reports, the death certificate, original autopsy report and twenty-six autopsy slides) and the November 11, 2006 supplemental report by Dr. Caffrey (wherein he reviewed additional medical treatment records). *See* Employer's Final Evidence Summary Form. Employer also listed a January 4, 2010 report by Dr. Vuskovich as a third medical report submitted on modification. *Id*. Dr. Dahhan's September 17, 2004 report was designated as rebuttal

designation and found that Dr. Caffrey's "initial report of June 27, 2006 and supplemental report of November 22, 2006 are more properly classified as a physician's opinion rather than an autopsy report." Decision and Order Awarding Benefits at 10. In weighing the autopsy evidence at 20 C.F.R. §718.304(b), the administrative law judge did not address Dr. Caffrey's slide review. *Id*. Rather, the administrative law judge weighed Dr. Caffrey's full opinion in her consideration of the "Other Evidence" at 20 C.F.R. §718.304(c). *Id*. at 12-13.

Employer correctly asserts in this appeal that Dr. Caffrey's opinion constitutes *both* an autopsy report and a medical report, because he performed an autopsy slide review and prepared a written opinion of the miner's pulmonary condition, based on his review of the medical record. *See Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229 (2007) (en banc). Although the administrative law judge cited *Keener* in support of her evidentiary determination, she erred in failing to specify whether or not it was possible to separate out the autopsy slide review portion of Dr. Caffrey's opinion for consideration under 20 C.F.R. §718.304(b). Decision and Order Awarding Benefits at 7 n.9.; *see Keener*, 23 BLR 1-240. However, because the administrative law judge ultimately weighed Dr. Dennis's autopsy findings against Dr. Caffrey's contrary autopsy findings at 20 C.F.R. §718.304(c), and gave full consideration to the totality of Dr. Caffrey's opinion in this case, employer has shown no prejudice and we consider the administrative law judge's error to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

**II. Complicated Pneumoconiosis**

In this case, the administrative law judge determined that claimant established a mistake in fact, based on her determination that the miner suffered from complicated pneumoconiosis. Section 411(c)(3) of the Act, 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 yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

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evidence. Under the heading "Autopsy evidence" employer again listed Dr. Caffrey's June 27, 2006 and November 11, 2006 reports. *Id*.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. 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, resolve any conflicts, and make a finding of fact. *See Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge noted that there was no positive x-ray evidence for complicated pneumoconiosis in the record before Judge Phalen, and further found that none of the x-ray readings submitted on modification was positive for complicated pneumoconiosis. Decision and Order Awarding Benefits at 10-11. Pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered the report of Dr. Dennis, the autopsy prosector, and found that his diagnosis of progressive massive fibrosis established that the miner had complicated pneumoconiosis.

Pursuant to 20 C.F.R. §718.304(c),[5] the administrative law judge weighed the opinions of Drs. Caffrey and Vuskovich, that the miner did not have complicated pneumoconiosis. *See* Decision and Order Awarding Benefits at 12; Director's Exhibit 83; Employer's Exhibit 1. The administrative law judge determined that Dr. Caffrey's opinion was not well-reasoned because Dr. Caffrey did not adequately explain the basis for his findings regarding to the miner's autopsy slides. Decision and Order Awarding Benefits at 12. The administrative law judge further rejected the opinions of Drs. Caffrey and Vuskovich, to the extent that they relied on the x-ray readings in the miner's treatment records to support their conclusions.[6] *Id*. at 13. The administrative law judge explained that she gave "no weight to x-ray interpretations" contained in the treatment records because "they were not generated using the International Labour Organization

[5] The administrative law judge incorporated, by reference, Judge Phalen's summary of a May 16, 2005 CT scan reading by Dr. Wheeler, a medical report by Dr. Broudy, and the miner's treatment records. Decision and Order Awarding Benefits at 12. The administrative law judge excluded Dr. Dahhan's opinion pursuant to 20 C.F.R. §725.414. *Id*. n.16.

[6] In reference to the treatment records, Dr. Caffrey observed that "any qualified radiologist would not miss a diagnosis of a lesion the size of complicated [coal worker's pneumoconiosis]." Director's Exhibit 83.

(ILO) classification system, as the applicable regulations require for a determination of pneumoconiosis." *Id*. (citations omitted).

Based on her consideration of the evidence as a whole, the administrative law judge stated, "I disagree with Judge Phalen and find that the autopsy evidence under [20 C.F.R. §]718.304(b), does establish the presence of complicated pneumoconiosis: the autopsy evidence outweighs the x-ray evidence and other evidence" under 20 C.F.R. §718.304(a) and (c). Decision and Order Awarding Benefits at 13. Thus, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and entitlement to benefits.

Employer asserts that the administrative law judge erred in giving less weight to Dr. Caffrey's opinion and in reaching a different conclusion from Judge Phalen as to whether the miner had complicated pneumoconiosis. Employer contends that by re-designating Dr. Caffrey's opinion, the administrative law judge was able to reject it without proper explanation. We disagree.

In his autopsy report, Dr. Dennis diagnosed "[p]ulmonary fibrosis, progressive massive type, secondary to anthracosilicosis with macule formation greater than [two centimeters]." Director's Exhibit 80; *see* Decision and Order Awarding Benefits at 11. The administrative law judge noted correctly that the term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis" and when there is a diagnosis of progressive massive fibrosis, it equates to a diagnosis of massive lesions, sufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(b). Decision and Order Awarding Benefits at 11; *see Perry v. Mynu Coals, Inc*., 469 F.3d 360, 365 n.4, 23 BLR 2-374, 2-385 n.4 (4th Cir. 2006); *Gray*, 176 F.3d at 387, 21 BLR at 2-624; *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1359, 20 BLR 2-227, 2-228 (4th Cir. 1996) (noting that complicated pneumoconiosis is known "by its more dauntingly descriptive name, 'progressive massive fibrosis.'"). The administrative law judge found that Dr. Dennis's opinion was entitled to significant weight. Decision and Order Awarding Benefits at 13. As employer does not allege error regarding that determination, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In contrast, the administrative law judge found that Dr. Caffrey "did not see the necessary findings on the autopsy slides to make a diagnosis of complicated pneumoconiosis, but he does not explain specifically what was absent from the autopsy slides to support his conclusion." Decision and Order Awarding Benefits at 13. Although Dr. Caffrey cited to "the guidelines as published July 1979 in the Archives of Pathology and Laboratory Medicine entitled 'Pathology Standards for Coal Workers' Pneumoconiosis,'" the administrative law judge found that "he does not describe those guidelines as outlined in that medical text." *Id*. Because the administrative law judge

rationally determined that the record is "insufficient to demonstrate that the guidelines upon which Dr. Caffrey relies to diagnose [complicated] pneumoconiosis are consistent with those set forth in the Act and its implementing regulations," we affirm her decision to give Dr. Caffrey's opinion less weight. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). We also affirm, as unchallenged, the administrative law judge's assignment of less weight to the opinions of Drs. Caffrey and Vuskovich, based on their reliance on certain negative x-rays for pneumoconiosis in the miner's treatment record, which the administrative law judge rejected. *See Skrack*, 6 BLR at 1-711; Decision and Order Awarding Benefits at 13.

Contrary to employer's contention in this appeal, the administrative law judge acted within her discretion in reviewing the evidence before Judge Phalen, in conjunction with the evidence submitted on modification, and in finding that the miner had complicated pneumoconiosis. *See O'Keeffe*, 404 U.S. at 256; *Jessee*, 5 F.3d at 723, 18 BLR at 2-26; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *King*, 246 F.3d at 822, 22 BLR at 2-305. Because the administrative law judge weighed all of the relevant evidence on the issue of the existence of complicated pneumoconiosis, and explained the basis for her credibility determinations, we affirm her finding that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. [7] *See Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gray*, 176 F.3d at 389, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-31. We further affirm the administrative law judge's finding that claimant established a basis for modification pursuant to 20 C.F.R. §725.310, and that she is entitled to benefits.

### III. Date for Commencement of Benefits

Employer argues that the administrative law judge erred in awarding benefits as of January 2004, the month in which the miner's claim was filed. We disagree. In a miner's claim, benefits are payable beginning with the month of onset of disability due to pneumoconiosis. 20 C.F.R. §725.503. Where the evidence does not establish the month of onset, benefits shall be payable beginning with the month during which the claim was filed, unless credited medical evidence establishes that the miner was not totally disabled at some point subsequent to the filing date of his claim. *See* 20 C.F.R. §725.503;

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

*Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Furthermore, if a claim is awarded pursuant to a request for modification based on a mistake in a determination of fact, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, or the month of onset of complicated pneumoconiosis. *See* 20 C.F.R. §725.503(d)(1); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989). However, if the evidence does not establish the month of onset, benefits are payable from the month in which the claim was filed. *See* 20 C.F.R. §725.503(b), (d)(1).

In this case, the administrative law judge awarded benefits based on her finding that claimant demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge specifically found that the record did not establish the onset date of the miner's complicated pneumoconiosis and, because employer does not allege error with that finding, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order Awarding Benefits at 14; Decision and Order Denying Reconsideration at 3. Therefore, contrary to employer's assertion, the administrative law judge correctly awarded benefits beginning the month in which the miner's claim was filed. *See Williams*, 13 BLR at 1-28. Therefore, we affirm her finding that benefits commence as of January 2004.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification of an Initial Claim and the Decision and Order Denying Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge