BRB No. 02-0803 BLA

HEARLD B. BEARFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/21/2003
	)	
PEABODY COAL COMPANY	)	
	)	
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 on Remand Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (99-BLA-0860) of Administrative Law Judge Pamela Lakes Wood 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).[1] This case, involving a claim

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations

filed on May 19, 1998, is before the Board for the second time.[2] In a Decision and Order dated February 6, 2001, the administrative law judge credited claimant with thirty-one years of coal mine employment based upon the agreement of the parties, and considered the claim under the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence of record did not establish the presence of a significant pulmonary impairment pursuant to 20 C.F.R. ' 718.204(c) (2000). The administrative law judge further found the evidence sufficient, however, to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. 718.304 (2000). Specifically, she found the x-ray evidence sufficient to establish the existence of complicated pneumoconiosis under Section 718.304(a) (2000), and the CT scan evidence sufficient to establish the disease under Section 718.304(c) (2000). Further finding the evidence, as a whole, sufficient to establish invocation of the irrebuttable presumption under Section 718.304(a)-(c), the administrative law judge awarded benefits. Employer appealed.

The Board affirmed the administrative law judge=s finding that the x-ray evidence established the existence of complicated pneumoconiosis under Section 718.304(a), but vacated the administrative law judge=s finding with regard to the CT

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became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed a previous claim on August 6, 1970. Director=s Exhibit 30. After a claim=s examiner denied the claim, claimant withdrew his claim by letter dated March 17, 1980. *Id*. On July 7, 1980, the district director notified claimant that the claim was deemed abandoned and administratively closed. *Id*. Claimant took no further action in pursuit of benefits until filing the instant claim on May 19, 1998. Director=s Exhibit 1.

scan evidence under Section 718.304(c). *Bearfield v. Peabody Coal Co.*, BRB No. 01-0502 BLA (Apr. 17, 2001)(unpublished). The Board instructed the administrative law judge to conduct an equivalency determination analysis pursuant to the decisions 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), and *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, --- BLR --- (4th Cir. 1999).[3] *Id.*

In her Decision and Order on Remand, dated July 24, 2002, the administrative law judge found that the CT scan evidence shows a condition that could reasonably be expected to yield one or more large opacities greater than one centimeter in diameter, had diagnosis been made by x-ray and that, therefore, claimant established the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304(c). The administrative law judge concluded that, on the basis of this finding and her previous finding that the x-ray evidence established the existence of complicated pneumoconiosis under Section 718.304(a), claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, and, consequently, entitled to benefits. On appeal, employer challenges the administrative law judge=s findings under Section 718.304(a), (c). Claimant responds in support of the administrative law judge=s decision awarding benefits. The Director, Office of Workers= Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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).

On appeal, employer again challenges the administrative law judge=s finding that the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a). The administrative law judge adopted her findings regarding the x-ray evidence from her previous, February 6, 2001 Decision and Order, findings which the Board affirmed, as discussed *supra*. Decision and Order on Remand at 2-3; Decision and Order at 11. Employer contends that, in her prior decision, the administrative law judge improperly resolved the

[3]Because claimant=s coal mine employment occurred in West Virginia, the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

conflict in the x-ray evidence based purely on a headcount of the physicians reading the films, without an adequate consideration of the qualifications of the physicians or an adequate explanation in support of her determination. Employer argues that the Board=s affirmance of the administrative law judge=s prior finding at Section 718.304(a) was clearly erroneous, and that, therefore, the law of the case doctrine does not prevent the Board from revisiting the issue.

Employer=s contention has merit. In the 2001 Decision and Order, the administrative law judge found the negative readings of two physicians, Drs. Wheeler and Scott, outweighed by the positive readings of five physicians, Drs. Patel, Ahmed, Aycoth, Pathak and Zaldivar. 2001 Decision and Order at 11. Upon further reflection, we vacate the administrative law judge=s finding in this regard. The record actually contains twenty-eight x-ray readings, twelve of which are positive for complicated pneumoconiosis and sixteen of which are negative for complicated pneumoconiosis. Director=s Exhibits 14, 15, 30; Claimant=s Exhibits 1-9, 13; Employer=s Exhibit 1. In her previous Decision and Order, the administrative law judge erred in failing to analyze the x-ray *interpretations* of record from a quantitative and qualitative standpoint. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Instead, the administrative law judge improperly calculated the number of physicians submitting positive and negative x-ray reports. Decision and Order at 11. Accordingly, we vacate the administrative law judge=s findings from her 2001 Decision and Order, which she adopted on remand, pertaining to the x-ray evidence relevant under Section 718.304(a). On remand, the administrative law judge must resolve the conflict posed by the x-ray interpretations of record, giving full consideration to the qualifications of the physicians submitting the readings.

Employer also argues that the administrative law judge, as she did when considering the x-ray evidence, improperly considered the CT scan interpretations by merely engaging in a headcount of physicians interpreting this evidence, without providing an adequate explanation for her conclusion that the CT scan evidence supports claimant=s burden at Section 718.304(c). Employer=s contention relates to the administrative law judge=s previous findings with respect to the CT scan evidence under Section 718.304(c), however, which she made in her 2001 Decision and Order. 2001 Decision and Order at 12. The Board vacated these findings, remanding the case for the administrative law judge to conduct an equivalency determination analysis. *Bearfield v. Peabody Coal Co.*, BRB No. 01-0502 BLA (Apr. 17, 2001)(unpublished), slip op. at 3-4. The administrative law judge=s equivalency determination analysis on remand cannot be affirmed and, therefore, the administrative law judge=s equivalency finding at Section 718.304(c) must be vacated.[4]

[4]Employer challenges the administrative law judge=s refusal to reopen the

record for employer to submit evidence relevant to the equivalency determination. Employer argues that the Fourth Circuit, in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), Aseems to place the onus on employer to proffer evidence that the findings under Section 718.304(b) and (c) are not the equivalent of one-centimeter-or-larger opacities.@ Employer=s Petition for Review and Brief at 15-16 n.3. Employer argues that this cannot be reconciled with the Fourth Circuit=s previous decision in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, --- BLR --- (4th Cir. 1999), and that, in light of the apparent change of law, employer should have been afforded an opportunity to develop and submit relevant proof necessary to properly analyze the evidence at Section 718.304(c). We disagree. The Fourth Circuit mandated in *Blankenship* that an equivalency determination be made, and nothing in the Fourth Circuit=s later decision in *Scarbro* alters that requirement. A hearing before the administrative law judge in this case was held on June 14, 2000, subsequent to the court=s 1999 decision in *Blankenship*. Therefore, employer had ample opportunity to submit evidence on the equivalency determination issue before the case was remanded to the administrative law judge.

The administrative law judge found that the size of opacities on the CT scans of record were generally the same as those found on the x-rays in light of Dr. Aycoth=s three x-ray reports and CT scan report. Decision and Order on Remand at 3. Specifically, the administrative law judge found that Dr. Aycoth=s CT scan report shows a condition which could reasonably be expected to yield one or more large opacities greater than one centimeter in diameter had diagnosis been made by x-ray because the CT scan report indicates the presence of two and three centimeter Airregular density effects compatible with progressive massive fibrosis,@ and the x-ray reports indicate the presence of two and three centimeter opacities. *Id*; Claimant=s Exhibit 11. However, the record reflects that Dr. Aycoth was silent as to whether the density effects he reported on the CT scan would have resulted in one or more opacities greater than one centimeter if viewed on x-ray. Claimant=s Exhibit 11. Thus, the administrative law judge impermissibly reached her own conclusion that the densities which Dr. Aycoth indicated were present on the CT scan could reasonably be expected to yield the same size opacities if viewed on x-ray. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-237 (2003); Decision and Order on Remand at 3. We vacate, therefore, the administrative law judge=s findings with regard to the CT scan evidence under Section 718.304(c). On remand, the administrative law judge must analyze the relevant CT scan evidence of record to determine whether this evidence establishes the requisite equivalency determination pursuant to *Scarbro* and *Blankenship*.

Employer further argues that the administrative law judge failed to consider the evidence of record indicating that claimant does not have any significant respiratory impairment. While claimant is not required to prove total disability to establish invocation of the irrebuttable presumption under Section 718.304, the record includes an opinion from Dr. Fino in which Dr. Fino specifically bases his opinion that claimant does not suffer from complicated pneumoconiosis, in part, on claimant=s lack of respiratory impairment. Employer=s Exhibit 2. On remand, the administrative law judge must consider this relevant evidence in determining whether claimant has established the existence of complicated pneumoconiosis under Section 718.304(c). *See Melnick v. Consolidated Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Accordingly, the administrative law judge=s Decision and Order on Remand Granting Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge