BRB No. 02-0810 BLA

MAE ANN SHARPE (Widow of WILLIAM A. SHARPE)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 08/22/2003
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr., Wilkes-Barre, Pennsylvania, for claimant.

Ashley M. Harman (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2001-BLA-00398 and 2001-BLA-00399) of Administrative Law Judge Robert D. Kaplan with respect to a miner=s claim and a survivor=s 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 relevant procedural history of this case is as follows: The miner filed an application for benefits on March 8, 1989. Director=s Exhibit 1. In a Decision and Order issued on August 26, 1993, Administrative Law Judge Julius A. Johnson determined that the x-ray evidence of record supported a finding that the miner was suffering from complicated pneumoconiosis.

Director=s Exhibit 56. Judge Johnson further found, therefore, that the miner was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. ' 718.304 and awarded benefits accordingly. *Id*. The Board affirmed the award of benefits in a Decision and Order dated September 28, 1994. *Sharpe v. Westmoreland Coal Co.*, BRB No. 93-2511 BLA (Sept. 28, 1994)(unpub.); Director=s Exhibit 65.

The miner died on April 18, 2000, while hospitalized for treatment of gastrointestinal bleeding, among other conditions. Claimant, the miner=s surviving spouse, filed an application for survivor=s benefits on April 26, 2000. Director=s Exhibit 66. Employer contested this claim and filed a timely request for modification of the award of benefits in the miner=s claim. Director=s Exhibit 73. In the Decision and Order that is the subject of the present appeal, Administrative Law Judge Robert D. Kaplan (the administrative law judge) found that the newly submitted evidence was insufficient to establish a mistake of fact in the award of benefits in the miner=s claim. The administrative law judge also found, based upon his determination that Judge Johnson properly found that the miner established the existence of complicated pneumoconiosis, that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. Accordingly, benefits were awarded in the survivor=s claim.

Employer argues on appeal that the administrative law judge did not apply the proper analysis when addressing its request for modification pursuant to 20 C.F.R. ' 725.310 (2000).[1] Employer also asserts that the administrative law judge erred in relying upon his consideration of the evidence under Section 725.310 (2000) to determine that entitlement was established in the survivor=s claim. Employer also maintains that the administrative law judge did not properly address either the computerized tomography (CT) scan evidence or the opinions of Drs. Castle, Wheeler, and Fino. Claimant has responded and urges affirmance of the denial of employer=s request for modification and the award of benefits in the survivor=s claim. The Director, Office of Workers= Compensation Programs, has not filed a brief 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 supported by substantial evidence, is rational,

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. ' 725.310, do not apply to claims filed before January 19, 2001. 20 C.F.R. ' 725.2.

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=s initial contention of error has merit. In assessing whether employer had established that there was a mistake in a determination of fact in the award of benefits in the miner=s claim, the administrative law judge was required to engage in a *de novo* consideration of the previously submitted evidence, in conjunction with the newly submitted evidence, to determine whether Judge Johnson erred in determining that the evidence supported a finding of complicated pneumoconiosis as described in Section 718.304(a).[2] *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990).

In the present case, the administrative law judge did not make independent findings of fact based upon his own weighing of the relevant evidence, both old and new. Rather, the administrative law judge accepted Judge Johnson=s findings of fact and assessed whether the evidence was sufficient to prove that Judge Johnson=s findings were in error. We vacate, therefore, the administrative law judge=s findings under Section 725.310 (2000) and remand the case to the administrative law judge for reconsideration of this issue. Because the administrative law judge relied upon his analysis of the evidence pursuant to Section 725.310 (2000) to determine that claimant established entitlement to benefits in the survivor=s claim, we also vacate this finding. If, on remand, the administrative law judge finds, based upon his own weighing of the relevant evidence, that the existence of complicated pneumoconiosis, as described in Section 718.304, has been established, then he may rely upon this determination to award benefits in the survivor=s claim. *See* 20 C.F.R. ' '718.205(c)(3), 718.304.

With respect to the administrative law judge=s consideration of the medical evidence, the administrative law judge first addressed the newly submitted x-ray interpretations and found that the readings by Drs. Scott, Fino, Wheeler, and Castle did not establish that Judge Johnson erred in finding that the existence of complicated pneumoconiosis was proven under Section 718.304(a). Employer argues that the administrative law judge did not give an adequate or valid rationale for discrediting the x-ray interpretations in which Dr. Scott indicated that the miner did not have complicated pneumoconiosis. This contention is without merit, as the administrative law judge acted within his discretion in according little

[2] The administrative law judge indicated correctly that employer=s request for modification was not premised upon an allegation of a change in the miner=s condition subsequent to the award of benefits in the miner=s claim. Decision and Order at 5; Director=s Exhibit 73.

weight to Dr. Scott=s readings because the physician expressed them in equivocal terms.[3] *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

Regarding Dr. Fino=s opinion, that the miner did not have complicated pneumoconiosis, the administrative law judge determined that it was entitled to little weight under Section 718.304(a) and (c), because Dr. Fino did not detect the presence of a large lesion in the miner=s lungs on x-ray and, contrary to the regulations, the doctor indicated that emphysema must be visible around a lesion to support a diagnosis of complicated pneumoconiosis and that the large opacity must appear in a particular location. Employer asserts that the administrative law judge erred in discrediting Dr. Fino=s opinion Awith little or no explanation.@ Employer=s Brief at 26. Because the administrative law judge provided an explanation for his weighing of Dr. Fino=s opinion and employer has not identified any specific error in the administrative law judge=s findings, we affirm the administrative law judge=s weighing of Dr. Fino=s opinion. 20 C.F.R. ''802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

With respect to Dr. Wheeler=s x-ray readings, employer maintains that the administrative law judge erred in discrediting them based upon Dr. Wheeler=s statement that the mass/large opacity that appeared on the miner=s x-rays did not represent complicated pneumoconiosis, because it was not located in the Astrike zone@ in which lesions of complicated pneumoconiosis typically appear. Employer=s Exhibit 6 at 29. The administrative law judge determined that because the regulations do not require that the large opacities manifest in a particular portion of the lungs, Dr. Wheeler=s opinion was entitled to little weight. Decision and Order at 7-8. Employer=s allegation of error has merit. The administrative law judge=s interpretation of the regulation did not address Dr. Wheeler=s use of the ILO form to record his x-ray readings and the requirements of the ILO form, on which the presence of complicated pneumoconiosis is not determined solely by the size of the irregularity, as suggested by the administrative law judge.

Section 718.304 provides that invocation of the irrebuttable presumption is established if the Aminer is suffering from a chronic dust disease of the lung@ which, when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B or C. 20 C.F.R. '718.304(a); *Eastern Associated Coal Corp v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *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*). The ILO

[3] Dr. Scott opined that the markings viewed on the miner=s x-rays indicated Ascarring at apices probably due to TB,@ Aprobably healed TB,@ and were Aconsistent with@ healed tuberculosis or histoplasmosis. Director=s Exhibits 30, 41; Employer=s Exhibit 3.

classification form requires that the physician interpreting the x-ray film first determine whether there are A[a]ny [p]arenchymal [a]bnormalities [c]onsistent with [p]neumoconiosis.@ If the physician answers in the affirmative, then he/she proceeds to the sections regarding the size of the opacities, *i.e.*, small opacities or large opacities of size A, B, or C. *See* Form CM-933, questions 2A, 2B and 2C. However, if the physician answers the question in the negative, then he/she is to skip the section regarding the size of the opacities. *See* Form CM-933, question 2A.

Because Dr. Wheeler complied with the procedure set forth in the regulations, the administrative law judge=s finding that his readings are not credible because Dr. Wheeler diagnosed a large opacity but declined to treat it as indicative of complicated pneumoconiosis is not rational as the administrative law judge did not take into consideration that Dr. Wheeler checked the "NO" box to Question 2A, thus opining that there were no parenchymal abnormalities consistent with pneumoconiosis. *See* Director=s Exhibits 30, 39, 42; Employer=s Exhibit 3; 20 C.F.R. '718.304(a); *Lester*, 993 F.2d 1143, 17 BLR 2-114; *Melnick*, 16 BLR 1-31. Consequently, we vacate 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) and remand the case for the administrative law judge to reconsider the relevant evidence.

In particular, the administrative law judge must determine whether the weight of the x-ray evidence, considered as a whole, establishes the existence of complicated pneumoconiosis. 20 C.F.R. '718.304; *Lester*, 993 F.2d at 1145; 17 BLR at 2-117; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Scarbro*, 220 F.3d 250, 22 BLR 2-93. Moreover, on remand, if two or more x-ray interpretations are in conflict, the administrative law judge must take into consideration the professional qualifications of the physicians who provided the x-ray interpretations in determining the relative weight to accord the evidence. 20 C.F.R. '718.202(a)(1); s*ee also 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).

With respect to Dr. Castle=s opinion, based on the physician=s review of the x-ray evidence, medical history, and objective test results, in addition to Dr. Imperiale=s CT scan readings, the administrative law judge considered it pursuant to Section 718.304(a) and (c) and found that it was entitled to little weight because Dr. Castle=s determination that there was no large lesion present conflicted with Dr. Wheeler=s finding. Decision and Order at 8. Employer argues that the administrative law judge=s analysis is not rational, as he discredited Dr. Wheeler=s reports. Employer also maintains that the administrative law judge did not address the fact that Dr. Castle acknowledged in his deposition that some physicians read the x-rays as containing a large opacity representing complicated

pneumoconiosis, but explained why the objective data, particularly the CT scan readings and the diffusing capacity tests, did not support a diagnosis of complicated pneumoconiosis.

These contentions have merit. The administrative law judge did not explain why he relied upon Dr. Wheeler=s diagnosis of a large lesion on x-ray to discredit Dr. Castle=s opinion nor did he explicitly address the deposition testimony which employer has identified. We vacate, therefore, the administrative law judge=s findings with respect to Dr. Castle=s opinion in this regard. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The administrative law judge must reconsider this opinion on remand.

Finally, employer argues that the administrative law judge did not properly weigh the CT scan evidence of record under Section 718.304(c). The record reflects that the miner had a CT scan of his chest in September of 1990 and a repeat scan in October of the same year. Dr. Imperiale is the only physician who interpreted the scans, as the films were destroyed for reasons unknown. In his report regarding the September 1990 scan, Dr. Imperiale stated that: A[I]n the right upper lobe there is a somewhat larger density which is nonspecific. This is probably all on the basis of old granulomatous disease, but I would recommend a repeat CT of the chest in 2 months.@ Director=s Exhibit 79. With respect to the October 1990 scan, Dr. Imperiale stated that Athe density as seen in the ct [scan] I believe represents all the old granulomatous disease on the right side.@ *Id.*

The administrative law judge found that the CT scan readings Asupport the finding that there [was] a disease process in [the miner=s] lungs@ and Ado not affirmatively disprove the previous diagnoses of complicated pneumoconiosis.@ Decision and Order at 10. Employer contends that the administrative law judge did not determine whether the CT scans proved or disproved the existence of complicated pneumoconiosis pursuant to Section 718.304(c) and did not fully consider the testimony of Drs. Wheeler and Castle. These contentions have merit.

In assessing the opinions in which physicians discussed the significance of the CT scans, the administrative law judge appeared to consider whether the opinions, particularly that of Dr. Imperiale, were sufficient to overcome Judge Johnson=s finding that the x-ray evidence of record established that the miner had complicated pneumoconiosis. In addition, as employer contends, the administrative law judge did not explicitly address the deposition testimony in which Drs. Wheeler and Castle explained how the observations reported by Dr. Imperiale confirmed their diagnoses of granulomatous disease, rather than complicated pneumoconiosis. Employer=s Exhibit 5 at 23-27; Employer=s Exhibit 6 at 30-36. We must, therefore, vacate the administrative law judge=s findings with respect to the CT scan evidence. *Clark*, 12 BLR 1-149; *Tackett*, 12 BLR 1-11. On remand, the administrative law judge must reconsider this evidence, along with the other evidence relevant to the issue of

complicated pneumoconiosis, in determining whether the irrebuttable presumption of total disability and death due to pneumoconiosis set forth in Section 718.304 is invoked. S*carbro*, 220 F.3d 250, 22 BLR 2-93.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part and vacated in part and the case is 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

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge