BRB No. 05-0122 BLA

KEITH RAY DARAGO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 08/22/2005
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Dorothea J. Clark and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Awarding Benefits (03-BLA-6406) of Administrative Law Judge Linda S. Chapman 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge initially credited the parties' stipulation that claimant[1] worked in qualifying coal mine employment for twenty-two years. Next, the administrative law judge found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, based on a finding that claimant suffers from complicated pneumoconiosis. Pursuant to Section 718.304(a), the administrative law judge noted that there were eight readings of four chest x-ray films and she found that Dr. Patel's interpretation of the May 14, 2001 film and Dr. Ahmed's interpretation of the October 23, 2003 film revealed evidence of category B opacities, which "clearly [satisfied] the requirements of prong (A)," and therefore, constituted evidence sufficient to trigger invocation of the irrebuttable presumption. Decision and Order at 10. The administrative law judge accorded less weight to the x-ray readings of Drs. Wheeler and Scott, who each found evidence of large masses, but opined that the masses were not complicated pneumoconiosis but were "probably due to tuberculosis or granulomatous disease," because these physicians' conclusions were unsubstantiated, unexplained, and uncorroborated. Decision and Order at 11.

Pursuant to Section 718.304(c),[2] the administrative law judge discounted the negative readings of the computerized tomography (CT) scans because the physicians who reported that the scans were negative for complicated pneumoconiosis identified large masses but provided equivocal or speculative conclusions concerning the etiology of the abnormalities. The administrative law judge then determined that the remaining evidence, consisting of the medical opinions of Drs. Rosenberg and Hippensteel, diagnosing the absence of complicated pneumoconiosis, were entitled to little weight because these physicians "relied heavily" on the absence of any respiratory or pulmonary impairment exhibited by claimant in rendering their opinions, thereby focusing on the medical condition of complicated pneumoconiosis, not the statutory criteria for creating the irrebuttable presumption. Consequently, the administrative law judge found that the x-ray and CT scan interpretations relied on by employer constituted "conjecture and guesswork" with respect to identifying a specific, definitive etiology for claimant's large masses and as such, failed to demonstrate affirmative evidence that the large masses illustrated on claimant's x-rays were "not there or [were] not what they seem to be." Decision and Order at 12. Hence, the administrative law judge concluded that the x-ray readings of Drs. Ahmed and Patel showing category B large opacities did not "lose force" and, therefore, were sufficient to establish invocation of the

[1] Claimant, Keith Ray Darago, filed his application for benefits on February 26, 2001. Director's Exhibit 1.

[2] Because there is no biopsy evidence of record, invocation of the irrebuttable presumption cannot be established under 20 C.F.R. §718.304(b). 20 C.F.R. §718.304(b).

irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, citing *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Accordingly, benefits were awarded.

On appeal, employer cites *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993), in support of its contention that the administrative law judge erred in applying an improper legal standard to find that two x-rays showing category B opacities were sufficient to establish the existence of complicated pneumoconiosis without weighing all the relevant evidence together to determine if claimant had established his burden of showing the existence of complicated pneumoconiosis and without considering whether the evidence established a chronic dust disease of the lung, *i.e.*, whether the large opacities seen on x-ray were due to coal mine employment. Employer further asserts that the administrative law judge erred in rejecting the medical opinions of Drs. Rosenberg and Hippensteel, who opined that claimant did not have complicated pneumoconiosis because he did not have a respiratory or pulmonary impairment, since such opinions are relevant to determining whether large opacities seen on x-ray are due to coal mine dust exposure. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response letter in this appeal. The Director agrees with employer that the administrative law judge erred in failing to properly weigh the positive and negative chest x-rays against each other to determine whether the x-ray evidence affirmatively established complicated pneumoconiosis and that he erred in rejecting the opinions of physicians who based their findings of no complicated pneumoconiosis on an absence of respiratory impairment. Further, while the Director agrees with employer to the extent it asserts that claimant must prove that any large opacity seen on x-ray must be the result of complicated pneumoconiosis and not another disease process, the Director does not agree that once claimant has established the existence of complicated pneumoconiosis, he must also establish that the pneumoconiosis arose out of coal mine employment. Rather, the Director contends that when, as here, claimant has over ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b).[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a);

[3] We agree with the Director. In this case, the administrative law judge found that, should claimant establish the existence of complicated pneumoconiosis, claimant would be entitled to the presumption that his pneumoconiosis arose out of coal mine employment based on his twenty-two years of coal mine employment. 20 C.F.R. §718.203(b); Decision and Order at 3.

O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc., 380 U.S. 359 (1965).

Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, provides 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(a)-(c). While Sections 718.304(a), (b), and (c) set forth three different methods by which a claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must in every case review all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). Furthermore, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has specifically held that evidence under one prong of Section 718.304 can diminish the probative value of evidence under another prong if the two forms conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, *citing Lester*, 993 F.2d at 1145, 17 BLR at 2-117.

Employer first asserts that the administrative law judge erred in finding invocation of the irrebuttable presumption established under Section 718.304(a) based on two x-ray interpretations indicating the presence of large opacities. Specifically, employer contends that the administrative law judge failed to weigh and analyze together the seven conflicting x-ray interpretations of record, consisting of five negative readings and two positive readings. Employer also argues that, in finding that the two x-ray readings classified for the presence of large opacities were sufficient to trigger invocation of the irrebuttable presumption, the administrative law judge effectively presumed that these two x-rays readings were correct, and in so doing, impermissibly shifted the burden to employer to disprove the existence of complicated pneumoconiosis. The Director agrees, contending that to the extent that the administrative law judge's analysis "artificially elevated the weight of claimant's positive x-ray evidence, we believe she incorrectly interpreted *Scarbro*," and consequently, the administrative law judge should have weighed the positive and negative x-ray readings against each other to determine whether the x-ray evidence established complicated pneumoconiosis. Director's Response Letter at 2. The parties' arguments have merit.

Relying on pertinent language in *Scarbro* concerning the evaluation of x-ray evidence, the administrative law judge determined that, because the x-ray interpretations of Drs. Patel

and Ahmed finding category B opacities on two different x-ray films constituted evidence of complicated pneumoconiosis sufficient "to trigger the irrebuttable presumption" under Section 718.304(a), these readings could "lose force only if the other evidence *affirmatively* show[ed] that the opacities [were] not there or [were] not what they seem to be." Decision and Order at 11 [emphasis in original], *citing Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.[4] The administrative law judge discounted the x-ray readings of Drs. Wheeler and Scott, dually qualified radiologists like Drs. Ahmed and Patel, who found evidence of simple pneumoconiosis and opined that the large abnormalities seen were "probably" due to tuberculosis or granulomatous disease, as their opinions were unsubstantiated, unexplained, and uncorroborated, not only because the record contained no evidence that claimant was "ever treated for, hospitalized for, complained of, or displayed symptoms of tuberculosis," but also because claimant's October 24, 2003 tuberculosis test specifically yielded negative results. Decision and Order at 11; Claimant's Exhibit 3. Consequently, the administrative law judge concluded that the x-ray readings of Drs. Wheeler and Scott failed to "*affirmatively* show that the opacities are not there or are not what they seem to be" and hence, the x-ray readings of Drs. Ahmed and Patel "did not lose force." Decision and Order at 11.

This interpretation of *Scarbro*, however, appears to impose a requirement on employer's medical experts to *affirmatively* show that the opacities identified by Drs. Ahmed and Patel were not there or were not what they seemed to be, effectively requiring employer's experts to ascertain a definitive etiology for the large masses evident on x-ray notwithstanding their explicit opinions that the masses seen on claimant's x-rays were not consistent with complicated pneumoconiosis. In effect, therefore, the administrative law judge required employer to disprove the existence of complicated pneumoconiosis once claimant submitted an x-ray reading indicative of large opacities pursuant to Section 718.304(a). The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically qualify a claimant for the irrebuttable presumption set forth in Section 718.304, particularly when conflicting evidence is presented that rebuts the x-ray reading. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Lester*, 993 F.2d at 1145-1146, 17 BLR at 2-117-118; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987) (claimant retains burden of proving presence of complicated pneumoconiosis by preponderance of evidence). Accordingly, we vacate the administrative law judge's finding at Section 718.304 and we remand the case for the administrative law judge to conduct a qualitative and quantitative analysis of the x-ray evidence to determine whether it is sufficient to establish the existence of complicated pneumoconiosis, and to also

[4] The administrative law judge correctly noted that, while Dr. Cappiello found evidence of complicated pneumoconiosis on the June 11, 2003 chest x-ray, Dr. Cappiello did not provide an ILO classification for the pneumoconiosis findings or an indication whether he found Category A, B, or C opacities. Decision and Order at 10 n.6; Claimant's Exhibit 3.

weigh all other relevant evidence in determining whether claimant has established the existence of complicated pneumoconiosis. 30 U.S.C. §923(b); *Mullins*, 484 U.S. at 135, 11 BLR at 2-1; *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Melnick*, 16 BLR at 1-33; *Trent*, 11 BLR at 1-26.

Employer next argues that the administrative law judge erred in summarily dismissing the medical opinions of Drs. Rosenberg and Hippensteel because it is incumbent upon an administrative law judge to weigh all relevant evidence pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), 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). Specifically, employer contends that, as Drs. Rosenberg and Hippensteel found no evidence of any significant pulmonary impairment based upon their review of claimant's diagnostic studies, the administrative law judge's discrediting of their opinions, that complicated pneumoconiosis is absent, amounts to an impermissible substitution of her judgment for those of the medical experts. The Director agrees, stating that while claimant does not have to prove the existence of a pulmonary impairment in order to be entitled to the 718.304 presumption, evidence which shows the presence or absence of such an impairment is a factor a physician may consider in determining whether an x-ray opacity represents complicated pneumoconiosis or some other disease.

The administrative law judge found that Drs. Rosenberg and Hippensteel's reliance on the fact that claimant's pulmonary function studies and arterial blood gas studies failed to demonstrate any functional impairment to find that claimant did not suffer from complicated pneumoconiosis diminished the probative value of their opinions since evidence of respiratory impairment is unnecessary to diagnose complicated pneumoconiosis. Thus, the administrative law judge concluded that Drs. Rosenberg and Hippensteel's reliance on objective studies demonstrating the presence of pulmonary impairment to show the existence of complicated pneumoconiosis belied the statutory criteria necessary to invoke the irrebuttable presumption, which does not require a showing of a respiratory impairment. Decision and Order at 12.

We agree with employer and the Director that the opinions of Drs. Rosenberg and Hippensteel that claimant did not have a respiratory impairment were relevant to determining whether the abnormalities seen on claimant's x-ray were complicated pneumoconiosis. *See Mullins*, 484 U.S. 135, 148 (evidence regarding impairment may shed light on interpretation of x-ray evidence); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) (while complicated pneumoconiosis may be present without impairment, the disease "usually produces significant pulmonary impairment"). Thus, because we are remanding this case for the administrative law judge to weigh together all the relevant evidence in determining whether claimant has established the existence of complicated pneumoconiosis, she must also reconsider the opinions of Drs. Rosenberg and Hippensteel insofar as they are relevant to

determining whether claimant has met his burden of showing the existence of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick*, 16 BLR at 1-31.

Consequently, the administrative law judge must evaluate the evidence under each prong of Section 718.304 on remand to determine whether the existence of complicated pneumoconiosis is shown under that subsection, and then, must weigh together all the relevant evidence to determine whether the existence of complicated pneumoconiosis is established.[5] If, on remand, the administrative law judge finds that claimant establishes entitlement to benefits, then the administrative law judge must determine the date from which benefits commence. *See* 20 C.F.R. §725.503.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is vacated 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

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[5] Claimant has conceded that he cannot establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Claimant's [Post-Hearing] Brief at 4; *see* Decision and Order at 3.