BRB No. 10-0689 BLA

LANDON B. LUSK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/05/2011
	)	
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 of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-05484) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) on a claim filed on July 12, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119

(2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act).[1] Administrative Law Judge Alice M. Craft originally awarded benefits in this case on August 11, 2004, finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that the pneumoconiosis was totally disabling at 20 C.F.R. §718.204(b), (c). Director's Exhibit 37. Pursuant to employer's appeal, the Board reversed the award of benefits on September 19, 2006, holding that the evidence of record was insufficient to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement.[2] Director's Exhibit 52. On May 16, 2007, claimant filed a request for modification, with new medical evidence in support of his request. Considering claimant's request for modification, the administrative law judge found that total disability was established at 20 C.F.R. §718.204(b), based on the new evidence submitted. The administrative law judge, therefore, found a change in conditions established pursuant to 20 C.F.R. §725.310. The administrative law judge accepted the parties' stipulation of more than thirty-three years of coal mine employment. Considering all of the evidence of record, the administrative law judge also found that claimant established the existence of complicated pneumoconiosis and that it arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a); 718.203(b); and 718.304. Additionally, the administrative law judge found that claimant established that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded. The administrative law judge further found that the commencement date for benefits was July 2001, the date the claim was filed.

On appeal, employer contends that the administrative law judge erred in finding that the medical evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304; erred in finding, alternatively, that the evidence establish disability causation at Section 718.204(c); and erred in awarding benefits from the date the claim was filed. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.[3]

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[1] Because this case was filed before January 1, 2005, the 2010 amendments to the Black Lung Benefits Act do not apply.

[2] The Board did not address the administrative law judge's finding that the other elements of entitlement were established pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(c). Director's Exhibit 52.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, a change in conditions on that basis pursuant to 20 C.F.R. §725.310. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, 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. The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically entitle claimant to the irrebuttable presumption found at Section 718.304. Rather, claimant is only entitled to invocation of the Section 718.304 presumption "because he has a 'chronic dust disease of the lung,' commonly known as complicated pneumoconiosis." *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993). To make such a determination, the administrative law judge must consider all of the evidence relevant to the issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis. The administrative law judge must weigh this evidence, resolve any conflict in the evidence, and make pertinent findings of fact thereon. 20 C.F.R. §718.304; *see 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 (1991) (*en banc*).

[4] The record indicates that this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibits 2, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Complicated Pneumoconiosis

In determining that complicated pneumoconiosis was established, the administrative law judge found:

> All of the physicians whose opinions are of record have concluded that the Claimant has masses in his upper lungs bilaterally, and these physicians have also concluded that these masses, on X-ray, equal or exceed the dimensions required for a determination of complicated pneumoconiosis under §718.304. Where the physicians differ is in their conclusions regarding what these masses are: to Dr. Gaziano and Dr. Rasmussen, they are pneumoconiotic, but to Dr. Crisalli, Dr. Rosenberg, and Dr. Wheeler, they are not. I find, therefore, that if the masses are determined to be pneumoconiosis, the presumption of total disability under §718.304 is also established, because the evidence unequivocally establishes the masses are of the requisite size. *See generally Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250 (4th Cir. 2000). Consequently, I must weigh the medical opinions to determine whether the Claimant has established that the masses are pneumoconiotic. *See Lester v. Director, OWCP*, 993 F.2d 1143 (4th Cir. 1993).

Decision and Order at 30.

In evaluating the physicians' opinions as to the cause of the large masses seen on x-ray,[5] the administrative law judge credited the opinion of Dr. Gaziano, over the contrary opinions of Drs. Rosenberg, Crisalli and Wheeler, because she found Dr. Gaziano's opinion to be better reasoned. Specifically, she noted that Dr. Gaziano's opinion was more credible because his finding, that the "rhomboidal lesion" seen on claimant's x-ray was "classic for complicated pneumoconiosis and is never seen with other disease," was unrebutted by the other physicians' opinions. Decision and Order at 32. Further, the administrative law judge found that Dr. Gaziano's opinion, that claimant's diagnosed "pulmonary hypertension [was] caused by lung disease and is consistent with a finding of advanced coal worker's pneumoconiosis," was based on his review of Dr. Karam's treatment notes. Decision and Order at 32. In addition, the

[5] The administrative law judge found: that Dr. Ahmed identified size "B" opacities on the December 5, 2001 x-ray; that Dr. Alexander identified size "C" opacities on the January 6, 2004 and the March 1, 2007 x-rays; that Dr. Wheeler identified greater than 1.5 cm masses on the March 2007 x-ray; and that Dr. Gaziano identified size "C" opacities on the June 2007 x-ray. *See* Claimant's Exhibits 2, 3, 6, 7, and 12; Employer's Exhibits 1-3.

administrative law judge found that Dr. Gaziano's opinion was persuasive, based on his qualifications as a Board-certified pulmonary specialist. Decision and Order at 32.

The administrative law judge gave less weight to the contrary opinion of Dr. Rosenberg, that the masses seen on x-ray were not those of complicated pneumoconiosis because, although Dr. Rosenberg reviewed Dr. Gaziano's opinion, he did not address Dr. Gaziano's findings. Specifically, the administrative law judge stated that Dr. Rosenberg's opinion was less credible because, she "would expect a Board-certified pulmonary specialist to assess the opinion of another specialist and, based on the medical evidence of record, address that specialist's conclusions." Decision and Order at 33.

Regarding Dr. Wheeler's opinion, that the masses seen on x-ray were not those of complicated pneumoconiosis, the administrative law judge found the opinion less credible because Dr. Wheeler relied on his finding that there was "no background of symmetrical small background nodules which merge to form large opacities," Decision and Order at 33; Employer's Exhibit 13. Dr. Wheeler concluded, therefore, that the "large lung masses [seen] were calcified granulomas that most likely indicated 'conglomerate histoplasmosis.'" Decision and Order at 33; Employer's Exhibit 13. The administrative law judge noted, however, that Dr. Wheeler's observation about the absence of small opacities on x-ray was contradicted by the readings of Drs. Alexander and Ahmed, dually-qualified B readers and Board-certified radiologists, who identified background opacities. Decision and Order at 34. The administrative law judge also accorded less weight to Dr. Wheeler's opinion, that the masses seen were "calcified granulomas" and "most likely due to histoplasmosis," because it was speculative. Decision and Order at 34. The administrative law judge noted that there was no evidence in the record that claimant had histoplasmosis. Finally, the administrative law judge accorded less weight to Dr. Wheeler's opinion because it was based, in part, on evidence that was not in the record.

Concerning the opinion of Dr. Rasmussen, who found that claimant had complicated pneumoconiosis, and the opinion of Dr. Crisalli, who found that he did not, the administrative law judge accorded their opinions little weight because they were each "based on medical evidence and opinions that presented only one side of the picture." Decision and Order at 3-5. The administrative law judge concluded, therefore, that the opinion of Dr. Gaziano, finding that the large masses seen on claimant's x-ray were masses that represented a "chronic dust disease of the lung" established, along with the x-ray evidence, that claimant had complicated pneumoconiosis at Section 718.304.

At the outset, we reject employer's argument that the administrative law judge erred in according less weight to Dr. Wheeler's opinion, that the large masses seen on claimant's x-rays were not those of complicated pneumoconiosis. Contrary to employer's argument, the administrative law judge properly found that Dr. Wheeler's

opinion was "antithetical to the regulatory policy that states that pneumoconiosis can progress after exposure ceases." Decision and Order at 35. Dr. Wheeler opined that the masses seen on claimant's x-ray were not pneumoconiosis, because, in his experience, "when exposure stops, the disease stops progressing." Decision and Order at 24. The administrative law judge, therefore, permissibly accorded less weight to Dr. Wheeler's opinion, that the masses seen on claimant's x-ray were not those of complicated pneumoconiosis. *See* 20 C.F.R. §718.201(c); *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005). Because the administrative law judge gave a valid reason for discrediting the opinion of Dr. Wheeler, her finding rejecting the opinion of Dr. Wheeler is affirmed. *See Kozele v. Rochester v. Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Gaziano regarding the existence of complicated pneumoconiosis, over the contrary opinion of Dr. Rosenberg. In particular, employer contends that the administrative law judge erred in according less weight to Dr. Rosenberg's opinion because he did not address Dr. Gaziano's specific finding that the large masses on claimant's x-ray were a "rhomboidal lesion," which was "classic for complicated pneumoconiosis and is never seen with other diseases." Decision and Order at 32. As employer contends, however, while rejecting Dr. Rosenberg's opinion for not addressing Dr. Gaziano's findings, the administrative law judge did not address the fact that Dr. Gaziano did not consider the opinions of other physicians in making his determinations. Specifically, employer contends that the administrative law judge accepted Dr. Gaziano's opinion that the large masses seen on claimant's x-ray were a rhomboid lesion characteristic of complicated pneumoconiosis, without addressing the fact that Dr. Gaziano was the only physician to identify the mass in that way. Thus, we agree that the administrative law judge selectively analyzed the opinion of Dr. Gaziano in this case. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Employer additionally contends that the administrative law judge evaluated the evidence inconsistently, when he stated that "it [was] important to consider the quantum … of the evidence that each physician reviewed," Decision and Order at 31, but then credited Dr. Gaziano's opinion, over Dr. Rosenberg's, even though he noted that Dr. Gaziano had reviewed less evidence than had Dr. Rosenberg. *See Hess*, 7 BLR at 1-297.

Moreover, we note, as employer contends, that the administrative law judge impermissibly found Dr. Gaziano's opinion "persuasive" based on his professional qualifications, Decision and Order at 32, without considering the impact of Dr. Rosenberg's similar qualifications on his opinion.[6] *See Hess*, 7 BLR at 1-297.

[6] The administrative law judge noted that Dr. Gaziano is Board-certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine, Claimant's Exhibit 6,

Consequently, we must vacate the administrative law judge's finding of complicated pneumoconiosis at Section 718.304, based on the opinion of Dr. Gaziano, and remand the case for further evaluation of the medical opinion evidence.

Section 718.204(c)

As an alternative ground to finding claimant entitled to invocation of the presumption of totally disabling pneumoconiosis at Section 718.304, the administrative law judge found that the evidence established that claimant's total respiratory disability is due to pneumoconiosis at Section 718.204(c). The administrative law judge found that all of the physicians agreed that claimant has a disabling respiratory impairment, but that Drs. Gaziano and Rasmussen linked it to pneumoconiosis, while Dr. Rosenberg linked it to claimant's conglomerate histoplasmosis. The administrative law judge rejected the opinion of Dr. Crisalli, that claimant's totally disabling respiratory impairment was due to bullous emphysema and asthma, because Dr. Crisalli did not find the existence of pneumoconiosis and did not consider evidence that documented the existence of claimant's pulmonary hypertension.

The administrative law judge found that, in making their findings, the doctors relied, in part, on their findings regarding the cause of the masses seen on claimant's x-rays. As employer contends, because we remand this case for further consideration at Section 718.304, we must also remand the case for further consideration at Section 718.204(c), if reached, as the administrative law judge's Section 718.304 findings affected his Section 718.204(c) findings.

Commencement Date of Benefits

Finally, employer contends that the administrative law judge erred in finding that benefits commence the date the claim was filed, since the administrative law judge granted modification in this case based on the evidence submitted with claimant's 2007 request for modification, showing that a change in conditions was established. In support of its argument, employer points out that Judge Craft found that the x-ray evidence, including the December 2001 x-ray the administrative law judge now finds to be the first evidence of complicated pneumoconiosis, failed to establish the existence of complicated pneumoconiosis, a finding affirmed by the Board. *See* Director's Exhibit 52.

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while Dr. Rosenberg is Board-certified in Internal Medicine, Pulmonary Disease, and Occupational Health. Decision and Order at 9 and 11. In addition, the administrative law judge noted that both physicians are B readers. Decision and Order at 9 and 11.

Because the administrative law judge granted modification based on a finding of a change in conditions, not a mistake in a determination of fact, she erred in finding that the commencement date of benefits was the date claimant filed his claim. *See Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991). We, therefore, vacate the administrative law judge's finding that the date of commencement of benefits was the date the claim was filed, and remand the case for the administrative law judge to reconsider the date from which benefits commence.[7] *See Eifler*, 926 F.2d at 666, 15 BLR at 2-4.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, 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

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7] If, on remand, the administrative law judge finds that the evidence establishes the existence of complicated pneumoconiosis, claimant would be entitled to benefits from the month in which complicated pneumoconiosis was first diagnosed. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989).