BRB No. 11-0731 BLA

EARVIN R. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIZWIL, INCORPORATED	)	DATE ISSUED: 08/23/2012
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

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 – Award of Benefits (2008-BLA-5896) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a subsequent miner's claim filed 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] This case involves a second request for modification of the denial of claimant's subsequent claim.

Claimant's first claim for benefits, filed on July 26, 1993, was denied by Administrative Law Judge Daniel J. Rokotenetz on November 24, 1999, because claimant, while establishing the existence of simple pneumoconiosis, failed to establish a totally disabling respiratory impairment. Director's Exhibit 1.

Claimant's subsequent claim, filed on February 8, 2001, was denied on May 5, 2004 by Administrative Law Judge Linda Chapman because claimant again failed to establish a totally disabling respiratory impairment and, therefore, failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Director's Exhibits 2, 31.

Claimant requested modification of Judge Chapman's denial on June 7, 2004. Director's Exhibits 33, 38. By Decision and Order dated April 26, 2007, Administrative Law Judge Larry Merck denied claimant's request for modification, finding that the newly submitted evidence was insufficient to establish total respiratory disability and, thus, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. Additionally, Judge Merck stated that a review of the record did not establish a mistake in a determination of fact and, therefore, did not support modification on that basis pursuant Section 725.310. Director's Exhibit 60.

Claimant filed a second request for modification on March 3, 2008. Director's Exhibits 57, 58. Weighing the evidence submitted since the denial of claimant's first request for modification, the administrative law judge found that the medical evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Consequently, the administrative law judge found that claimant established a change in conditions since the denial of his first request for modification and, therefore, a basis for modification pursuant to Section 725.310.

Addressing the merits of entitlement, the administrative law judge, weighing all of the evidence of record submitted since the denial of claimant's subsequent claim, found that the earlier evidence was not sufficient to outweigh the more recent evidence which

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant claim, as this claim was filed prior to the enactment date of the new amendments. 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010); Director's Exhibit 2.

established the existence of complicated pneumoconiosis under Section 718.304. Consequently, the administrative law judge found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 and, therefore, that claimant had established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). The administrative law judge further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Additionally, based on claimant's invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge found that claimant established the final two conditions of entitlement under Part 718, total respiratory disability and disability causation. Consequently, the administrative law judge found that claimant established entitlement to benefits under Part 718. Accordingly, the administrative law judge awarded benefits, commencing as of July 2007.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in finding the medical evidence of record sufficient to establish the existence of complicated pneumoconiosis and, thus, invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304.[2] In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. 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.[3] 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 suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the

[2] Employer reiterated these arguments in its reply brief.

[3] As claimant was last employed in the coal mining industry in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 3.

subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's first claim was denied because claimant did not establish that he was totally disabled. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing that element of entitlement. 20 C.F.R. §725.309(d)(2), (3). Additionally, because claimant requested modification of the denial of his subsequent claim based on a failure to establish a change in the applicable condition of entitlement, the issue before the administrative law judge was whether the new evidence submitted on modification, considered along with the evidence originally submitted in the subsequent claim, established a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

One method of establishing total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1). Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by Section 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 or autopsy, 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. The introduction of legally sufficient evidence of complicated pneumoconiosis, however, does not automatically qualify a claimant for 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 that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc).

Herein, the administrative law judge found the newly submitted evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 and, thus, sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Consequently, the administrative law judge found the evidence sufficient to establish a change in conditions pursuant to Section 725.310 and, ultimately, sufficient to establish entitlement to benefits.

Pursuant to Section 718.304(a), the administrative law judge stated that the record developed since the denial of the first request for modification contained two readings of the March 24, 2010 x-ray film.[4] Dr. Alexander, a B reader and Board-certified radiologist, read the x-ray film as showing q/p, 2/2 small opacities and Category B large opacities in the right upper lobe and left upper lobe. Claimant's Exhibit 2. However, Dr. Wheeler, also a dually-qualified radiologist, opined that while some small nodules seen on the x-ray film might be coal workers' pneumoconiosis, the two larger masses are not large opacities representing complicated pneumoconiosis because the small nodules are mainly peripheral and are of low profusion. Employer's Exhibit 3. Instead, Dr. Wheeler opined that the six centimeter mass seen in the right upper lung and the six centimeter mass in the left upper lung are compatible with conglomerate granulomatous disease, histoplasmosis or mycobacterium avian complex. *Id*. Finding Drs. Alexander and Wheeler to be equally qualified, the administrative law judge found that the new x-ray evidence was inconclusive for the presence of pneumoconiosis and a large opacity consistent with pneumoconiosis. Decision and Order at 11. Consequently, the administrative law judge found that the newly submitted x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a).

Pursuant to Section 718.304(b), the administrative law judge found that the record contained the pathology report by Dr. Jansen, consisting of two tissue samples obtained during the July 13, 2007 mediastinoscopy[5] performed by Dr. Mitchell. Within his biopsy report, Dr. Jansen opined that one of the tissue samples consisted of a one centimeter aggregate of black anthracotic soft tissue and that microscopically it contained "dense sclerosing fibrosis with pigmented histocytes … there was no granulomatous inflammation or evidence of neoplasm." Director's Exhibit 69; Claimant's Exhibit 7. Based on Dr. Jansen's observation of the one centimeter aggregate of black anthracotic soft tissue, the administrative law judge found that Dr. Jansen's biopsy report is positive for pneumoconiosis. Decision and Order at 11. However, the administrative law judge further found that, "standing alone," the report was not sufficient to establish the

[4] The administrative law judge referred to the date of the x-ray film as January 24, 2010. Decision and Order at 10-11. However, a review of the record indicates that the correct date of the x-ray film is March 24, 2010. Claimant's Exhibit 2; Employer's Exhibit 3.

[5] Mediastinoscopy is defined as an examination of the mediastinum (the mass of tissue and organs separating the two lungs, between the sternum in front and the verteral column behind, and from the thoracic inlet above the diaphragm below, containing the heart and its large vessels, the trachea, esophagus, thymus, lymph nodes, and other structures and tissues) by means of a tubular instrument permitting direct inspection of the tissues in the area. *Dorland's Illustrated Medical Dictionary*, 31st Edition 2007.

existence of complicated pneumoconiosis pursuant to Section 718.304(b) because Dr. Jansen did not additionally address whether his pathology findings represented a finding of "massive lesions" or whether this one centimeter mass would appear as a mass greater than one centimeter in diameter on x-ray. 20 C.F.R. §718.304(b); *Melnick*, 16 BLR at 1-33-34; Decision and Order at 11-12; Director's Exhibit 69; Claimant's Exhibit 7. Consequently, the administrative law judge found the newly submitted biopsy evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b).

Pursuant to Section 718.304(c), the administrative law judge considered the two readings of the January 7, 2008 digital x-ray, Dr. Mitchell's October 2007 cardiopulmonary exercise test, and Dr. Mitchell's operative report of the July 13, 2007 mediastinoscopy.[6] The administrative law judge initially found the January 7, 2008 digital x-ray was insufficient to establish the existence of complicated pneumoconiosis, crediting the negative reading by Dr. Wheeler, a dually-qualified radiologist, over the opinion of Dr. Sola, whose credentials are not in the record. Dr. Wheeler stated that that film showed extensive chronic obstructive pulmonary disease and rounded densities in both upper lung zones whose "appearance favors silicosis." Director's Exhibit 58; Employer's Exhibit 1; Decision and Order at 12. Similarly, the administrative law judge

[6] Dr. Mitchell, in the operative report from the July 13, 2007 mediastinoscopy, discussing the necessity of the procedure, stated that a CT scan showed "bilateral 6 centimeter pulmonary masses with mediastinal adenopathy with one 3.5 centimeter subcarinal node." Director's Exhibit 69. In his description of the operative procedure, Dr. Mitchell then stated:

> Bronchoscopy was performed. There was some increased clear mucus in the right main stem, but there was no evidence of masses intraluminally in the bronchi on either side. In addition, there was no evidence of external compression of the bronchi. After sterile prep and drape a cervical mediastinoscopy was performed. There was excellent visualization of the mediastinum. A right paratracheal node was benign by frozen section with granulomatous tissue present. I was able to identify the subcarinal node which was 3 centimeters, very distinct and large. A biopsy of this showed only granulomatous material and anthracosis.

Director's Exhibit 69; Claimant's Exhibit 7. In a follow-up letter dated September 19, 2007, Dr. Mitchell stated that claimant has bilateral infiltrates and mediastinal adenopathy and that following the July 13, 2007 bronchoscopy and mediastinal biopsy, "[a]ll biopsies demonstrated only granulomatous disease and no evidence of malignancy." *Id*.

found that Dr. Mitchell's cardiopulmonary exercise test was insufficient to establish the existence of complicated pneumoconiosis because the report, while noting that claimant's pulmonary condition may be causing an impairment, did not discuss the etiology of the impairment. Decision and Order at 12; Director's Exhibit 74. However, the administrative law judge found that, based on the descriptions contained in the July 13, 2007 bronchoscopy/mediastinoscopy report by Dr. Mitchell, the evidence was sufficient to establish the existence of complicated pneumoconiosis at Section 718.304(c). Noting that Dr. Mitchell did not diagnose complicated pneumoconiosis, the administrative law judge nonetheless found that various descriptions contained within Dr. Mitchell's report were consistent with a finding of a large pulmonary opacity consistent with pneumoconiosis. Decision and Order at 13; Director's Exhibit 69; Claimant's Exhibit 7.

The administrative law judge then considered all of the relevant evidence, finding the x-ray evidence, digital x-ray evidence, biopsy evidence and medical opinion evidence insufficient to overcome the diagnosis of the presence of a large pulmonary mass consistent with pneumoconiosis contained in Dr. Mitchell's July 13, 2007 bronchoscopy/mediastinoscopy report. Decision and Order at 16. Specifically, the administrative law judge found that Dr. Jansen's pathology report of tissue samples obtained from the July 13, 2007 procedure, while insufficient, standing alone, to establish complicated pneumoconiosis, when "incorporated" into Dr. Mitchell's report, supported, rather than negated, a finding of complicated pneumoconiosis. *Id*. Additionally, the administrative law judge found that the medical opinions of record, including the reports of Dr. Koura, claimant's treating physician, which do not contain diagnoses of complicated pneumoconiosis, were insufficient to overcome Dr. Mitchell's mediastinoscopy results. *Id*. The administrative law judge therefore determined that "Dr. Mitchell's mediastinoscopy report[,] which establishes the presence of a large pulmonary mass consistent with pneumoconiosis through other diagnostic evidence under 20 C.F.R. §718.304(c)[,] outweighs the contrary probative evidence." *Id*. Consequently, the administrative law judge found the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c) and, further found the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Thus, the administrative law judge concluded that the evidence was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis, arguing that the administrative law judge applied an incorrect standard of proof in weighing the medical evidence. Specifically, employer contends that the administrative law judge erred in crediting the report by Dr. Mitchell as a diagnosis of complicated pneumoconiosis under Section 718.304(c). Employer further contends that the administrative law judge erred in substituting his opinion for that of the medical experts

in selectively analyzing the medical evidence of record. Employer also argues that the medical evidence of record, as a matter of law, is insufficient to establish the existence of complicated pneumoconiosis because none of the physicians credited by the administrative law judge diagnosed complicated pneumoconiosis pursuant to Section 718.304(c).

There is merit to employer's contentions. In finding that the medical evidence establishes the existence of complicated pneumoconiosis pursuant to Section 718.304, the administrative law judge relied on the report from claimant's bronchoscopy/mediastinoscopy performed by Dr. Mitchell on July 13, 2007. Decision and Order at 13, 16. In weighing the bronchoscopy/mediastinoscopy report of Dr. Mitchell under Section 718.304(c), the administrative law judge relied on selective portions of Dr. Mitchell's report, but did not discuss the report in its entirety to determine whether it is sufficient to establish the existence of complicated pneumoconiosis. Moreover, the administrative law judge combined the operative report by Dr. Mitchell with the pathology report by Dr. Jansen, attributing all the statements in the two reports to Dr. Mitchell. Decision and Order at 13. Specifically, the administrative law judge stated that Dr. Mitchell observed a large three centimeter subcarinal mass and obtained a one centimeter sample. The administrative law judge then quoted Dr. Jansen's pathology report to determine that the one centimeter sample established the presence of anthracotic soft tissue and also had associated dense sclerosing fibrosis. Decision and Order at 13; Director's Exhibit 69; Claimant's Exhibit 7. Further, the administrative law judge, noting the presence of large pulmonary masses on claimant's x-ray films and that Dr. Mitchell observed that the subcarinal lymph node was three centimeters in size, determined that this mass would then be seen as a large pulmonary mass on x-ray. Decision and Order at 13. However, Dr. Mitchell did not make these conclusions or provide the connection between his findings and the requirements of Section 718.304. Because the administrative law judge did not accurately characterize the conclusions contained in Dr. Mitchell's report, we vacate the administrative law judge's finding that Dr. Mitchell's report established the requisite elements of complicated pneumoconiosis pursuant to Section 718.304(c). 20 C.F.R. §718.304(c); *Melnick*, 16 BLR at 1-33-34; *see Wojtowicz v. Dusquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). On remand, the administrative law judge must consider Dr. Mitchell's report pursuant to the specific requirements of Section 718.304(c) to determine whether Dr. Mitchell's report, standing on its own, establishes the requisite criteria at Section 718.304(c). 20 C.F.R. §718.304; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34.

Additionally, because this case involves a second request for modification of the denial of claimant's February 8, 2001 subsequent claim (based on a failure to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d)), when weighing the newly submitted evidence, the issue properly before the administrative law

judge is whether the new evidence submitted with both of the requests for modification, considered in conjunction with the evidence developed in the subsequent claim, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess*, 21 BLR at 1-143. If the evidence establishes a change in conditions and, therefore, a change in an applicable condition of entitlement, or a mistake in a determination of fact with respect to the prior denial pursuant to Section 725.310, the administrative law judge must then consider all of the record evidence to determine whether claimant is entitled to benefits. *Hess*, 21 BLR at 1-143.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits 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

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge