BRB No. 12-0568 BLA

LANDON B. LUSK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/13/2013
	)	
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 on Remand 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/carrier (employer) appeals the Decision and Order on Remand (2008-BLA-05484) of Administrative Law Judge Adele Higgins Odegard awarding benefits on the request for modification of a claim filed on July 12, 2001, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the

Act).[1] The procedural history of this case is as follows: Administrative Law Judge Alice M. Craft originally awarded benefits 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, Administrative Law Judge Adele Higgins Odegard (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. The administrative law judge found, therefore, that claimant was entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Alternatively, 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, the administrative law judge awarded benefits. The administrative law judge further found that the commencement date for benefits was July 2001, the date the claim was filed.

Pursuant to employer's second appeal, the Board vacated the administrative law judge's finding of complicated pneumoconiosis at 20 C.F.R. §718.304 and her finding that claimant was entitled to the irrebuttable presumption of totally disabling pneumoconiosis. The Board remanded the case for the administrative law judge to reconsider the evidence relevant to the issue of complicated pneumoconiosis. The Board also remanded the case for reconsideration at Section 718.204(c), if reached, as the administrative law judge's Section 718.304 findings affected his Section 718.204(c) findings. Consequently, the Board vacated the administrative law judge's Decision and

[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 finding of Administrative Law Judge Alice M. Craft 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.

Order awarding benefits and remanded the case for further consideration. *Lusk v. Eastern Assoc. Coal Corp.*, BRB No. 10-0689 BLA (Aug. 5, 2011)(unpub.). Additionally, the Board held that, because the administrative law judge granted modification based on a change in conditions, and not a mistake of fact, she erred in finding the commencement date of benefits to be the filing date of the claim. The Board held, therefore, that, on remand, the administrative law judge must also reconsider the commencement date of benefits, if reached.

On remand, the administrative law judge again found that the evidence established the existence of complicated pneumoconiosis at Section 718.304 and that claimant was, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis. Alternatively, the administrative law judge found that disability causation was established pursuant to Section 718.204(c). The administrative law judge, therefore, awarded benefits. Regarding the commencement date of benefits, the administrative law judge found that, because the earliest evidence of complicated pneumoconiosis was found in the x-ray dated December 5, 2001, benefits were payable from December 1, 2001.

On appeal, employer contends that the administrative law judge erred in finding complicated pneumoconiosis established and erred in finding that claimant invoked the irrebuttable presumption of totally disabling pneumoconiosis, as she merely reiterated her prior findings concerning the opinions of Drs. Gaziano and Rasmussen. Additionally, employer contends that the administrative law judge erred in finding the commencement date of benefits to be December 2001, based on the fact that complicated pneumoconiosis was first found on the December 2001 x-ray. Employer contends that the administrative law judge's commencement date of benefits finding is in error because: the December 2001 x-ray was inconclusive regarding the existence of complicated pneumoconiosis; claimant was not first diagnosed with complicated pneumoconiosis until June 2007; and claimant did not request modification until May 2007. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has responded to employer's appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in

[3] We affirm, as unchallenged on appeal, the finding of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) 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).

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; *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). 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 Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991)(en banc).

20 C.F.R. §718.304
Complicated Pneumoconiosis

In addressing the issue of complicated pneumoconiosis on remand, the administrative law judge, referring to her prior decision, noted that "the x-ray interpretations and CT scan reports all showed large upper lung masses, but the interpreting physicians differed in whether the masses were pneumoconiotic in origin."

[4] 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).

Decision and Order on Remand at 4. Reconsidering the opinions of Drs. Gaziano and Rosenberg pursuant to the Board's instructions, the administrative law judge accorded greater weight to the opinion Dr. Gaziano than to that of Dr. Rosenberg because she found it was better reasoned.[5] Specifically, the administrative law judge first noted that Dr. Gaziano was the only physician who examined claimant. Additionally, she found Dr. Gaziano's opinion entitled to great weight because, in considering whether the masses seen on x-ray were the result of granulomatous disease instead of complicated pneumoconiosis, Dr. Gaziano stated that with:

> 'this much change on x-ray,' one would certainly expect 'evidence of clinical tuberculosis,' and so any conclusion that the [c]laimant's condition is related to a granulomatous disease such as tuberculosis is 'extremely far-fetched[,]' … [as] [c]laimant has no history of tuberculosis, and no evidence (such as a skin test) of tuberculosis infection.

Decision and Order on Remand at 6. The administrative law judge stated that because "Dr. Gaziano is a Board-certified pulmonary physician …. I would expect him to have a good understanding of the correlation (if any) between x-ray images and a physical disease process." Decision and Order on Remand at 6. Further, the administrative law judge found Dr. Gaziano's opinion entitled to great weight because he had reviewed claimant's treatment records, and they corroborated his findings. Specifically, the administrative law judge noted that "Dr. Gaziano explained in some detail how the [c]laimant's pulmonary hypertension, as set forth in the treatment record, is consistent with (and is in fact due to) complicated pneumoconiosis." Decision and Order on Remand at 6. The administrative law judge found, therefore, that because of Dr. Gaziano's qualifications as a Board-certified pulmonologist, Dr. Gaziano's comments on the issue were persuasive. Decision and Order on Remand at 6.

Turning to Dr. Rosenberg's opinion concerning "the etiology of the [c]laimant's large lung masses," the administrative law judge "declin[ed] to give it significant weight"

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[5] Dr. Gaziano conducted an evaluation of claimant on June 2007. His evaluation included a physical examination, work and medical histories, chest x-ray, pulmonary function study and blood gas study. In January 2010, Dr. Gaziano reviewed Dr. Karam's medical treatment notes. Dr. Gaziano identified the large masses seen on claimant's x-ray as those of complicated pneumoconiosis. Claimant's Exhibits 7, 14, 16.

Dr. Rosenberg reviewed all of claimant's medical data, with the exception of Dr. Karam's treatment records. Dr. Rosenberg opined that the large masses seen on claimant's x-rays were due to "granulomatous disease of one form or another." Employer's Exhibit 9.

because Dr. Rosenberg relied on x-rays that were not in the record and because Dr. Rosenberg failed to "explain why he credited Dr. Wheeler's conclusions on the lack of micronodularity [on x-rays] over the conclusions of equally qualified physicians who found micronodularity[.]"[6] Decision and Order on Remand at 7. In addition, the administrative law judge noted that Dr. Rosenberg failed to discuss his reasons for determining "that the [c]laimant's abnormal [x]-ray masses were due to granulomatous disease (and not to pneumoconiosis)." Decision and Order on Remand at 7. In light of the foregoing, the administrative law judge accorded greater weight to the opinion of Dr. Gaziano, which he found to be more credible, and found that the "[medical] opinion evidence support[ed] the conclusion that the [c]laimant has complicated pneumoconiosis." Decision and Order on Remand at 8.

Employer contends, however, that the administrative law judge erred in crediting the opinion of Dr. Gaziano because he was an examining physician, arguing that a mechanical preference for the opinion of an examining physician is reversible error. Contrary to employer's assertion, the administrative law judge did not "mechanically" credit the opinion of Dr. Gaziano because he was an *examining* physician. Rather, she permissibly considered the fact that Dr. Gaziano was the only physician of record to have examined claimant, along with the fact that his opinion was better reasoned than that of Dr. Rosenberg, in assessing the credibility of his medical opinion. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *see Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-8, 22 BLR 2-564, 2-571 (4th Cir. 2002); *see 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). Employer's argument is, therefore, rejected.

Employer also contends that the administrative law judge erred in crediting Dr. Gaziano's opinion because the doctor relied on an x-ray interpretation showing a "rhomboidal lesion" as the basis for his finding of complicated pneumoconiosis.[7] The Board previously held that it was error for the administrative law judge to rely on Dr.

[6] The Board previously affirmed the administrative law judge's decision to discredit the opinion of Dr. Wheeler because his finding that claimant did not have complicated pneumoconiosis was based, in part, on his finding that there was no background of symmetrical small background nodules which merge to form large opacities, when other equally-qualified radiologists found a background of small opacities and coalescences. Claimant's Exhibits 2, 3, 6, 12; Employer's Exhibit 13; *Lusk v. Eastern Assoc. Coal Corp.*, BRB No. 10-0689 BLA, slip op. at 5 (Aug. 5, 2011) (unpub.).

[7] Dr. Gaziano stated that the "rhomboidal lesion seen … is classic for complicated pneumoconiosis and is never seen with other disease." Claimant's Exhibit 6.

Gaziano's opinion for this reason. In reconsidering the opinion of Dr. Gaziano, however, the administrative law judge noted that she gave "no increased weight" to Dr. Gaziano's opinion based on his finding of a "rhomboidal lesion." Decision and Order on Remand at 6. Consequently, we reject employer's argument that the administrative law judge erred in relying on the opinion of Dr. Gaziano because he found a "rhomboidal lesion," as this was not a reason the administrative law judge gave for crediting Dr. Gaziano's opinion. *See* Decision and Order on Remand at 6.

Employer additionally contends that all of the reasons given by the administrative law judge for according Dr. Rosenberg's opinion little weight are erroneous. We disagree. The administrative law judge rationally accorded little weight to the opinion of Dr. Rosenberg because he relied on Dr. Wheeler's x-ray interpretations, ("which included [x]-rays that were not in the record"), but did not explain why he credited Dr. Wheeler's assessment that there was no background of micronodularity on claimant's x-rays, when other x-ray interpretations by equally-qualified physicians specifically found micronodularity. Decision and Order on Remand at 7.

In discussing Dr. Rosenberg's reliance on the x-ray interpretations of Dr. Wheeler, the administrative law judge noted that she had previously found, and the Board had affirmed, her finding that Dr. Wheeler's opinion was not well-reasoned and not entitled to significant weight. Decision and Order on Remand at 3 n.1. The administrative law judge, therefore, permissibly found that Dr. Rosenberg's reliance on Dr. Wheeler's x-ray readings tainted his entire opinion.[8] We, therefore, affirm the administrative law judge's

[8] The administrative law judge found that:

> [i]n addition to relying on [x]-ray interpretations that were not otherwise of record, Dr. Rosenberg's conclusion did not address interpretations from dually-qualified readers that showed evidence of micronodularities that Dr. Wheeler denied existed. For example, [x]-ray interpretations by Dr. Ahmed and Dr. Alexander, and a CT scan by Dr. Alexander, discuss "scattered" opacities or "areas of coalescence." Claimant's Exhibits 1, 2, 3, 13. Dr. Rosenberg's written report reflects he reviewed all of these items. Employer's Exhibit 9 at 1. However, in his report, Dr. Rosenberg did not address these items of evidence, or the physicians' conclusions. Nor did he specifically indicate why he credited Dr. Wheeler's conclusions (about micronodularity, etc.) over these physicians' opinions. Moreover, Dr. Rosenberg also did not discuss whether Claimant could have been expected to

finding that Dr. Rosenberg's opinion is not well-reasoned and her decision to accord it little weight.[9] Based on the administrative law judge's findings with respect to the opinions of Drs. Gaziano and Rosenberg, the administrative law judge rationally found that the existence of complicated pneumoconiosis was established pursuant to Section 718.304. Accordingly, the administrative law judge's findings that the existence of complicated pneumoconiosis was established pursuant to Section 718.304 and that claimant was, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act are affirmed.[10]

> have any symptoms from a granulomatous disease, in light of the abnormal [x]-ray findings.
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> In sum, not only did Dr. Rosenberg rely (just as did Dr. Wheeler) on [x]-ray interpretations that are not otherwise in evidence, he also did not explain why he credited Dr. Wheeler's conclusions on the lack of micronodularity over the conclusions of equally[-]qualified physicians who found micronodularity, and whose opinions he also reviewed. Additionally, Dr. Rosenberg did not discuss his determination that the [c]laimant's abnormal [x]-ray masses were due to granulomatous disease (and not to pneumoconiosis) in light of clinical indicia of disease, such as symptoms of illness.

Decision and Order on Remand at 7.

[9] Employer also contends that, in weighing Dr. Rosenberg's opinion, the administrative law judge erred in not considering that Dr. Rosenberg, like Dr. Gaziano, is a Board-certified pulmonologist. Employer is correct that the administrative law judge did not refer to Dr. Rosenberg's credentials on remand. Contrary to employer's contention, however, the administrative law judge's finding that Dr. Rosenberg's opinion is not entitled to significant weight was not based on Dr. Rosenberg's credentials or the lack thereof. Rather, it was based on Dr. Rosenberg's evaluation of the medical documentation before him. Employer's contention in this regard is, therefore, rejected. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] Because we affirm the administrative law judge's finding of complicated pneumoconiosis and her finding that claimant was entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act, we need not consider the administrative law judge's finding that claimant established disability causation pursuant to 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Commencement Date of Benefits

The administrative law judge noted the Board's instruction that, if she should find 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. The administrative law judge found that the "earliest evidence of complicated pneumoconiosis is found in the x-ray dated December 5, 2001." Decision and Order on Remand at 11. The administrative law judge, therefore, found "that benefits to the [c]laimant are payable from December 2001." Decision and Order on Remand at 11.

Employer contends, however, that the administrative law judge erred in finding that benefits are payable from December 2001 as the x-ray referenced by the administrative law judge was merely "the first suggestion of the disease" and was, therefore inconclusive and not a diagnosis of complicated pneumoconiosis. Employer's Brief at 23. Contrary to employer's contention, the administrative law judge properly found that "benefits to the [c]laimant are payable from December 2001" based on the earliest evidence of complicated pneumoconiosis, namely the December 5, 2001 x-ray. *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); Decision and Order on Remand at 11. Because claimant has established that the first evidence of complicated pneumoconiosis was in December 2001, he has established that he was totally disabled by pneumoconiosis from that date. 30 U.S.C. §921(c)(3); *Williams*, 13 BLR at 1-30; *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits to claimant from December 2001 is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY S. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge