BRB No. 07-0278 BLA

S.P.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 12/27/2007
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Larry L. Rowe, Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2004-BLA-5720) of Administrative Law Judge Stephen L. Purcell with respect to 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). The administrative law judge noted that the claim before him was a subsequent claim pursuant to 20 C.F.R. §725.309(d).[1] The

[1] Claimant filed claims on January 18, 1980, December 2, 1991, and March 1, 2000. Director's Exhibits 1-3. The claims were denied on the ground that claimant failed to establish total respiratory or pulmonary disability. *Id*. Claimant filed his most recent claim on May 16, 2002. Director's Exhibit 5.

administrative law judge credited claimant with thirty-three years of coal mine employment and considered the newly submitted evidence pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that, although the x-ray evidence did not establish the presence of large opacities as required under 20 C.F.R. §718.304(a), the medical opinion evidence was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(c). The administrative law judge further found that the presumption, set forth in 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of coal mine employment was invoked and was not rebutted. Based upon these findings, the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d) and entitlement to benefits on the merits.

Employer argues on appeal that the administrative law judge misinterpreted Section 718.304(c) and did not properly weigh the relevant evidence. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter in which he states that he will not file a brief in response to employer's appeal unless requested to do so.

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. 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).

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §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 which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit court has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray.[2]

[2] 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 1, 2, 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Eastern Associated Coal Corp. v. Director, OWCP [Scarbro], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis 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. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (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*).

Pursuant to Section 718.304(a), the administrative law judge considered twenty-four readings of ten x-rays. The administrative law judge found that no large opacities were detected on the films dated June 26, 1980, October 2, 1980, December 14, 1991, October 3, 1993, June 14, 2000, and March 13, 2003. Decision and Order at 24-25; Director's Exhibits 1-3; Employer's Exhibit 2. With respect to the films dated May 30, 2002 and June 17, 2003, the administrative law judge found that they were in equipoise, as equally qualified physicians provided conflicting readings for large opacities. Decision and Order at 23-24; Director's Exhibits 12, 13; Employer's Exhibits 5, 9, 17. The administrative law judge determined that the May 12, 2004 film did not meet the requirements of Section 718.304(a), as it was read as negative for pneumoconiosis by Dr. Scott. Decision and Order at 23-24; Employer's Exhibit 3. The administrative law judge stated that "[b]ased on the foregoing, I find that [c]laimant has failed to establish the existence of complicated pneumoconiosis by a preponderance of the x-ray evidence pursuant to 20 C.F.R. §718.304(a)." Decision and Order at 25.

The administrative law judge then considered the medical opinions of record under Section 718.304(c). The administrative law judge found that the medical opinions in which Drs. Gaziano and Smith diagnosed complicated pneumoconiosis were entitled to greater weight than the contrary opinion of Dr. Wheeler. Decision and Order at 25, 31-33. In particular, the administrative law judge found that Dr. Gaziano provided a persuasive explanation for attributing the markings observed on claimant's chest x-rays to complicated pneumoconiosis, rather than tuberculosis (TB) or granulomatous disease. *Id*. at 31-33. Based upon this determination, the administrative law judge concluded that invocation of the irrebuttable presumption of total disability due to pneumoconiosis was established at Section 718.304(c).[3] *Id*. at 33.

[3] The administrative law judge determined that the opinions of Drs. Porterfield and Zaldivar were entitled to little, if any, weight with respect to the issue of whether claimant is suffering from complicated pneumoconiosis as defined in 20 C.F.R. §718.304, as they were poorly reasoned and/or documented. Decision and Order at 28,

Employer argues that the administrative law judge's analysis of the medical opinions under Section 718.304(c) was irrational, as Drs. Gaziano and Smith based their diagnoses on x-ray evidence that the administrative law judge determined was insufficient to establish the presence of large opacities at Section 718.304(a). The administrative law judge recognized the apparent conflict in his findings and stated in a footnote that:

> I note that the medical opinions of Drs. Gaziano and Smith are based on their interpretations of Claimant's chest x-ray results. While I have found the x-ray evidence, considered in isolation, does not support a finding of complicated pneumoconiosis, I also find that the favorable medical opinion evidence of record outweighs the contrary x-ray evidence reported on the ILO forms contained in the record…In this case, none of Employer's experts who reviewed the newly submitted x-ray evidence checked the box indicating the presence of A, B, or C opacities on their ILO forms, and I must therefore accept their x-ray interpretations as evidence that these films do not support a diagnosis of complicated pneumoconiosis when weighing that evidence under §718.304(a). However, these same x-rays have been read by highly qualified physicians on both sides as showing the presence of one or more large opacities, and the interpretations of what those opacities represent have been discussed at length by both Claimant's and Employer's experts. While I am obliged by the *McCoy* decision to accept the ILO interpretations of Employer's experts when evaluating the x-ray evidence under §718.304(a), I am not so constrained when reviewing the medical opinion evidence concerning what physicians observed on Claimant's chest x-rays under §718.304(c) of the regulations.

Decision and Order at 25-26 n. 18. As employer asserts, the administrative law judge's interpretation of the connection between Sections 718.304(a) and (c) is not correct.

Section 718.304(a) provides that the irrebuttable presumption of total disability due to pneumoconiosis is invoked when the evidence establishes that the miner is

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30; Director's Exhibit 13; Claimant's Exhibit 6; Employer's Exhibit 1. The administrative law judge found that the opinion in which Dr. Rasmussen diagnosed complicated pneumoconiosis, based upon an x-ray reading, was not entitled to full weight, because Dr. Rasmussen did not explain how the objective test results supported his diagnosis. Decision and Order at 26, 28; Claimant's Exhibit 1. The administrative law judge's findings with respect to these opinions are affirmed, as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

suffering from a chronic dust disease of the lung which, "when diagnosed by chest x-ray…yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B, or C" under the ILO system. 20 C.F.R. §718.304(a). In light of the absence of biopsy evidence in this case, the relevant inquiry under Section 718.304(c) concerns whether "when diagnosed *by means other than*" the method set forth in Section 718.304(a), the disease would be "a condition which would be reasonably expected to yield the results described" in Section 718.304(a). 20 C.F.R. §718.304(c) (emphasis supplied).

The administrative law judge's accurate determination that Drs. Gaziano and Smith relied upon their interpretations of the ILO classified x-ray evidence to diagnose complicated pneumoconiosis, indicates that these physicians did not render their diagnoses "by means other than" those described in Section 718.304(a).[4] 20 C.F.R. §718.304(c). Thus, the administrative law judge's decision to rely upon these opinions to find invocation of the irrebuttable presumption established under Section 718.304(c) was not correct. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62. Instead, the administrative law judge's consideration of the opinions of Drs. Gaziano, Smith, Wheeler, and the other physicians of record who commented on whether the markings observed on x-ray represented large opacities as defined in Section 718.304(a), should have occurred at Section 718.304(a). *Id*.

Accordingly, we vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption pursuant to Section 718.304(c) and remand the case to the administrative law judge for reconsideration of this issue. Because the administrative law judge relied upon his finding under Section 718.304(c) to determine that claimant established a change in an applicable condition of entitlement, we must also vacate his finding under Section 725.309(d).

[4] Dr. Gaziano, a B reader, reviewed all of the x-rays of record, dating from 1980 to 2003, and opined that they showed a progression from simple to complicated pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 5 at 12-13, 15-17, 19-20. Dr. Gaziano also provided an ILO reading of the film dated June 17, 2003, in which he diagnosed the presence of Category B large opacities. Director's Exhibit 12. The administrative law judge found that this film was in equipoise, as equally qualified physicians provided conflicting readings for large opacities. Decision and Order at 23-24. Dr. Smith, a Board-certified radiologist and B reader, interpreted the same film as showing Category B large opacities. Claimant's Exhibit 9. The administrative law judge determined that this film was also in equipoise, as physicians with similar qualifications reached contrary conclusions as to whether large opacities were present. Decision and Order at 24.

On remand, the administrative law judge must initially consider the evidence relevant to Section 718.304(a) and (c) separately and reach an independent conclusion under each subsection. When reconsidering the evidence relevant to Section 718.304(a), the administrative law judge must determine whether the credibility of Dr. Gaziano's opinion, that claimant's chest x-rays do not show evidence of active or healed TB, is affected by his statement in a letter to claimant that the markings on the June 17, 2003 x-ray could represent old TB. Evidence relevant to Section 718.304(c) includes the CT scan readings of record, provided that the administrative law judge determines that diagnoses made based upon a CT scan are representative of "acceptable medical procedures." 20 C.F.R. §718.304(c). In addition, the administrative law judge must consider on remand whether Dr. Scott's deposition testimony is admissible pursuant to the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3)(i), (ii), (c).[5] Employer's Exhibit 14.

If the administrative law judge determines that invocation has been established under one subsection, but not both, he must weigh all of the relevant evidence together to determine if invocation has been conclusively demonstrated. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34. Should the administrative law judge find that claimant has established the existence of complicated pneumoconiosis, he must determine whether the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007). In the event that the administrative law judge concludes that invocation of the irrebuttable presumption has not been established, he must determine whether claimant has established a change in an applicable condition of entitlement by other means.[6] *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004).

[5] The administrative law judge determined correctly that Dr. Scott's CT scan readings, x-ray interpretations, and statements regarding his interpretation of an x-ray dated October 17, 2005, were not medical reports pursuant to 20 C.F.R. §725.414(a)(1), (a)(3)(ii). Decision and Order at 28-29 n.21.

[6] 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 most recent prior claim was denied because he failed to establish a totally disabling respiratory impairment. Director's Exhibit 3. Consequently, claimant has to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3)

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