BRB No. 08-0267 BLA

R. M. (Widow of M. M.) Claimant-Respondent v. PAT WHITE FUELS, INCORPORATED and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND, C/O ALTERNATIVE CONCEPTS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/19/2008 DECISION and ORDER

Appeal of the Decision and Order on Remand-Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John L. Grisby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 on Remand-Award of Benefits (04-BLA-5091) of Administrative Law Judge Larry S. Merck rendered on a survivor's[1] 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). This case has been before the Board previously. Pursuant to claimant's appeal, the Board vacated Administrative Law Judge Daniel J. Roketenetz's denial of survivor's benefits, and remanded the case for him to consider whether the relevant medical evidence established the existence of complicated pneumoconiosis arising out of coal mine employment, which, if established, would entitle claimant to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. [*R. M.*] *v. Pat White Fuels, Inc.*, BRB No. 05-0402 BLA (Feb. 21, 2006)(unpub.). The Board further instructed that if the evidence did not establish complicated pneumoconiosis, Judge Roketenetz should reconsider the medical opinions to determine whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Employer moved for reconsideration, arguing that, since it was finally determined in the miner's unsuccessful claim for benefits that he did not have complicated pneumoconiosis, claimant was collaterally estopped from attempting to prove complicated pneumoconiosis in her survivor's claim with x-ray readings submitted from the miner's claim.[2] Claimant and the Director, Office of Workers' Compensation Programs (the Director), argued that employer waived the defense of collateral estoppel by failing to timely raise it. After a review of the claim's procedural history, the Board

[1] Claimant is the miner's widow. The miner died on March 2, 2001, and claimant filed her survivor's claim on June 11, 2001. Director's Exhibits 3, 7.

[2] The miner filed two unsuccessful claims. In the most recent claim, filed on January 21, 1998, an administrative law judge found that the miner did not have complicated pneumoconiosis. Pursuant to the miner's appeal, the Board affirmed the denial of benefits. [*M.M.*] *v. Pat White Fuels, Inc.*, BRB No. 00-0892 BLA (Aug. 31, 2001)(unpub.). The miner died while his appeal was pending, and no autopsy was performed. In the survivor's claim, filed under the amended regulations and thus governed by the evidentiary limitations of 20 C.F.R. §725.414, the widow designated as her affirmative evidence 1998 x-ray readings from the miner's denied claim to attempt to establish complicated pneumoconiosis. Employer designated rebuttal readings from the miner's denied claim.

granted reconsideration and instructed Judge Roketenetz to determine, on remand, whether employer waived the defense of collateral estoppel. [*R.M.*] *v. Pat White Fuels, Inc.*, BRB No. 05-0402 BLA (Nov. 17, 2006)(unpub.). If Judge Roketenetz determined that employer timely raised collateral estoppel, he was then to determine whether the requirements for collateral estoppel were established.

Employer argued further that Judge Roketenetz erred in failing to consider the medical evidence from the miner's lifetime claims. The Board noted that evidence from a miner's claim is not automatically admissible in a survivor's claim under the revised regulations, and instructed Judge Roketenetz to determine the admissibility of evidence pursuant to 20 C.F.R. §725.414, and that if any medical evidence exceeded the evidentiary limitations, to determine whether "good cause" for submitting the evidence was established pursuant to 20 C.F.R. §725.456(b)(1).[3] The Board therefore vacated all of Judge Roketenetz's findings, and instructed that, after determining the admissibility of evidence, Judge Roketenetz was to reconsider whether the miner had pneumoconiosis and whether his death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.205(c).

On remand, because Judge Roketenetz was unavailable, the case was reassigned, without objection, to Administrative Law Judge Larry S. Merck (the administrative law judge). The parties designated evidence under 20 C.F.R. §725.414. Further, employer argued that since claimant was attempting to establish complicated pneumoconiosis using previously outweighed x-ray readings selected from the miner's denied claim, the administrative law judge should find good cause for admitting all of the evidence from the miner's claims.

The administrative law judge found that employer did not establish good cause to admit the evidence from the miner's claims. Additionally, the administrative law judge found that employer did not raise collateral estoppel as an affirmative defense when the case was before Judge Roketenetz, and therefore, waived collateral estoppel. The administrative law judge therefore determined that claimant was not collaterally estopped from litigating the existence of complicated pneumoconiosis. The administrative law judge found that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and determined that the positive x-

[3] The Board noted that since Judge Roketenetz had admitted all the evidence from the miner's claims into the record at the hearing, employer had no reason then to argue that "good cause" existed for the submission of the evidence. [*R.M.*] *v. Pat White Fuels, Inc.*, BRB No. 05-0402 BLA (Nov. 17, 2006)(unpub.), at 6. Thus, the Board instructed Judge Roketenetz to provide the parties with an opportunity to make a showing of good cause. *Id.*

ray evidence, weighed together with the otherwise negative medical evidence, established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b). Thus, the administrative law judge found claimant entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.205(c)(3), 718.304, and he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer waived the defense of collateral estoppel. Employer further asserts that the administrative law judge provided no explanation for finding that good cause was not established. Additionally, employer contends that the administrative law judge erred in his analysis of the medical evidence when he found that the existence of complicated pneumoconiosis was established. Claimant responds, urging affirmance of the award of benefits. The Director has filed a limited response, arguing that employer waived the argument that claimant is collaterally estopped from invoking the Section 718.304 presumption, and that, although the administrative law judge failed to explain his good cause determination, the error was harmless, as employer's good cause argument lacks merit. In a reply brief, employer argues that it did not waive the collateral estoppel issue, and asserts that it has made a particularized showing of good cause on the facts of this case.

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

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Employer contends that the administrative law judge erred in finding that employer waived collateral estoppel[4] as to the finding of no complicated pneumoconiosis that was made in the miner's claim. The administrative law judge found that employer did not effectively raise collateral estoppel because it did not argue the issue before Judge Roketenetz. Employer argues that it raised collateral estoppel and res judicata, in writing, before the district director. Employer's Brief at 15-20. Both claimant and the Director respond that employer's controversion filed with the district director stated that the entire claim was barred by collateral estoppel and res judicata, not that the specific issue of complicated pneumoconiosis was barred by collateral estoppel. Claimant's Brief at 3-6; Director's Brief at 5-6. The Director further notes that, in employer's post-hearing brief to Judge Roketenetz, employer did not raise collateral estoppel or any other affirmative defense. Employer replies that it raised the issue before the district director and never withdrew it. Reply Brief at 2-9.

The Board noted in its last decision that collateral estoppel is an affirmative defense that is ordinarily deemed waived if not raised in the pleadings. [*R.M.*], slip op. at 3, citing *Gilbert v. Ferry,* 413 F.3d 578 (6th Cir. 2005). The record reflects that although employer filed a general controversion with the district director, it did not specifically argue collateral estoppel on the complicated pneumoconiosis issue until it filed its motion for reconsideration with the Board. On these facts, the administrative law judge found that employer waived collateral estoppel by failing to raise the argument in a timely manner. We conclude that the administrative law judge reasonably addressed this issue on remand, as instructed, and that substantial evidence supports his finding. We therefore affirm the administrative law judge's determination that employer waived the collateral estoppel issue. *See Gilbert*, 413 F.3d at 579.

Next, employer contends that the administrative law judge erred in failing to explain his good cause finding, and argues that it established good cause to admit the miner's claim evidence because claimant is attempting to establish invocation of the irrebuttable presumption based on x-ray evidence from the miner's denied claim. Employer's Brief at 23-24. The Director agrees that the administrative law judge failed to explain, but urges that "remand is unnecessary" because employer is essentially

[4] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a four-part test to determine whether collateral estoppel bars relitigation of an issue: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) judicial determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Smith v. S.E.C.*, 129 F.3d 356, 362 (6th Cir. 1997).

arguing that the miner's claim evidence is relevant, an argument that does not equate to good cause. Director's Brief at 7, *citing Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

Review of the administrative law judge's decision reveals no explanation for his finding that good cause was not established. Thus, the decision does not comply with 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). Further, as will be discussed, we must remand this case for the administrative law judge to reconsider the issue of complicated pneumoconiosis. As the issue of good cause is committed to the administrative law judge's discretion, we instruct the administrative law judge, on remand, to reconsider the good cause issue and explain his finding consistent with the APA.

Employer next contends that the administrative law judge erred in finding that the existence of complicated pneumoconiosis was established.[5] Pursuant to 20 C.F.R. §718.304(a), employer contends that the administrative law judge selectively analyzed the conflicting x-rays. Employer's Brief at 28-35. Employer's contention has merit. Claimant submitted two readings of a February 13, 1998 x-ray. Drs. Sargent and Barrett, both Board-certified radiologists and B readers, read this x-ray as positive for simple pneumoconiosis and as Category C for large opacities. Director's Exhibit 1. However, Dr. Sargent commented he was "uncertain" whether there were large opacities, and he noted the possibility of tuberculosis (TB), a fungus, or granulomatous disease. Further, Dr. Barrett commented that his reading was probably "all old post-TB scarring upper lobes . . . old granulomata." *Id.*

Citing *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (2000)(*en banc*), the administrative law judge found that Dr. Sargent's comments regarding the Category C large opacity were not relevant to the existence of complicated pneumoconiosis but rather

[5] Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304, provides in relevant part that there is an irrebuttable presumption that the miner died due to pneumoconiosis if the miner suffered 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(a)-(c). In determining whether claimant has established invocation of the irrebuttable presumption, the administrative law judge must consider all relevant evidence. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

to its cause, and therefore could not be considered until Section 718.203(b).[6] The administrative law judge therefore determined that Dr. Sargent rendered a finding of complicated pneumoconiosis. Decision and Order on Remand at 14.

Contrary to the administrative law judge's finding, Dr. Sargent's comments were relevant to whether a Category C large opacity of complicated pneumoconiosis existed on the x-ray. Dr. Sargent indicated that he was "uncertain as to large opacities," and noted the possible diagnoses of "TB or other granulomatous disease." Director's Exhibit 1. A doctor's comments that potentially undermine the x-ray diagnosis of a large opacity by suggesting alternative diagnoses are relevant and must be considered at Section 718.304(a).[7] *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1999)(*en banc*). Therefore, the administrative law judge erred. Further, a review of the administrative law judge's decision discloses no discussion of Dr. Barrett's comments. We must therefore vacate the administrative law judge's finding pursuant to Section 718.304(a) and remand the case for him to reconsider the readings and relevant comments of Drs. Sargent and Barrett consistent with *Melnick*.

Further, as employer argues, the administrative law judge did not adequately explain his analysis of the negative readings. Drs. Binns and Abramowitz, both Board-certified radiologists and B readers, read the February 13, 1998 x-ray as negative for any abnormalities consistent with pneumoconiosis. Director's Exhibit 1. Additionally, Dr. Binns commented that extensive scarring in the upper lobes was secondary to old inflammatory disease, possibly TB, and was atypical of pneumoconiosis. Dr. Binns added that he could not exclude the possibility of some superimposed occupational disease, an inflammatory process, or neoplasm. Dr. Abramowitz commented that there was extensive disease in the upper lung zones, for which he could not exclude infiltrate or a mass, but there was no conclusive evidence of occupational pneumoconiosis. The administrative law judge considered the comments by Drs. Binns and Abramowitz at Section 718.304(a) and found that they contained "internal inconsistencies" that rendered

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[6] Under Section 718.203(b), where a miner was employed for ten or more years in coal mines, there is "a rebuttable presumption that the [miner's] pneumoconiosis arose out of such employment." 20 C.F.R. §718.203(b).

[7] By contrast, *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (2000)(*en banc*), addressed a different situation. There, a doctor unequivocally classified an x-ray as positive for simple pneumoconiosis, but commented that the pneumoconiosis was not coal workers' pneumoconiosis. *Cranor*, 22 BLR at 1-5. Because the doctor's comments were relevant only to the cause of the simple pneumoconiosis, not its existence, the doctor's comments were to be considered at 20 C.F.R. §718.203(b). *Cranor*, 22 BLR at 1-6. That was not the situation here.

the doctors' negative readings "inconclusive." Decision and Order on Remand at 15-16. However, this analysis was inconsistent with the administrative law judge's approach to the positive readings, and lacked an explanation as to what was inconclusive about the doctors' opinions that the x-rays were negative for pneumoconiosis. *See* 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge, on remand, should reconsider the negative readings and the doctors' comments. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

In light of the foregoing, we also instruct the administrative law judge to reconsider the negative readings by Dr. Fino, a B reader, of the x-rays dated January 26, 1999 and February 25, 1999, which the administrative law judge found to be outweighed by the positive readings of Drs. Sargent and Barrett. Thus, on remand, the administrative law judge must determine whether the x-ray evidence supports a finding of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a).

There was no biopsy or autopsy evidence in the survivor's claim at Section 718.304(b), and the administrative law judge found that claimant did not establish complicated pneumoconiosis pursuant to Section 718.304(c). In the interest of judicial economy, the Board will briefly address a few points raised by employer at Section 718.304(c). As employer contends, the administrative law judge discounted Dr. Westerfield's opinion that complicated pneumoconiosis was absent because he found that Dr. Westerfield did not adequately address the positive x-ray readings by Drs. Sargent and Barrett. Since the administrative law judge on remand must reconsider the x-rays, he should reconsider Dr. Westerfield's opinion. Further, the administrative law judge discounted Dr. Fino's opinion that the miner did not have complicated pneumoconiosis because he found that Dr. Fino did not adequately explain why he attributed the miner's chronic obstructive pulmonary disease (COPD) solely to smoking. This finding addressed Dr. Fino's opinion that the miner's COPD was not legal pneumoconiosis, but it is unclear how any failure to explain the etiology of the miner's COPD detracted from Dr. Fino's opinion that the miner did not have complicated pneumoconiosis on any of his x-rays. *See* 5 U.S.C. §557(c)(3)(A); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103*; Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge also found that Dr. Fino considered inadmissible evidence; however, the administrative law judge, on remand, must reconsider and explain his good cause determination. Thus, the administrative law judge should reconsider Dr. Fino's opinion.[8]

[8] Contrary to employer's other arguments, the administrative law judge did not err in declining to view the miner's hospital x-rays as negative for complicated pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Further, the administrative law judge properly found that employer submitted no evidence to demonstrate that the miner's CT scan readings were medically acceptable and

Therefore, we vacate the administrative law judge's finding that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis, and we remand the case to the administrative law judge. On remand, the administrative law judge must reconsider the good cause issue and explain his determination. With respect to complicated pneumoconiosis, the administrative law judge must first determine whether the evidence in each category of Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then weigh the evidence supportive of a finding of complicated pneumoconiosis against the contrary evidence. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick*, 16 BLR at 1-33. If the administrative law judge finds that the evidence does not establish the existence of complicated pneumoconiosis, then he must determine if the evidence otherwise establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

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relevant to establishing or refuting entitlement, a showing that is required by the party submitting other medical evidence under 20 C.F.R. §718.107(b).

Accordingly, the administrative law judge's Decision and Order on Remand-Award of Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration 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