BRB Nos. 08-0293 BLA
and 08-0293 BLA-S

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| R.P. | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 12/23/2008 |
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| EASTERN ASSOCIATED COAL CORPORATION | ) | |
| | ) | |
| 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 and the Attorney Fee Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Linda Nelson Garrett (Linda Nelson Garrett, PLLC), Summersville, West Virginia, for claimant.

Laura Metcoff Klaus and W. William Prochot (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 and the Attorney Fee Order (04-BLA-6746) of Administrative Law Judge Richard A. Morgan rendered on 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). This claim was filed on November 20, 2002. Director's Exhibit 2. The administrative law judge credited claimant with at least twenty-seven years of coal mine employment, as stipulated by the

parties.[1] 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 found that the x-ray evidence was supported by CT scan readings, a PET scan reading, and medical opinion evidence. The administrative law judge therefore determined that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge additionally found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) and that employer did not rebut this presumption. Accordingly, the administrative law judge awarded benefits. Subsequently, the administrative law judge considered claimant's counsel's petition for a fee and employer's objections thereto, and awarded a fee of $10,894.40.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence when he found the existence of complicated pneumoconiosis established. Claimant responds in support of the administrative law judge's award of benefits. Employer filed a reply brief. Further, employer challenges the administrative law judge's fee award. Claimant did not respond to employer's appeal of the fee award. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief on appeal.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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. Section 411(c)(3) of the Act, implemented by Section 718.304, provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by x-ray, yields one or more large opacities (greater than one centimeter in diameter) that would be classified in Category A, B, or C under the ILO classification

[1] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

system; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung;[2] 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).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to Section 718.304(a),[3] the administrative law judge reviewed seventeen readings of eleven x-rays taken between 1986 and 2005,[4] and considered the readers' radiological qualifications. In so doing, the administrative law judge found that claimant's July 4, 2002, December 19, 2002, December 20, 2002, January 9, 2003, May 21, 2003, January 19, 2004, and October 13, 2005 x-rays established complicated pneumoconiosis.

Relevant to the issues raised by employer, the record reflects that Dr. Wiot, a Board-certified radiologist and B reader, read each x-ray[5] except for the one dated December 19, 2002, and indicated that, although the ILO classification system required him to classify the x-rays as "Category B," the changes on the x-rays represented

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[2] In this case, there was no biopsy or autopsy evidence in the record for consideration pursuant to 20 C.F.R. §718.304(b).

[3] The administrative law judge weighed the x-rays relevant to complicated pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but they are more appropriately considered at 20 C.F.R. §718.304(a).

[4] The three earliest x-rays, dated April 28, 1986, June 28, 1991, and February 5, 1998, were all read as negative for pneumoconiosis, and the May 1, 1999 x-ray was found unreadable. Employer's Exhibit 7 at 5-7, 16.

[5] Although Dr. Wiot's readings exceeded the evidentiary limits applicable to employer under 20 C.F.R. §725.414, the administrative law judge admitted them into the record, at the hearing, for good cause shown pursuant to 20 C.F.R. §725.456(b)(1). Transcript at 52. On appeal, no party challenges this aspect of the administrative law judge's decision.

sarcoidosis[6] and not pneumoconiosis. Employer's Exhibit 7 at 3-4, 11-15; Employer's Exhibit 9 at 15. The administrative law judge, however, found that only the doctor's formal classification of the x-ray was relevant. Thus, "following a strict reading of the regulation[']s use of the ILO classification system," the administrative law judge determined that "the X-rays are positive for complicated coal workers' pneumoconiosis." Decision and Order at 16.

Employer argues that the administrative law judge erred by failing to consider the interpretations of Dr. Wiot in their entirety to determine whether they were positive for complicated pneumoconiosis. We agree.

A doctor's comments that potentially undermine the x-ray diagnosis of a large opacity are relevant and must be considered at Section 718.304(a). *Melnick,* 16 BLR at 1-37. Thus, the administrative law judge erroneously found that Dr. Wiot's interpretations were positive for complicated pneumoconiosis without also evaluating the doctor's comments and testimony that the opacities were sarcoidosis.[7] We must therefore vacate the administrative law judge's determination that the x-ray evidence established complicated pneumoconiosis pursuant to Section 718.304(a), and remand the case for him to reconsider the x-ray readings, including the relevant comments and testimony of Dr. Wiot, consistent with *Melnick*.

Further, to avoid any repetition of error on remand, the administrative law judge must also consider the comments that Drs. Ranavaya and Scatarige provided with their readings of the December 19, 2002 x-ray, in determining whether this x-ray is positive for complicated pneumoconiosis.[8] *Melnick,* 16 BLR at 1-37. Additionally, on remand, the administrative law judge should initially consider the x-rays separately from the CT scans and PET scan. Conventional chest x-rays are considered at Section 718.304(a),

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[6] The record contains medical evidence that sarcoidosis is a disease unrelated to coal mine dust exposure. Claimant's Exhibit 5 at 39; Employer's Exhibit 9 at 24.

[7] In addition to including comments on the x-ray classification forms, Dr. Wiot testified that sarcoidosis was "far and away" the best diagnosis. Employer's Exhibit 9 at 15.

[8] Dr. Ranavaya, a B reader, and Dr. Scatarige, a Board-certified radiologist and B reader, classified the December 19, 2002 x-ray for Category B large opacities. *Id.* Additionally, Dr. Ranavaya commented that the opacities "likely" related to complicated pneumoconiosis but he recommended future studies to rule out a progressive pathology. Director's Exhibit 19. Dr. Scatarige suggested that a CT scan be done to determine whether the opacities were due to coal workers' pneumoconiosis, granulomatous disease, or sarcoidosis. Employer's Exhibit 4.

while medical tests such as CT and PET scans constitute other diagnostic means that are considered at Section 718.304(c). *See Melnick*, 16 BLR at 1-34.

Pursuant to Section 718.304(c), initially, we instruct the administrative law judge to reconsider the January 19, 2004 and October 13, 2005 CT scans and the May 6, 2003 PET scan. When the administrative law judge considered these items of evidence along with the conventional chest x-rays, he found that they supported complicated pneumoconiosis. However, as employer contends, the administrative law judge did not resolve the conflicting readings by Drs. Alexander and Scott of the October 13, 2005 CT scan,[9] or conduct an equivalency determination of the CT scan evidence.[10] The administrative law judge must do so on remand. Further, as employer argues, when considering Dr. Damon's opinion that the May 6, 2003 PET scan was consistent with progressive massive fibrosis and coal workers' pneumoconiosis, the administrative law judge did not consider medical testimony that a PET scan is not diagnostic of pneumoconiosis. Claimant's Exhibits 5 at 44; 9 at 9; Employer's Exhibit 9 at 23-24. The administrative law judge, on remand, should consider this relevant evidence. *See 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).

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[9] Dr. Alexander read the January 19, 2004 and October 13, 2005 CT scans as positive for complicated pneumoconiosis, while Dr. Scott interpreted the October 13, 2005 CT scan as indicative of tuberculosis or histoplasmosis. Claimant's Exhibits 1, 2; Employer's Exhibit 3.

[10] In *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the Fourth Circuit court stated that although the clauses in (A), (B), and (C) of Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provide three different ways to establish the existence of complicated pneumoconiosis and thereby invoke the irrebuttable presumption, these clauses were intended to describe a single, objective condition. Thus, the court stated that, in applying the standard set forth in each prong, equivalency determinations must be performed to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. The court further stated that because prong (A) sets out an entirely objective scientific standard, *i.e.*, an opacity on x-ray greater than one centimeter, x-ray evidence provides the benchmark for determining what under prong (B) is a "massive lesion" and what under prong (C) is an equivalent diagnostic result reached by other means. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Additionally, employer challenges the administrative law judge's analysis of the medical opinion evidence.[11] Drs. Al-Asadi and Ranavaya diagnosed claimant with complicated pneumoconiosis, while Drs. Fino, Wiot, and Zaldivar concluded that claimant does not have complicated pneumoconiosis, but likely has sarcoidosis. Director's Exhibit 15; Claimant's Exhibits 3, 9; Employer's Exhibits 8, 9, 19, 20. The administrative law judge found that the opinions of Drs. Al-Asadi and Ranavaya were well-reasoned and supported by the objective evidence. He discounted the contrary opinions of Drs. Fino, Wiot, and Zaldivar because he found that, "with the X-ray evidence and CT scan evidence meeting the regulatory definition of complicated pneumoconiosis," the doctors could not conclusively state that claimant has sarcoidosis, or "conclusively rebut" the x-ray evidence of complicated pneumoconiosis. Decision and Order at 17.

Employer argues that the administrative law judge erred by crediting the opinions of Drs. Al-Asadi and Ranavaya without explaining how the objective evidence supported their conclusions. Moreover, employer argues that the administrative law judge effectively shifted the burden of proof to employer to establish that claimant has sarcoidosis, and not complicated pneumoconiosis, when he discounted the opinions of Drs. Fino, Wiot, and Zaldivar.

As discussed, the administrative law judge must reconsider the x-ray and CT scan evidence that he relied upon to weigh the medical opinions. Thus, he must also reconsider the medical opinions. Further, we agree that the administrative law judge, on remand, must explain how the opinions of Drs. Al-Asadi and Ranavaya are supported by objective evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Additionally, while the administrative law judge has broad discretion to assess the credibility of the doctors' opinions, *see Underwood v. Elkay Mining*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), claimant bears the burden to establish the existence of a chronic dust disease of the lung commonly known as complicated pneumoconiosis. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118. Employer does not have the burden to prove that claimant has sarcoidosis. On remand, the administrative law judge must reweigh the medical opinion evidence, with the burden of proof on claimant to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. *See Lester,* 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33.

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[11] The administrative law judge considered the medical opinion evidence relevant to complicated pneumoconiosis under Section 718.202(a)(4), but it is more appropriately considered at Section 718.304(c).

Thus, we vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at Section 718.304, and remand the case for further consideration. On remand, the administrative law judge must discuss and weigh all relevant evidence in determining whether claimant has established complicated pneumoconiosis at Section 718.304. The administrative law judge must first determine whether the relevant evidence in each category under 20 C.F.R. §718.304(a) and (c) tends to establish the existence of complicated pneumoconiosis, and then must weigh the evidence at subsections (a) and (c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Lester,* 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. Based on this holding, we also vacate the administrative law judge's finding pursuant to Section 718.203(b).

If, on remand, the administrative law judge determines that the evidence fails to establish complicated pneumoconiosis, he must then determine whether the evidence establishes that claimant is totally disabled due to simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2),(c).

Employer challenges the administrative law judge's award of a fee, specifically, his decision to allow certain time entries and to award fees for expert witnesses who did not attend the hearing. Claimant's counsel is entitled to a fee only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Because we have vacated the award of benefits, there has not been a successful prosecution. Consequently, no fee is due and we decline to address the fee order at this time.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, 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