

BRB No. 07-0369 BLA

R. F. G.)
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 Claimant-Respondent)
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 v.)
)
 CHICOPEE COAL COMPANY,)
 INCORPORATED)
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 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 02/21/2008
 PNEUMOCONIOSIS FUND)
)
 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 Granting Benefits and the Decision and Order Granting Reconsideration of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Deputy 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 and carrier appeal the Decision and Order Granting Benefits and the Decision and Order Granting Reconsideration (04-BLA-5808) of Administrative Law Judge Pamela Lakes Wood 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). In her Decision and Order, the administrative law judge found that employer was not properly named as the responsible operator, because carrier had canceled employer's black lung insurance policy prior to claimant's last day of employment. Consequently, she dismissed employer and carrier, and substituted the Black Lung Disability Trust Fund as the party liable for the payment of benefits. The administrative law judge also found that the evidence established the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to a motion for reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge reversed her decision to dismiss employer and carrier. Initially, the administrative law judge rejected the Director's arguments that employer and carrier waived their right to contest their liability by failing to timely contest their designation by the district director, and that carrier's post-hearing evidence regarding its insurance coverage should be excluded from the record. However, the administrative law judge agreed with the Director that the Act precluded carrier from retroactively cancelling its insurance policy, leaving carrier's policy with employer in effect as of the last day of claimant's employment. Therefore, the administrative law judge designated employer and carrier as the parties liable for the payment of benefits.¹

On appeal, employer and carrier assert that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304. Employer and carrier also contend that the administrative law judge erred in finding them to be liable for the payment of benefits. The Director responds, asserting that employer and carrier cannot contest their liability for benefits, because they failed to timely challenge the district director's designation of employer and carrier as the liable parties in a Schedule for the Submission of Additional Evidence that was issued during the initial processing of claimant's claim. Alternatively, the Director maintains that the administrative law judge correctly determined that carrier could not

¹ In the same order, the administrative law judge awarded claimant's counsel an attorney's fee of \$5,380.00.

retroactively cancel its insurance policy, and that therefore, it is the responsible carrier and employer is the responsible operator. Claimant has not participated in this appeal.²

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

Employer and carrier challenge the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304.

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 that 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. *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*).

² We affirm the administrative law judge's finding regarding the attorney's fee, as this finding is not challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer and carrier contend that the administrative law judge erred in her consideration of the x-ray evidence pursuant to 20 C.F.R. §718.304(a). The administrative law judge considered five readings of three x-rays. Dr. Ahmed, a Board-certified radiologist and B reader, read the July 16, 1998 x-ray as positive for both simple pneumoconiosis and for category “A” large opacities. Claimant’s Exhibit 2. However, Dr. Binns, who is also a Board-certified radiologist and B reader, read the same x-ray as positive for simple pneumoconiosis only, and as category “O,” or negative, for any large opacities. Employer’s Exhibit 2. Dr. Patel, a Board-certified radiologist and B reader, read the February 10, 2003 x-ray as positive for both simple pneumoconiosis and for category A large opacities. Director’s Exhibit 16. Dr. Binns read the same x-ray as positive for simple pneumoconiosis only, and as negative for large opacities.³ Employer’s Exhibit 1. Dr. Zaldivar, a B reader, read the July 9, 2003 x-ray as negative for any pleural or parenchymal abnormalities consistent with pneumoconiosis. Director’s Exhibit 27. On the x-ray classification form, Dr. Zaldivar noted tuberculosis as an “other abnormality,” and he noted that claimant had tuberculosis in 1958. *Id.*

The administrative law judge stated that “at the outset,” she accorded “no weight” to Dr. Zaldivar’s negative reading of the July 9, 2003 x-ray, because Dr. Zaldivar had inappropriately considered a history of tuberculosis that was related to him by claimant, and then had “used it to interpret (and therefore discount) some of the opacities that he found.”⁴ Decision and Order at 10. The administrative law judge therefore rejected Dr. Zaldivar’s “purported” x-ray interpretation. *Id.* The administrative law judge also found that Dr. Zaldivar had “inferior credentials” to the other readers because he was not Board-certified in radiology. *Id.* Noting that the three remaining, equally-qualified readers disagreed as to whether the July 16, 1998 and February 10, 2003 x-rays reflected large opacities, the administrative law judge stated that “one person may always be mistaken, and two of the equally qualified readers agreed as to the size of the opacities found” Decision and Order at 10. The administrative law judge therefore determined that the x-ray evidence “weigh[ed] in favor” of complicated pneumoconiosis. *Id.*

Employer and carrier argue that the administrative law judge erred in discrediting Dr. Zaldivar’s x-ray interpretation. We agree. The administrative law judge erred in rejecting Dr. Zaldivar’s x-ray interpretation because the doctor noted claimant’s confirmed history of tuberculosis when he read claimant’s x-ray as revealing post-

³ Dr. Binns evaluated the same x-ray again on behalf of the Director, to assess the x-ray’s film quality only. Director’s Exhibit 18.

⁴ As summarized by the administrative law judge, the record reflects that claimant was treated for tuberculosis in 1958. Decision and Order at 4, 11, 13.

inflammatory changes of tuberculosis. *See Melnick*, 16 BLR at 1-37. The administrative law judge identified nothing in the record to indicate that Dr. Zaldivar's reading was based on anything other than his own interpretation of the x-ray. Thus, substantial evidence does not support the administrative law judge's finding that Dr. Zaldivar provided a "purported x-ray interpretation that does not qualify as such." Decision and Order at 10. Dr. Zaldivar's x-ray interpretation form indicates his opinion that the July 9, 2003 x-ray revealed no pleural or parenchymal abnormalities consistent with pneumoconiosis, but did reveal changes due to the previous tuberculosis. Director's Exhibit 27. Thus, his x-ray reading was relevant to whether complicated pneumoconiosis exists. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34.

Although the administrative law judge also noted that Dr. Zaldivar is not a Board-certified radiologist, the administrative law judge's erroneous characterization of his reading affected her analysis, and she did not explain why Dr. Zaldivar's lack of Board certification in radiology merited assigning his uncontradicted reading "no weight" whatsoever. *Cf. Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Therefore, we vacate the administrative law judge's finding pursuant to Section 718.304(a) and remand this case for further consideration of Dr. Zaldivar's x-ray reading.⁵

Employer and carrier challenge the administrative law judge's weighing of the remaining readings of the July 16, 1998 and February 10, 2003 x-rays by Drs. Ahmed, Binns, and Patel. As noted above, the administrative law judge stated that "taking into consideration that one person may always be mistaken, and two of the equally qualified readers agreed as to the size of the opacities found, I find the evidence to weigh in favor of a finding of complicated pneumoconiosis." Decision and Order at 10. In resolving the conflicting readings in this manner, the administrative law judge essentially resorted to a count of the experts interpreting the x-rays, contrary to *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Consequently, on remand, the administrative law judge should reconsider the x-ray readings, and fully explain her crediting and weighing of the evidence in compliance 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.

⁵ In considering Dr. Zaldivar's reading that noted lung changes of prior tuberculosis, the administrative law judge should also consider Dr. Binns's notation of "fibrotic changes secondary to old inflammatory disease." Employer's Exhibit 2; *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-34 (1991)(*en banc*).

§919(d) and 5 U.S.C. §554(c)(2).⁶ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered Dr. Rasmussen's opinion that claimant has complicated pneumoconiosis, Category A, and Dr. Zaldivar's opinion that claimant has no pneumoconiosis but has radiographic changes of old tuberculosis. Claimant's Exhibit 3; Director's Exhibit 27. The administrative law judge found that Dr. Rasmussen's opinion was better reasoned and documented because it was supported by the positive x-ray evidence, and because Dr. Rasmussen had relied on "an accurate and detailed history" of claimant's coal mine employment, smoking, and treatment for tuberculosis. Decision and Order at 12. By contrast, the administrative law judge found that Dr. Zaldivar's opinion was "unreasoned and undocumented" because it was based on "nothing more than the [c]laimant's history of treatment for tuberculosis" Decision and Order at 13.

Because we have vacated the administrative law judge's finding that the x-ray evidence supported a finding of complicated pneumoconiosis, we also vacate her finding as to the medical opinions at Section 718.304(c) and instruct her to reconsider the medical opinions on remand. Additionally, we agree with employer that the record reflects that Dr. Zaldivar also relied on claimant's history of coal mine employment, smoking, and treatment for tuberculosis. Director's Exhibit 27. Thus, on remand, the administrative law judge should reconsider the comparative quality of the reasoning and documentation of the conflicting opinions. 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).

Additionally, employer and carrier maintain that the administrative law judge erred in considering the credentials of Drs. Zaldivar and Rasmussen, noting that the record contains Dr. Zaldivar's credentials, but not Dr. Rasmussen's credentials. The administrative law judge stated that "although the credentials of Dr. Rasmussen are not of record, he appears on the list of physicians qualified to perform pulmonary examinations on behalf of the Department of Labor. I therefore find that both physicians are qualified and will not discredit Dr. Rasmussen because his c.v. is absent." Decision and Order at

⁶ In weighing the x-ray readings, the administrative law judge noted that Dr. Binns had identified coalescence of opacities on the x-ray, and she remarked that "coalescence [is] the process that leads to the formation of the large opacities characteristic of coal workers' pneumoconiosis." Decision and Order at 10. As the administrative law judge identified no medical testimony in the record to this effect, we agree with employer that the administrative law judge on remand should explain the basis for this statement. See *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

12. In the absence of Dr. Rasmussen's curriculum vitae, or other source of his qualifications, the administrative law judge's finding that Dr. Rasmussen is as qualified as Dr. Zaldivar is not supported by the record. Since the comparative qualifications of the physicians are relevant to the reliability of their opinions, the administrative law judge on remand should reconsider the physicians' respective qualifications. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341.

We now turn to employer's and carrier's assertions regarding liability for the payment of benefits. They argue that the administrative law judge erred in finding that carrier could not retroactively cancel its insurance policy. In response, the Director first argues that by failing to respond to the district director's liability determination in the Schedule for the Submission of Additional Evidence (SSAE), employer and carrier waived their right to challenge their liability in future proceedings. Second, the Director asserts that if employer and carrier can now challenge their liability, they were properly found liable for benefits on the ground that carrier could not retroactively cancel its insurance policy. We agree with the Director that employer's failure to timely challenge its designation as the responsible operator bars it from now challenging that designation.

The regulations provide that within thirty days of the district director's issuance of a SSAE, which "shall contain the district director's designation of a responsible operator liable for the payment of benefits," pursuant to 20 C.F.R. §725.410(a)(3), "that operator shall file a response with regard to its liability. The response shall specifically indicate whether the operator agrees or disagrees with the district director's designation." 20 C.F.R. §725.412(a)(1). Further, "If the responsible operator designated . . . does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim." 20 C.F.R. §725.412(a)(2). On May 2, 2003, the district director issued a SSAE designating employer as the responsible operator. Director's Exhibit 23. Consistent with 20 C.F.R. §725.412, employer was given until June 1, 2003 to accept or reject its designation as the responsible operator, and was advised that if it failed to respond, it would be deemed to have accepted the designation and to have waived its right to contest its liability in any further proceedings. *Id.* Employer did not respond regarding the responsible operator designation, but requested and was granted an extension to develop medical evidence. Director's Exhibit 25.

On these facts, we agree with the Director that employer cannot now contest its liability, as employer failed to contest the district director's designation as the responsible operator in the SSAE. Consequently, employer is foreclosed from challenging its liability, as it is deemed to have waived this issue by failing to timely respond to the district director's finding on this matter in the SSAE. 20 C.F.R. §725.412(a)(2); *see generally Weis v. Marfork Coal Co., Inc.*, 23 BLR 1-182, 1-188-89, n.8 (2006)(*en*

banc)(McGranery & Boggs, JJ., dissenting). On this ground, we affirm the administrative law judge's finding that employer was properly designated as the responsible operator. Consequently, we do not address the administrative law judge's conclusion that employer was properly designated as the responsible operator because carrier could not retroactively cancel its insurance policy.⁷

Accordingly, the administrative law judge's Decision and Order Granting Benefits and Decision and Order Granting Reconsideration are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁷ Because the identity of the responsible operator is no longer at issue, and the responsible operator is presumed to be financially capable of assuming liability, 20 C.F.R. §725.495(b), we decline to address at this time whether carrier was properly named as the responsible carrier.