BRB No. 07-0426 BLA

J. F. Claimant-Respondent v. FAITH COAL SALES, INCORPORATED and AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/29/2008 DECISION and ORDER

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

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer and carrier ("employer") appeal the Decision and Order – Award of Benefits (05-BLA-6075) of Administrative Law Judge Larry S. Merck 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). In his Decision and Order, the administrative law judge found the stipulation of the parties to twenty-six years of coal mine employment[1] to be supported by the record. The administrative law judge noted that employer had withdrawn the issue of whether claimant had pneumoconiosis, and he found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge 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.

On appeal, employer asserts that the administrative law judge erred in finding that the x-ray and CT scan evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a),(c). Claimant responds, urging the Board to affirm the award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief 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'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 that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable

[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] We affirm the administrative law judge's length of coal mine employment finding, and his findings that claimant has pneumoconiosis that arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (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 20 C.F.R. §718.304(a), employer contends that the administrative law judge erred in his evaluation of the x-ray evidence. The administrative law judge considered four x-ray interpretations. Dr. Grimes, whose qualifications are not in the record, read the February 12, 2003 x-ray as "compatible with ILO pneumoconiosis type ru, perfusion 3/3." Director's Exhibit 23. Dr. Baker, a B-reader, read the July 30, 2004 x-ray as positive for simple pneumoconiosis and category "B" large opacities.[3] Director's Exhibit 11. Dr. Dahhan, a B-reader, read the January 27, 2005 x-ray as positive for simple pneumoconiosis, and noted that no large opacities were present. Director's Exhibit 26 at 14. Dr. Buck, whose credentials are not contained in the record, read an x-ray dated February 6, 2006, as "consistent with complicated coal worker's pneumoconiosis," and "coal worker's pneumoconiosis with nodular interstitial changes in the upper lung fields and pleural and parenchymal scarring suggestive of complicated early progressive massive fibrosis." Claimant's Exhibit 2.

The administrative law judge found the July 30, 2004 x-ray to be positive for complicated pneumoconiosis, and the January 27, 2005 x-ray to be negative for complicated pneumoconiosis, since neither x-ray reading was contradicted. Decision and Order at 6-7. Turning to the February 6, 2006 x-ray, the administrative law judge stated that:

> Dr. Buck did not use the ILO-UICC classification system. However, considering that Dr. Buck is a Board-certified Radiologist[4] and that the x-ray was ordered for the purpose of determining the progression of Claimant's pneumoconiosis, I find that Dr. Buck's conclusion that the abnormalities on the x-ray film were consistent with and suggestive of complicated pneumoconiosis indicates that he decided that the size of the

[3] Dr. Barrett, a B-reader and Board-certified radiologist, evaluated the same x-ray to assess its quality. Director's Exhibit 12.

[4] The administrative law judge stated that he took official notice of the physicians' qualifications as listed on the website of the American Board of Medical Specialties. Decision and Order at 6 n.4.

> opacities met the minimum criteria to warrant a diagnosis of complicated pneumoconiosis. Accordingly, I find that Dr. Buck's interpretation is sufficiently detailed to be in substantial compliance with the regulations, notwithstanding the lack of an ILO-UICC classification.

Decision and Order at 8. Therefore, the administrative law judge found that the February 6, 2006 x-ray was positive for complicated pneumoconiosis. In considering the February 12, 2003 x-ray, the administrative law judge noted that Dr. Grimes's narrative report was "in substantial compliance with the . . . ILO-UICC classification system." Decision and Order at 9. However, the administrative law judge found that Dr. Grimes "d[id] not definitively describe the size of the opacities in a manner that allows for a determination of whether Claimant has or does not have complicated pneumoconiosis," because Dr. Grimes's "ru" designation denoted a size range of opacities "up to one centimeter in diameter, which could include opacities large enough to qualify for complicated pneumoconiosis." Decision and Order at 9. The administrative law judge accorded little weight to Dr. Grime's x-ray interpretation because Dr. Grimes's qualifications were unknown, and because his reading was inconclusive on the issue of complicated pneumoconiosis. *Id.*

The administrative law judge thus found two x-rays to be positive for complicated pneumoconiosis, one x-ray to be negative for complicated pneumoconiosis, and one x-ray to be inconclusive for complicated pneumoconiosis. Based on the preponderance of positive x-rays, the administrative law judge found that the x-ray evidence established the existence of complicated pneumoconiosis at Section 718.304(a). *Id.* at 9-10.

Employer contends that the administrative law judge erroneously relied on Dr. Buck's unclassified reading of the February 6, 2006 x-ray as evidence of complicated pneumoconiosis under 20 C.F.R. §718.304(a) Employer's Brief at 9 (unpaginated). We agree.

Under 20 C.F.R. §718.304(a), an x-ray reading must specifically diagnose "one or more large opacities (greater than 1 centimeter in diameter) . . . [which] would be classified in Category A, B, or C" in the ILO/U-C International Classification of x-rays to establish the existence of complicated pneumoconiosis. 20 C.F.R §718.304(a)(1). Accordingly, the applicable quality standard provides that "[a] chest X-ray to establish the existence of pneumoconiosis shall be classified as Category . . . A, B, or C . . . ." 20 C.F.R. §718.102(b). As employer argues, Dr. Buck did not diagnose large opacities greater than one centimeter in diameter classified as Category A, B, or C. Therefore, the administrative law judge erred in finding Dr. Buck's reading to be positive x-ray evidence of complicated pneumoconiosis under 20 C.F.R. §718.304(a).

That the administrative law judge found Dr. Buck's x-ray reading to be in substantial compliance and thus positive for complicated pneumoconiosis, based on comments to the revised regulations, does not alter the analysis. As noted, the applicable regulation mandates that an x-ray "shall be" classified as Category A, B, or C to establish complicated pneumoconiosis. 20 C.F.R. §718.102(b). Moreover, while the comments noted by the administrative law judge indicated that "[i]n some circumstances," an administrative law judge might find an unclassified x-ray to be in substantial compliance if it is sufficiently detailed, the specific example provided of this principle was that an unclassified x-ray describing "no pneumoconiosis" could properly be found negative for pneumoconiosis. 65 Fed.Reg. 79919, 79929 (Dec. 20, 2000). We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304(a), and remand this case for him to reconsider whether the x-ray evidence establishes the existence of complicated pneumoconiosis. *See Melnick*, 16 BLR at 1-33.

Employer also asserts that, contrary to the administrative law judge's finding, Dr. Grimes's x-ray interpretation is not "inconclusive on the issue of complicated pneumoconiosis." Decision and Order at 9. Dr. Grimes's x-ray interpretation diagnosing only simple pneumoconiosis is relevant to whether complicated pneumoconiosis exists. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Melnick*, 16 BLR at 1-33-34. Therefore, the administrative law judge on remand should reconsider Dr. Grimes's reading, in light of Dr. Grimes's credentials, if any. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

In light of the foregoing, we vacate the administrative law judge's finding that the x-ray evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and remand this case for further consideration of the x-ray evidence.[5]

Because the record contains no biopsy or autopsy evidence, the only other method by which claimant could establish the existence of complicated pneumoconiosis was with other evidence yielding results equivalent to either x-ray or biopsy/autopsy evidence. 20 C.F.R. §718.304(c); *see Gray*, 176 F.3d at 390; 21 BLR at 2-630.

Employer asserts that the administrative law judge erred in finding that a CT scan reading established the existence of complicated pneumoconiosis pursuant to 20 C.F.R.

[5] Employer also asserts that the administrative law judge erred by considering the CT scan evidence with the x-ray evidence pursuant to 20 C.F.R. §718.304(a). We reject this assertion, as a review of the Decision and Order indicates that the administrative law judge considered only the conventional x-ray evidence at 20 C.F.R. §718.304(a). Decision and Order at 6-10.

§718.304(c). Employer notes that under 20 C.F.R. §718.107(b), the party submitting a CT scan must demonstrate that it is medically acceptable and relevant to establishing or refuting a claim for benefits, and employer maintains that there is no evidence of record satisfying this requirement. Further, employer asserts that the CT scan does not support claimant's burden of establishing the existence of complicated pneumoconiosis, as it lacks a classification of a category A, B, or C opacity.

The record contains Dr. Tiu's interpretation of a January 27, 2005 CT scan. Dr. Tiu stated:

> Conglomerate massive fibrosis in both upper lobes is associated with multiple parenchymal and some pleural micronodules. Cluster of calcification within one of these conglomerate fibrosis was identified and is accompanied by the presence of several calcified right hilar and subcarinal lymph nodes. In addition, several micronodules were seen scattered in both lung fields. The largest of these rounded micronodules measures 1 cm and some of these nodules contain irregular central calcifications. There is also mild hyperaeration of both lung fields associated with multiple dilated bronchial airways predominantly seen in both lower lobes.

Claimant's Exhibit 1. Dr. Tiu's impression was "Finding compatible with complicating pneumoconiosis seen in conjunction with pulmonary emphysema and bronchiectasis." *Id.* Dr. Tiu also noted that there were several "scattered micronodules with irregular calcifications seen scattered in both lung fields, which probably represents multiple pulmonary granulomas, although one cannot fully exclude the possibility of pulmonary metastasis." *Id.*

The administrative law judge found that Dr. Tiu interpreted the January 27, 2005 CT scan as positive for complicated pneumoconiosis. The administrative law judge stated that because Dr. Tiu is "a highly qualified physician who interpreted the CT scan for the purpose of determining whether Claimant has pneumoconiosis, I find the CT scan to be in accord with acceptable medical procedures." Decision and Order at 10. The administrative law judge further found that "the equivalent diagnostic result of the CT scan is probative in establishing complicated pneumoconiosis under §718.304(c)." *Id.*

CT scans are "other medical evidence" under the provisions of 20 C.F.R. §718.107. Under Section 718.107(b), the party submitting the test or procedure must demonstrate that "the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). Thus, when a party seeks to admit a CT scan, the issue for an administrative law judge to consider, on a case-by-case basis, is whether that party has met these requirements. *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*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

As employer asserts, there is no evidence in the record addressing whether Dr. Tiu's CT scan reading satisfies the criteria in 20 C.F.R. §718.107(b).[6] Because we are remanding this case for further consideration, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304(c), and instruct the administrative law judge to initially consider whether claimant, as the party proffering the CT scan, has established its medical acceptability under 20 C.F.R. §718.107.

Employer also argues that Dr. Tiu's interpretation of the CT scan, even if admissible, cannot be considered evidence of complicated pneumoconiosis, because it lacks an "A, B, or C classification." Employer's Brief at 12 (unpaginated). We disagree. The absence of an A, B, or C classification, applicable to conventional x-rays, would not preclude the administrative law judge from considering Dr. Tiu's CT scan interpretation as a diagnosis by "other means" pursuant to 20 C.F.R. §718.304(c), if the administrative law judge explains his determination that it yields results equivalent to an x-ray or biopsy/autopsy diagnosis. *See* 20 C.F.R. §718.304(c); *Gray*, 176 F.3d at 390; 21 BLR at 2-630.

Finally, we note that on remand, the administrative law judge should reconsider the medical opinions addressing the existence of complicated pneumoconiosis when weighing the evidence pursuant to 20 C.F.R. §718.304(c). *Melnick*, 16 BLR at 1-34.

In sum, on remand the administrative law judge should determine the admissibility of claimant's CT scan under 20 C.F.R. §718.107(b). In considering the evidence on remand, the administrative law judge must first determine whether the evidence in each category at 20 C.F.R. §718.304(a) and (c) tends to establish the existence of complicated pneumoconiosis, and then weigh the evidence supportive of a finding of complicated pneumoconiosis against the contrary probative evidence, with the burden of proof remaining on claimant to establish the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Melnick*, 16 BLR at 1-33. If the administrative law judge finds that the

[6] At the hearing, when the CT scan was identified, claimant's counsel asked that it be considered "under the other medical evidence section under Section 718.107." Hearing Transcript at 7.

evidence does not establish the existence of complicated pneumoconiosis, then he must determine if the evidence of record establishes that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c).

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