BRB No. 13-0218 BLA

KENITH D. HURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIUM ENERGY, INCORPORATED	)	DATE ISSUED: 02/27/2014
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE CASUALTY	)	
	)	
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 Awarding Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly, PLLC) Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-05825) of Administrative Law Judge Stephen M. Reilly, rendered on a claim filed on June 1, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with at least twenty-five years of surface coal mine employment, and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge initially found that

claimant was entitled to the irrebuttable presumption at 20 C.F.R. §718.304, because the weight of the x-ray evidence, CT scans, digital x-rays, and medical opinions of Drs. Rasmussen and Baker established that claimant suffers from complicated pneumoconiosis. Based on the filing date of this claim, the administrative law judge also considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] Because the administrative law judge found that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant was entitled to invoke the amended Section 411(c)(4) presumption. The administrative law judge further found that employer failed to establish rebuttal of that presumption. The administrative law judge also determined that claimant established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that claimant has complicated pneumoconiosis. Employer contends that the administrative law judge did not rationally weigh the x-ray and CT scan evidence, that he mischaracterized Dr. Rasmussen's opinion, and erred in finding that the opinions of Drs. Rasmussen and Baker were reasoned and documented on all of the relevant medical issues in this case. Employer also argues that the administrative law judge did not provide a valid rationale for rejecting the opinions of Drs. Fino and Tuteur, that claimant's radiological findings and respiratory disability were the result of his radiation treatment for lymphoma and treatment for rheumatoid arthritis, but not coal dust exposure. In addition, employer contends that the administrative law judge erred in finding that employer did not rebut the amended Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to employer's 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 supported by substantial evidence, is rational, and is in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Accordingly, the Board will apply the law of the United States Court of

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. COMPLICATED PNEUMOCONIOSIS

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as 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, 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 introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke 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 of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered seven readings of three analog x-rays.[3] The August 11, 2009 x-ray was read by Dr. Rasmussen, a B reader, as positive for simple pneumoconiosis only, and by Dr. DePonte, dually qualified as a Board-certified radiologist and B reader,[4] as positive for simple and

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Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[3] One reading by Dr. Barrett of the August 11, 2009 x-ray was for quality purposes only. Director's Exhibit 16.

[4] A "Board-certified radiologist" is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology. A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R.

complicated pneumoconiosis, Category C. Director's Exhibits 15, 16. The September 29, 2009 x-ray was read by Dr. DePonte, as positive for simple and complicated pneumoconiosis, Category C, while Dr. Fino, a B reader, read the same x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibits, 19, 20. The July 20, 2011 x-ray was also read as positive for simple and complicated pneumoconiosis, Category C, by Dr. DePonte, but as negative by Dr. Fino. Claimant's Exhibit 2; Employer's Exhibit 9.

The administrative law judge concluded that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), based on Dr. DePonte's positive readings. Decision and Order at 4. Employer asserts that the administrative law judge should have credited Dr. Fino's interpretations over those of Dr. DePonte because Dr. Fino had a full understanding of claimant's medical history. Contrary to employer's argument, however, the administrative law judge permissibly assigned controlling weight to Dr. DePonte's readings, based on the fact that she is a dually qualified radiologist, whereas Dr. Fino is not a radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Melnick*, 16 BLR at 1-37; Decision and Order at 4. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Relevant to 20 C.F.R. §718.304(c),[5] the administrative law judge considered the digital x-ray, CT scan and medical opinion evidence. The record contains five interpretations of two digital x-rays. The October 17, 2009 digital x-ray was read by Dr. Meyer, a dually qualified radiologist, as positive for simple pneumoconiosis, and by Dr. DePonte as positive for simple and complicated pneumoconiosis, Category C. *See* Claimant's Exhibit 8; Employer's Exhibit 3. The December 16, 2009 digital x-ray was read as negative for simple and complicated pneumoconiosis by Dr. Fino,[6] whereas Drs.

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§718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[5] There is no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

[6] Dr. Fino identified a "large area of infiltrate and/or mass lesion measuring about 10 [centimeters] x 5 [centimeters]" and a smaller lesion measuring "4 [centimeters] x 3 [centimeters]." Director's Exhibit 18.

Alexander and DePonte each read the x-ray as positive for both simple and complicated pneumoconiosis.[7] *See* Director's Exhibit 18; Claimant's Exhibits 1, 9.

The record also contains eight interpretations of four CT scans, dated September 11, 2003, July 21, 2005, September 13, 2006, and September 21, 2006. The September 11, 2003 CT scan was interpreted by Dr. Fino as normal, without evidence of either simple or complicated pneumoconiosis. Director's Exhibit 19. Dr. DePonte interpreted the scan as showing "mild fine nodular interstitial lung disease," and made a differential diagnosis of pneumoconiosis. Claimant's Exhibit 4. Dr. Fino interpreted the July 21, 2005, September 13, 2006, and September 21, 2006 CT scans as demonstrating bilateral hilar radiation fibrosis consistent with "lymphoma and treatment for lymphoma," as opposed to coal dust-related changes. Director's Exhibit 19. In contrast, Dr. DePonte interpreted each of the scans as showing small nodules in all lung zones, ranging from one to three millimeters, a large opacity of five by six centimeters in the right upper lobe, and a four by five centimeter density in the left upper lobe. Claimant's Exhibits 5, 6, 7. Dr. DePonte stated that the opacities were consistent with complicated pneumoconiosis and "would appear nearly equivalent in size on a plain chest film." *Id.*

The administrative law judge found that the "digital x-ray evidence as a whole" supports a finding of complicated pneumoconiosis, as one x-ray is in equipoise and one is positive for the disease. Decision and Order at 11. With regard to the CT scan evidence, the administrative law judge assigned greater weight to Dr. DePonte's positive readings, over the negative readings by Dr. Fino. Initially, although employer argues that Dr. Fino's CT scan readings are more credible,[8] we consider this argument to be a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We conclude that the administrative law judge acted within his discretion in resolving the conflict in the CT scan evidence, based on the superior radiological credentials of Dr. DePonte, in comparison to Dr. Fino. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Melnick*, 16 BLR at 1-37; Decision and Order at 10.

[7] Dr. DePonte found complicated pneumoconiosis, Category C, but Dr. Alexander found Category A, and noted that cancer was also possible. Claimant's Exhibits 1, 9.

[8] Employer argues that Dr. DePonte's readings are less credible because she did not know about claimant's work or medical histories at the time her readings were conducted. However, the record reflects that Dr. DePonte was deposed in this case and did not change her opinion that claimant has complicated pneumoconiosis after being informed of claimant's coal mine work history and his treatment for lymphoma. Employer's Exhibit 11.

However, with regard to the digital x-ray evidence, employer asserts that because neither Dr. Alexander nor Dr. DePonte specifically stated that the masses they identified on the digital x-rays "would appear larger than one centimeter and be classified as either Category A, B, or C *on a standard chest x-ray film*," the digital x-ray readings do not constitute "legally sufficient evidence" to establish that claimant has complicated pneumoconiosis. Employer's Brief in Support of Petition for Review at 38. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge must make the necessary equivalency determination to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *See Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999); *see also Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 364, 23 BLR 2-374, 2-384 (4th Cir. 2006). Because the administrative law judge has not made the necessary equivalency determination with regard to the digital x-ray evidence, we are unable to affirm his finding that the digital x-ray evidence supports a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

Furthermore, with regard to the medical opinion evidence, we agree with employer that the administrative law judge's findings do not satisfy the Administrative Procedure Act.[9] The administrative law judge weighed four medical opinions relevant to whether claimant has complicated pneumoconiosis. Dr. Rasmussen performed the Department of Labor examination on August 12, 2009, and diagnosed simple coal workers' pneumoconiosis, based on his own x-ray reading and claimant's work history. Director's Exhibit 15. Dr. Rasmussen observed a mass on the x-ray and noted the "possibility" of complicated pneumoconiosis. *Id*. Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD) and rheumatoid arthritis. He opined that claimant had a "very severe" respiratory impairment, based on the results of the pulmonary function studies, and a gas exchange impairment on light exercise, as demonstrated by the arterial blood gas studies. *Id*. Dr. Rasmussen attributed claimant's disabling lung disease to a combination of the effects of radiation and his coal dust exposure. *Id*.

Dr. Baker examined claimant and prepared a report on July 20, 2011, wherein he diagnosed simple and complicated pneumoconiosis, based on claimant's history of coal dust exposure and the x-ray readings by Dr. DePonte. Claimant's Exhibit 2. Dr. Baker opined that the pulmonary function and arterial blood gas studies showed a severe

[9] 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), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

respiratory impairment, which he attributed, in significant part, to coal dust exposure. *Id*. In a deposition conducted on August 16, 2011, Dr. Baker stated that he could not entirely exclude the possibility that claimant's radiological findings were caused by lymphoma and rheumatoid arthritis, in the absence of a biopsy. Employer's Exhibit 8. However, Dr. Baker opined that claimant's bilateral radiographic changes were more consistent with complicated pneumoconiosis. *Id*.

Dr. Fino examined claimant on December 16, 2009. In a report dated December 30, 2009. Dr. Fino opined that claimant did not have simple or complicated pneumoconiosis, but diagnosed "bilateral lung fibrosis consistent with post-radiation treatment" and "a combined fibrotic and obstructive abnormality," which would disable claimant from his usual coal mine work. Director's Exhibit 19. In a deposition conducted on August 16, 2011, Dr. Fino explained that his opinion was based on his analysis of the radiographic evidence, over time, in conjunction with the timing of claimant's lymphoma treatment. Employer's Exhibit 12. Dr. Fino noted that claimant's September 11, 2003 CT scan was normal, but the July 21, 2005, September 13, 2006, and September 21, 2006 CT scans were "very abnormal." *Id*. Dr. Fino testified that this progression suggested "too-rapid [an] onset for coal-dust related disease," but was consistent with the fact that claimant was diagnosed with lymphoma in September of 2003 and underwent treatment thereafter. *Id*.

Dr. Tuteur performed a consultative review of the medical record. Employer's Exhibit 6. In a report dated January 28, 2011, Dr. Tuteur opined that claimant did not have simple or complicated pneumoconiosis, and also opined that claimant did not have any respiratory condition that would satisfy the definition of legal pneumoconiosis. *Id*. Dr. Tuteur identified multiple causes for claimant's disabling respiratory condition, including pulmonary fibrosis associated with claimant's lymphoma treatment, coronary artery disease, obstructive sleep apnea, claimant's weight, and medications for the treatment of rheumatoid arthritis, which he described as having serious pulmonary side effects. *Id* Dr. Tuteur testified that claimant's radiological findings were distinguished from complicated pneumoconiosis, insofar as progressive massive fibrosis due to coal dust exposure starts in the upper lobes and does not go out from the hilum and mediastinum, as presented in this case. Employer's Exhibit 10.

In resolving the conflict in the medical opinion evidence, the administrative law judge stated:

> Even though Dr. Rasmussen found findings consistent with complicated pneumoconiosis, but he did not specifically diagnose complicated pneumoconiosis, I find this sufficient to find that [claimant] had complicated pneumoconiosis.

Decision and Order at 17. The administrative law judge found that claimant established the existence of complicated pneumoconiosis, based on the opinions of Drs. Rasmussen and Baker, which he described as "consistent with the objective medical evidence," including the x-rays, CT Scans, digital x-rays and medical records. Decision and Order at 16. Conversely, the administrative law judge rejected the contrary opinions of Drs. Fino and Tuteur because "they do not explain how [claimant's] fibrosis related to lymphoma progressed after his radiation was completed." *Id*. at 16. The administrative law judge noted Dr. Tuteur's explanation that "changes in the lungs related to radiation would stabilize after the healing process from radiation was completed." *Id*. He found that Dr. Tuteur "failed to account for the progression of [claimant's] large opacities as reflected by radiological evidence after radiation had been completed." *Id*. Similarly, the administrative law judge found that Dr. Fino did not explain why claimant "demonstrated a worsening radiological picture," after cessation of his radiation treatment. *Id*.

We agree with employer that the administrative law judge has failed to rationally explain how Dr. Rasmussen's opinion supports a finding of complicated pneumoconiosis, since Dr. Rasmussen did not diagnose complicated pneumoconiosis and noted only that it was a "possibility." *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). There is also merit to employer's assertion that the administrative law judge's credibility findings with regard to Drs. Fino and Tuteur are "premised on a false assumption – that the radiological evidence revealed a progression of fibrosis throughout the years following [claimant's] lymphoma radiation treatment, which occurred in 2004." Employer's Brief in Support of Petition for Review at 18. Employer asserts that the only radiological progression occurred from the time claimant was first diagnosed with lymphoma, and no radiographic abnormalities, until he ended his treatment in 2004, and "masses or complicated pneumoconiosis like readings first entered the record." *Id*. Employer further argues that Dr. DePonte's readings, which were credited by the administrative law judge, do not support the administrative law judge's theory of progression:

> When interpreting a CT scan taken before the radiation treatment, Dr. DePonte did not diagnose complicated pneumoconiosis. . . . [I]n her review of the CT scans taken post-radiation treatment, Dr. DePonte consistently reports a right opacity measuring five by six [centimeters] and a left opacity measuring four to five [centimeters]. Dr. DePonte thus never describes a worsening or progressing radiological picture following the cessation of the radiation treatment.

Id. at 19 (citations and footnote omitted).

Because the administrative law judge did not identify the evidence in the record that supports his conclusion that claimant's radiological findings continued to progress after

the radiation treatment ended, we are unable to affirm the administrative law judge's decision to accord little weight to the opinions of Drs. Fino and Tuteur, based on the rationale he provided. *See Wojtowicz*, 12 BLR at 1-165. Consequently, we must vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). We also must vacate the administrative law judge's overall finding that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and remand this case for further consideration.

II. REBUTTAL OF THE AMENDED SECTION 411(c)(4) PRESUMPTION

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by establishing that claimant does not have clinical or legal pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment.[10] *See* 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). The administrative law judge stated that he gave less weight to the opinions of Drs. Fino and Tuteur, on the issues of the existence of legal pneumoconiosis and disability causation, as they are "not consistent with the objective medical data," which "demonstrates complicated pneumoconiosis." Decision and Order at 19. To the extent that the administrative law judge's credibility findings with regard to Drs. Fino and Tuteur were dependent on his determination that claimant has complicated pneumoconiosis, which we have vacated, we must also vacate the administrative law judge's finding that employer failed to rebut the presumption at amended Section 411(c)(4). We therefore remand this case for further consideration of this issue, if claimant does not establish entitlement to benefits pursuant to 20 C.F.R. §718.304.

III. REMAND INSTRUCTIONS

On remand, the administrative law judge must reconsider the medical opinion evidence and determine whether each physician has provided a reasoned and documented opinion on all of the relevant medical issues presented in this case. The administrative law judge must weigh all of the relevant evidence together in determining whether claimant has complicated pneumoconiosis, prior to finding that he is entitled to the irrebuttable presumption at 20 C.F.R. §718.304. As necessary, the administrative law judge must also reconsider the medical opinion evidence and determine whether

[10] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the presumption at amended Section 411(c)(4). Decision and Order at 21; s*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

employer has established rebuttal of the amended Section 411(c)(4) presumption. In rendering his findings on remand, the administrative law judge must explain the basis for his findings in accordance with the APA.

Accordingly, the Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded 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