BRB No. 07-0329 BLA

C.E.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/31/2008
	)	
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler and Associates), Princeton, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly P.L.L.C.), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2003-BLA-06661) of Administrative Law Judge Daniel F. Solomon on a subsequent 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). The administrative law judge credited claimant with twenty-seven years of coal mine employment and adjudicated this subsequent claim, filed on September 6, 2001, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's original claim, filed on September 25, 1997, was administratively denied on January 28, 1998, for failure to establish that claimant was totally disabled due to pneumoconiosis. The administrative

law judge found that the weight of the newly submitted evidence was sufficient to establish the existence of both simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1), (4), 718.203(b), and invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c). The administrative law judge thus found that claimant had established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and was entitled to benefits.

On appeal, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established at Section 718.304(a), (c). Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs, has chosen not to participate in this appeal.[1]

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.[2] 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)(A) of the Act, 30 U.S.C. §921(c)(3)(A), 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 or autopsy, 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)(A); 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 found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment and his finding that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *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*). Additionally, 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 Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F. 3d 250, 255, 22 BLR 2-93, 2-100 (4th 2000); *Double B Mining, Inc. v. Blankenship*, 177 F. 3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Pursuant to Section 718.304(a), employer contends that the administrative law judge did not resolve the conflicting x-ray evidence in finding complicated pneumoconiosis established. Specifically, employer alleges that the administrative law judge failed to properly consider the credentials of the x-ray readers, and failed to provide a valid rationale for crediting Dr. Patel's Category B interpretation over the remaining x-ray interpretations of record that were uniformly negative for complicated pneumoconiosis.[3] Employer's contentions have merit.

In evaluating the x-ray evidence at Section 718.304(a), the administrative law judge acknowledged employer's assertion that Drs. Scott and Scatarige,[4] as professors of radiology at Johns Hopkins University, were the best qualified readers, but determined that the record "shows the presence of a large mass, on x-ray and on CT scan….[i]f Dr. Patel is to be credited as to composition and to size, the reading will qualify [as a

[3] The evidence at 20 C.F.R. §718.304(a) consists of four readings of two chest x-rays. The October 29, 2001 x-ray was read by Dr. Patel, a dually qualified reader, as 3/2 with category B sized opacities, and as 2/2 with no large opacities by Dr. Scott, a dually qualified reader and professor of radiology at John Hopkins University. Director's Exhibit 17; Employer's Exhibit 2. The October 28, 2002 x-ray was read by Dr. Smith, a dually qualified reader and professor of radiology at West Virginia University and the University of Charleston, as 3/2 positive for pneumoconiosis with no large opacities, and by Dr. Castle, a B reader, as 3/2 positive for pneumoconiosis with no large opacities. Employer's Exhibits 1, 2.

[4] Employer had initially submitted an x-ray reading by Dr. Scatarige that was excluded from the record because it exceeded the evidentiary limitations at 20 C.F.R. §725.414. Thus, Dr. Scatarige's qualifications are pertinent only to the administrative law judge's weighing of the CT scan evidence.

diagnosis of complicated pneumoconiosis]." Decision and Order at 8. The administrative law judge then credited the opinion of Dr. Patel over the contrary opinions of the other three x-ray readers because he found that Dr. Patel's interpretation of the October 29, 2001 film was "the only x-ray evidence completely consistent with Dr. Groten's opinion [that the February 2, 2006 and May 16, 2006 computerized tomography (CT) scan findings were consistent with complicated pneumoconiosis]," and "the other readings… are less consistent with the rest of the record." Decision and Order at 9. The administrative law judge, however, did not clarify why consistency with Dr. Groten's CT scan findings of complicated pneumoconiosis entitled the x-ray interpretation of Dr. Patel to greater weight. Rather, the administrative law judge engaged in circular reasoning by crediting Dr. Groten's CT scan interpretations, despite Dr. Groten's failure to set forth either an equivalency analysis or the dimensions of any large opacities observed, *see* Claimant's Exhibits 1, 2, on the ground that "the only x-ray evidence completely consistent with Dr. Groten's opinion is Dr. Patel's reading and he determined requisite size on x-ray." Decision and Order at 9. The administrative law judge also failed to identify how the other x-ray interpretations were "less consistent with the rest of the record," when, as employer notes, they are consistent with each other, as well as with the medical opinions of Drs. Crisalli and Castle, and the objective evidence of record that demonstrates no respiratory impairment. *See* Employer's Brief at 10. As the administrative law judge did not provide valid reasons for his credibility determinations, we vacate his findings at Section 718.304(a), and remand this case for the administrative law judge to reassess the x-ray evidence of record, and to provide a full discussion and rationale for his findings, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201(1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Island Creek Coal Co. v. Compton*, 211 F.2d 203, 22 BLR 2-162 (4th Cir. 2000); *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34.

Employer additionally maintains that the administrative law judge failed to address all relevant evidence and provide valid reasons for his weighing of the CT scan evidence[5] and the medical opinions at Section 718.304(c).[6] We agree. As previously

[5] Drs. Groten and Scatarige each interpreted the two CT scans of record, obtained on February 2, 2006 and May 16, 2006. Claimant's Exhibits 1, 2; Employer's Exhibits 13, 14.

[6] The medical opinion evidence relevant to Section 718.304(c) consists of the October 29, 2001 medical report of Dr. Porterfield, the December 17, 2002 report and June 24, 2004 deposition testimony of Dr. Crisalli, and the October 28, 2003 report and

discussed, the administrative law judge improperly credited Dr. Groten's two CT scan reports, that merely noted "findings consistent with complicated coal worker's [sic] pneumoconiosis" without providing any measurements of the abnormalities observed, based on their consistency with Dr. Patel's x-ray interpretation of Category B large opacities. Decision and Order at 9. While Dr. Scatarige observed abnormalities of up to five centimeters on the two CT scans,[7] the administrative law judge discounted Dr. Scatarige's differential diagnoses of "TB, non-TB mycobacterium infection, histoplasmosis, and sarcoidosis" on the grounds that the physician did not diagnose simple pneumoconiosis, contrary to the administrative law judge's findings, and failed to consider whether any of his diagnoses constituted legal pneumoconiosis as defined at 20 C.F.R. §718.201, when the administrative law judge noted that silico-tuberculosis is among the possible forms of legal pneumoconiosis. Decision and Order at 7-9; Employer's Exhibits 13, 14. Employer correctly maintains, however, that in considering the opinion of Dr. Scatarige, the administrative law judge has impermissibly shifted the burden of proof in requiring employer to rule out the presence of legal pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280, 18 BLR 2A-1 (1994). Further, the administrative law judge failed to adequately consider the other evidence of record that corroborated Dr. Scatarige's CT scan findings. Specifically, the administrative law judge did not acknowledge that Dr. Scott's x-ray reading noted the possibility of tuberculosis, nor did the administrative law judge discuss the testimony of Drs. Crisalli and Castle, Board-certified internists, that detailed their reasons for concluding that complicated pneumoconiosis was not present, while noting evidence of granulomatous disease. *See* Employer's Exhibits 1, 2, 3, 8, 9. Rather, the administrative law judge summarily gave less weight to the opinions of Drs. Castle[8] and Crisalli and gave "greatest weight to Dr. Groten as a [B]oard[-]certified radiologist and to Dr. Patel as a dually qualified B reader than to the internists as to whether complicated

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July 12, 2004 deposition testimony of Dr. Castle. Director's Exhibit 13; Employer's Exhibits 1, 3, 4, 8.

[7] Dr. Scatarige's findings on the two CT scans included "5 cm irregular central mass/consolidation in RUL and 4 cm irregular central mass/consolidation in LUL with smaller apical and mid-lung nodules and some adjacent ground glass opacities….[t]he process extends to the pleura and there is a 2 cm subcarinal lymph node." Employer's Exhibits 13, 14. Dr. Scatarige observed "[n]o small, symmetrical, central, round opacities to suggest CWP/silicosis." *Id*.

[8] The administrative law judge additionally discounted the opinion of Dr. Castle on the ground that "he merely performed a record review and relied in large part on evidence that is not used in my evaluation under 20 C.F.R. §725.414." Decision and Order at 9. Dr. Castle, however, also interpreted the October 28, 2002 x-ray as a B reader.

pneumoconiosis exists," Decision and Order at 9, without explaining why the comparative credentials of the physicians rendered them more or less competent to determine the presence or absence of complicated pneumoconiosis. As the administrative law judge's analysis at Section 718.304(c) was affected by his improper consideration of the conflicting x-ray evidence pursuant to Section 718.304(a), and did not comport with the requirements of the APA, we vacate the administrative law judge's findings at Section 718.304(c).

On remand, the administrative law judge must fully explain his credibility determinations and consider whether the weight of the x-ray evidence at Section 718.304(a), and the weight of the CT scan and medical opinion evidence at Section 718.304(c), support a finding of the existence of complicated pneumoconiosis. *Scarbro*, 220 F. 3d 250, 22 BLR 2-93; *Blankenship*, 177 F.3d 240, 22 BLR 2-554. The administrative law judge should then weigh together all of the relevant evidence to determine whether the existence of complicated pneumoconiosis is established.[9] *See Compton*, 211 F.2d 203, 22 BLR 2-162; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306 (2003).

[9] As the administrative law judge's finding of a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) was based upon his finding of complicated pneumoconiosis, the administrative law judge must render additional findings under 20 C.F.R. §725.309(d) if, on remand, he finds that complicated pneumoconiosis is not established.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and 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