BRB No. 07-0401 BLA

K.W.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANADA COAL CORPORATION	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE GROUP	)	DATE ISSUED: 01/29/2008
	)	
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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

J. Lawson Johnston (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-5958) of Administrative Law Judge William S. Colwell awarding benefits 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 a Decision and Order dated December 29, 2006, the

administrative law judge credited claimant with fifteen and one-half years of coal mine employment[1] and found that the biopsy and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). The administrative law judge further determined that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to the presumption found at 20 C.F.R §718.203(b). Additionally, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis arising out of coal mine employment, and was, therefore, sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Decision and Order at 15-16. The administrative law judge, therefore, found that even though the evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), claimant nevertheless established entitlement to benefits because he had established that he was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Decision and Order at 18-19. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established entitlement to benefits through invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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).

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

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, the finding that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), and the determination that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, creates an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis if (A) an x-ray of the miner's lungs shows at least one opacity greater than one centimeter in diameter; (B) a biopsy reveals "massive lesions" in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B). In *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, stated that although the clauses in (A), (B), and (C), provide three different ways to establish the existence of complicated pneumoconiosis for purposes of invoking the irrebuttable presumption, the clauses were intended to describe a single, objective condition. Thus, the court held that, in applying the standards 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 an 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. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999). In addition, in determining whether complicated pneumoconiosis has been established, the administrative law judge must, in every case, review the evidence under each prong, and consider all of the relevant evidence presented. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *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*).

In finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 in this case, the administrative law judge found that there was no x-ray evidence of complicated pneumoconiosis. Decision and Order at 15. Turning to the computerized tomography (CT) scan and biopsy evidence, the administrative law judge found that while a September 28, 2000 CT scan revealed no evidence of a hilar mass lesion, a CT scan dated October 30, 2003 revealed a mass measuring 2 cm x 2 cm x 1.5 cm in claimant's right lung, which was seen as largely unchanged on subsequent scans dated March 26, 2004, and May 20, 2005. Decision and Order at 8, 15; Claimant's Exhibits 3, 5.

The administrative law judge found that Dr. Coburn, the radiologist who interpreted the May 20, 2005 CT scan, initially opined that the nodule was not typical for pneumoconiosis, but, after reviewing the biopsy report of the lesion,[3] amended his opinion to conclude that the nodule represented "[p]rogressive massive fibrosis which is atypical but by biopsy is associated with the patient's pneumoconiosis."[4] Decision and Order at 15; Claimant's Exhibit 4. The administrative law judge further found that, by contrast, Dr. Oesterling, a Board-certified pathologist, had reviewed the surgical biopsy report and the digital photomicrographs and opined that, while the biopsy revealed evidence of moderate, macular coal workers' pneumoconiosis, a low-level form of simple pneumoconiosis, it did not support a diagnosis of complicated pneumoconiosis, because the sample was devoid of collagen, the scar tissue resulting from the fibrotic response associated with complicated pneumoconiosis. Decision and Order at 15; Employer's Exhibit 5 at 22-23, 25-6, 46-48.

[3] Claimant underwent a fine needle aspiration and core biopsy on November 6, 2003, performed by Dr. Grimes. Dr. Grimes listed his core biopsy diagnosis as "[f]ocal fibrosis associated with abundant carbonaceous debris" with "[n]o microscopic evidence of malignancy." Director's Exhibit 13. Dr. Grimes commented that the microscopic findings "raise[d] the concern of localized pulmonary fibrosis secondary to occupational exposure, (possibly coal worker's pneumoconiosis if the clinical history is concordant.)" *Id.* In his accompanying cytopathology report, Dr. Grimes listed his impression of the fine needle aspiration as: "Non-diagnostic aspirate: few benign epithelial cells, numerous macrophages containing carbonaceous, particulate material." *Id.* Dr. Grimes commented that the cytologic findings by themselves were non-diagnostic, but correlated with the needle core biopsy results in that "[s]ome of the macrophages contain carbonaceous material with polarizable debris, raising the concern of a lesion resulting from occupational, mixed dust exposure." *Id.*

[4] Specifically, following his initial review of the May 20, 2005 computerized tomography (CT) scan, Dr. Coburn stated: "There is a suggestion that the nodule is from coal workers' pneumoconiosis. This is not typical for progressive massive fibrosis or coalescence. There is not a background of interstitial changes associated with the lesion or retraction into the lesion or bleb formation along the margins." Claimant's Exhibit 4. However, in a May 23, 2005 addendum to his report, Dr. Coburn stated that he had learned that a November 6, 2003 biopsy of the right lung lesion had "demonstrated a definite pneumoconiosis" and concluded that while he had earlier "suggested that this was not a typical finding for pneumoconiosis . . . this does indeed represent changes from pneumoconiosis with progressive massive fibrosis." *Id.*

Weighing the opinions of Drs. Coburn and Oesterling, which he determined to be the most probative evidence as to the existence of complicated pneumoconiosis,[5] the administrative law judge found that while Dr. Oesterling had explained why, despite the size of the nodule and the biopsy evidence of coal workers' pneumoconiosis, he believed the biopsy sample did not support a diagnosis of complicated pneumoconiosis from a medical or pathological standpoint, he failed to address whether the lesion met the statutory definition of the disease. Decision and Order at 16. By contrast, the administrative law judge found that Dr. Coburn's opinion "confirmed, by CT scan, the presence of a large mass greater than one centimeter in diameter," that, when biopsied, was found to be coal worker's pneumoconiosis. *Id.* The administrative law judge accorded the greatest weight to the opinion of Dr. Coburn, finding his reasoning and conclusion to be more persuasive than that of Dr. Oesterling, and concluded that the biopsy and CT scan evidence established the existence of complicated pneumoconiosis, and that claimant was therefore entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *Id.*

Employer contends that the administrative law judge's finding of complicated pneumoconiosis is not supported by substantial evidence. Specifically, employer contends that the administrative law judge erred in relying solely on Dr. Coburn's CT scan report, as supported by the biopsy, to find that claimant had established the existence of complicated pneumoconiosis, without making the requisite equivalency determination. Employer's Brief at 11; Employer's Reply Brief at 2-3. We agree. The burden rests with claimant to present medical evidence showing that the two centimeter mass seen on the May 20, 2005 CT scan, and identified by Dr. Coburn as representing progressive massive fibrosis associated with pneumoconiosis, would equate to a greater than one centimeter opacity if seen on x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In this case, while the administrative law judge rejected Dr. Oesterling's opinion that claimant did not have complicated pneumoconiosis,

[5] The administrative law judge found that Drs. Smiddy, Rasmussen, and Thakkar had also offered opinions regarding the results of the CT scans and the biopsy, but he accorded their opinions diminished weight because there was no indication that they had personally reviewed either the CT scans or the biopsy tissue. Decision and Order at 15. Specifically, Dr. Smiddy opined, in a letter to claimant, that the biopsy represented complicated pneumoconiosis; Dr. Rasmussen diagnosed complicated pneumoconiosis based on the biopsy report, CT scans, x-ray evidence and claimant's coal mine employment history; and Dr. Thakkar diagnosed advanced coal worker's pneumoconiosis, but did not identify the coal workers' pneumoconiosis as "complicated pneumoconiosis." Decision and Order at 15.

the administrative law judge did not discus the medical evidence, if any, that established that the mass seen by Dr. Coburn on CT scan, and found to be pneumoconiosis on biopsy, would equate to a greater than one centimeter opacity on x-ray. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236 (2003) (Gabauer, J., concurring). Furthermore, as employer contends, the administrative law judge's discrediting of Dr. Oesterling's opinion, on the ground that Dr. Oesterling failed to address whether the lung lesion would meet the statutory definition of complicated pneumoconiosis, was not rational in light of the administrative law judge's earlier finding that "[Dr. Oesterling] testified that the maximum dimension of either of the two cores of tissue was less than a centimeter so the diagnosis of complicated pneumoconiosis could not be made based on size alone . . . ." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 9, 16; Employer's Brief at 9; Employer's Exhibit 5 at 22-23.

Accordingly, we vacate the administrative law judge's finding that the biopsy and CT scan evidence established complicated pneumoconiosis, and remand the case to the administrative law judge for further consideration of all of the medical evidence, and to determine whether there is medical evidence that supports an equivalency determination. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561 The administrative law judge must sufficiently discuss the evidence and his reasons for crediting it or discrediting it pursuant to the requirements of 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). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

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

_____
JUDITH S. BOGGS
Administrative Appeals Judge