BRB No. 02-0719 BLA

DOUGLAS L. STACY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 07/18/2003
	)	
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 Awarding Benefits on Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC) Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification (99-BLA-1062) of Administrative Law Judge Linda S. Chapman 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).[1] The administrative law judge

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations

found that the claim[2] was timely filed pursuant to 20 C.F.R. ' 725.308, and that the evidence of record established a coal mine employment history of twenty-three years. In addition, the administrative law judge found that claimant was unable to establish a mistake in the prior determination of fact, but that the evidence, as a whole, established the presence of complicated pneumoconiosis thus entitling claimant to the irrebutable presumption of total disability due to pneumoconiosis at Section 411(c) of the Act, 30 U.S.C. ' 921(c)(3), as implemented by 20 C.F.R. ' 718.304. Accordingly, benefits were awarded. The administrative law judge further determined that benefits should commence on March 1, 1998, the first day of the month in which complicated pneumoconiosis was first diagnosed.

On appeal, employer contends that the administrative law judge erred in concluding that claimant established the existence of complicated pneumoconiosis because the administrative law judge failed to properly weigh all of the relevant evidence; address the newly submitted evidence in conjunction with the previously submitted evidence; properly determine whether claimant established a change in conditions subsequent to the prior denial; and make a specific inquiry as to whether modification in the instant case would be in the Ainterest of justice.@ Employer also asserts that the administrative law judge erred in determining that benefits should commence on March 1, 1998 since there was no evidence supporting that determination. Claimant, in response, urges affirmance of the award of benefits. The Director, Office of Workers= Compensation Programs (the Director), has not filed a brief in this appeal.[3]

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to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed a claim for benefits on April 29, 1996. Director=s Exhibit 1. On July 3, 1997 Administrative Law Judge Lee J. Romero issued a Decision and Order denying benefits because claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director=s Exhibit 46. Subsequent to an appeal by claimant, the Board issued a Decision and Order affirming the denial of benefits. *Stacy v. Dominion Coal Co.*, BRB No. 97-1592 BLR (Aug. 18, 1998)(unpub.). Subsequently, claimant submitted additional medical evidence, which was found by the district director to constitute a request for modification. Director=s Exhibit 52. The district director denied the request for modification. Director=s Exhibit 58. Claimant submitted additional evidence, and sought a hearing on modification. Director=s Exhibits 59, 60. Subsequent to the hearing, Administrative Law Judge Linda S. Chapman issued the Decision and Order awarding benefits from which employer now appeals.

[3] We affirm, as unchallenged on appeal, the administrative law judge=s length of coal mine employment determination as well as the finding that the claim was timely filed pursuant to Section 725.308. *See Skrack v. Island Creek Coal. Co.*, 6 BLR 1-710 (1983). For the same reason, we also affirm the administrative law judge=s determination that there was no mistake in the prior determination that claimant failed to establish the

existence of pneumoconiosis or that his totally disabling respiratory impairment was due to pneumoconiosis. *Id.* Further, we note that since the record demonstrates that claimant=s most recent coal mine employment took place was in Virginia, Director=s Exhibit 2, the applicable law in this case is that of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. '921(b)(3), as incorporated into the Act by 30 U.S.C. '932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that the administrative law judge failed to consider all the evidence of record, both old and new, in finding a change in conditions established. Employer contends that the prior evidence, in this case, is extremely relevant because it had been determined, just two years earlier, that claimant did not have even simple pneumoconiosis, and Drs. Wheeler, Hippensteel, and Branscomb had noted then that the masses seen on claimant=s lungs were not pneumoconiosis. Employer also contends that the administrative law judge erred in failing to specifically determine whether modification in this case was in the interest of justice.

After reviewing the administrative law judge=s decision and employer=s assertions, we conclude that the administrative law judge has failed to engage in the requisite analysis on modification. The administrative law judge=s award of benefits on modification must, therefore, be vacated. This claim was initially denied because claimant failed to establish the existence of simple pneumoconiosis or disability causation. Director=s Exhibit 51. In considering evidence submitted with the request for modification, the administrative law judge found that claimant established a change in conditions because the newly submitted evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304.

Pursuant to Section 725.310 (2000), an administrative law judge is obligated to perform an independent assessment of newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).[4] Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that there is no need for a smoking-gun factual error, changed conditions, or startling new evidence. Instead, the administrative law judge may grant the request for modification if he finds the ultimate finding, *i.e.*, entitlement or nonentitlement in error. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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[4] Employer has not challenged the administrative law judge=s finding that no mistake in a determination of fact was made in the prior Decision and Order.

While the administrative law judge in this case recognized the proper standard on modification, she failed to engage in the requisite change in conditions analysis, and instead, based her finding of entitlement on the newly submitted evidence, without a full discussion of the prior evidence. As employer argues, a review of the record demonstrates that there was earlier evidence relevant to the existence of complicated pneumoconiosis which the administrative law judge failed to fully discuss on modification. See Claimant=s Exhibits 2, 8. Accordingly, the administrative law judge=s Decision and Order awarding benefits must be vacated and the case remanded to the administrative law judge for further consideration of modification. *See Jessee*, 5 F.3d 723, 18 BLR 2-26; *Nataloni*, 17 BLR 1-82. In considering all the evidence on modification, the administrative law judge must also consider whether modification in this case would be in the interest of justice. *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996); *see Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

Employer also asserts that the administrative law judge erred in finding the existence of complicated pneumoconiosis established. Employer contends that the administrative law judge erred in concluding that the x-ray and CT-scan evidence supported a finding of complicated pneumoconiosis because the administrative law judge improperly rejected the opinions of Drs. Wheeler, Scott, Branscomb, Fino and Hippensteel, all of whom concluded that the abnormalities appearing on some of claimant=s x-rays and CT scans, if any, were not the result of pneumoconiosis or any coal-mine related disease. *See* Employer=s Exhibits 5, 8, 11, 12, 15, 23, 24. Employer asserts that the burden rests with claimant to affirmatively establish the presence of complicated pneumoconiosis, and that the administrative law judge, therefore erred in requiring these physicians to demonstrate an Aintervening pathology@ to explain the abnormalities shown. Employer=s Brief at 24-26. Employer further argues that medical evidence used by the administrative law judge to support a finding of complicated pneumoconiosis, the opinions of Drs. Robinette, Byers and Rasmussen, Claimant=s Exhibits 2, 8, 10-12, are flawed as those physicians failed to fully explain their conclusions.

In concluding that claimant established the existence of complicated pneumoconiosis, the administrative law judge determined that the x-ray interpretations of Drs. DePonte, Aycoth, Robinette, Capiello, Ahmed and Patel, Claimant=s Exhibits 1, 4, 5, 7, 9, 11, 12, all diagnosed the existence of large opacities and complicated pneumoconiosis. The administrative law judge concluded that these interpretations were more credible than the interpretations of Drs. Wheeler, Fino, Branscomb and Hippensteel, who did not find complicated pneumoconiosis, because they diagnosed the existence of large opacities, but failed to provide an Aintervening pathology,@ for those opacities. Similarly, the administrative law judge concluded that interpretations of the CT scan taken March 23, 1999 by Drs. Wheeler, Scott and Branscomb, Employer=s Exhibits 1, 3 6, were equivocal and entitled to no weight because while the physicians acknowledged

the existence of large masses on the scan, they failed to diagnose with specificity the cause of the masses. Decision and Order at 27-28. The administrative law judge also concluded that the CT scan evidence failed to show that the large opacities were not present on the x-ray. Decision and Order at 28. Accordingly, the administrative law judge concluded that the weight of relevant evidence supported a finding of complicated pneumoconiosis.

Section 411(c) of the Act, 30 U.S.C. '921(c)(3), and its implementing regulation found at 20 C.F.R. '718.304, provide that if a miner is suffering or suffered from complicated pneumoconiosis, then there is an irrebuttable presumption that he is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that, at time of his death, he was totally disabled due to pneumoconiosis. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *Braenovich v. Cannelton Industries, Incorporated/Cypress Amax*, 22 BLR 1-236 (2003)(Gabauer, J. concurring); *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*). Complicated pneumoconiosis may be established by x-ray evidence if the x-ray evidence reveals one or more large opacities (greater than one centimeter in diameter) which would be classified as category A, B, or C. 20 C.F.R. '718.304(a). Complicated pneumoconiosis may also be established by biopsy or autopsy evidence, if such evidence establishes massive lesions in the lungs. 20 C.F.R. '718.304(b). A diagnosis of complicated pneumoconiosis may also be made by other means, if the condition diagnosed would yield similar results to those described at Section 718.304(a) and (b). 20 C.F.R. '718.304(c).[5] Section 718.304(a)-(c) does not provide alternative means of

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[5] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosisY, if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made

establishing the irrebuttable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge to first evaluate and weigh the evidence in each category, and then weigh all the evidence together before finding the irrebuttable presumtpon invoked. *Melnick*, 16 BLR at 1-33.

In this case, the administrative law judge=s finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304(a)-(c) is flawed and requires remand. The x-ray interpretations of Drs. Wheeler, Fino, Branscomb and Hippensteel ruled out the existence of simple pneumoconiosis, complicated pneumoconiosis or any coal mine employment related disease. Dr. Wheeler stated that the absence of background nodules, and the presence of calcified masses in the pleura and left apex showed that claimant did not suffer from complicated pneumoconiosis by x-ray. Employer=s Exhibit 11. Dr. Fino indicated that because it was apparent that the masses in the lungs developed quickly (as compared to earlier completely negative x-rays), complicated pneumoconiosis could not have occurred. Employer=s Exhibit 15. Dr. Hippensteel opined that complicated pneumoconiosis was not present because claimant=s concurrent diffusion study was normal. Employer=s Exhibit 8. Lastly, Dr. Branscomb indicated that the Aabsence of any diffuse regularities or irregular nodulation@ on the x-ray argued against the existence of simple or complicated pneumoconiosis. Employer=s Exhibit 12.

The burden rests with claimant to affirmatively establish the existence of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100. X-ray interpretations showing large opacities can Alose force@ as a diagnosis of complicated pneumoconiosis if other evidence shows that the opacities are not demonstrative of the disease. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100. Here, the x-ray interpretations in question stated that pneumoconiosis was not the cause of the abnormalities seen on claimant=s lung. Accordingly, we vacate the administrative law judge=s weighing of the evidence supported a finding of complicated pneumoconiosis pursuant to Section 718.304(a), and remand the case for the administrative law judge to further consider the doctors= interpretations of the x-ray evidence.

Similarly, the administrative law judge erred in his analysis of the CT scan evidence at Section 718.304(c). Drs. Wheeler, Scott and Branscomb all reviewed the CT scan taken March 23, 1999. Employer=s Exhibits 1, 3, 5. Contrary to the administrative law judge=s finding that the physicians= conclusions were Aequivocal,@ Decision and Order at 28, the physicians, reviewing the CT scan, all concluded that the scan did not demonstrate the existence of pneumoconiosis. Accordingly, we vacate the administrative law judge=s rejection of the opinions because they did not diagnose an intervening pathology at Section 718.304(c), and remand the case for further consideration of all the evidence on complicated pneumoconiosis. 20 C.F.R. ' 718.304(a)-(c).

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under this paragraph shall accord with acceptable medical procedures.

Finally, employer asserts that if the administrative law judge should find the existence of complicated pneumoconiosis established, he erred in finding that benefits should commence March 1, 1998, since there was no evidence in the record which showed that complicated pneumoconiosis was demonstrated in March 1998, and the new evidence showing complicated pneumoconiosis was not provided until October 1999.

Where entitlement is established by operation of the irrebuttable presumption of total disability due to pneumoconiosis, 20 C.F.R. '718.304, the administrative law judge must determine whether the evidence establishes a specific onset date of claimant=s complicated pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If the evidence does not establish a specific onset date of complicated pneumoconiosis, then the date for commencement of benefits date is the first day of the month during in which the claim is filed, unless credited evidence establishes that claimant had only simple pneumoconiosis as of some point subsequent to the filing date. 20 C.F.R. '725.503(b); *Williams*, 13 BLR at 1-30. Because this is a request for modification, and the award of benefits in this case, if any, will be based on a change in conditions, benefits cannot commence prior to the initial denial of benefits because benefits can only be awarded from the date of the change in conditions. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1364, 20 BLR 2-227, 2-234 (4th Cir. 1996), *rev=g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert denied*, 510 U.S. 1090 (1997); *Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991).

Thus, in this case, because there is no support in the record for the administrative law judge=s determination that March, 1998 was the first time when complicated pneumoconiosis was manifested, nor has the administrative law judge discussed evidence supportive of his conclusion, we must vacate the administrative law judge=s onset date determination. If, on remand, the administrative law judge determines that claimant is entitled to benefits, he must reconsider the onset date. *See Rutter*, 86 F.3d at 1364, 20 BLR at 2-234; *Eifler*, 926 F.2d 663, 15 BLR 2-1; *Williams*, 13 BLR at 1-30.

Accordingly, the administrative law judge=s Decision and Order Awarding Benefits on Modification is affirmed in part, 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