BRB No. 06-0938 BLA

I.W. (Widow of J.W.) Claimant-Respondent v. NEW HIGNITE COAL COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/30/2007 DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Steven A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

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

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (03-BLA-6130) of Administrative Law Judge Rudolf L. Jansen on a survivor's claim[1] 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). This case has been before the Board previously. In its prior decision, in [*I.W.*] *v. New Hignite Coal Co.*, BRB No. 05-0429 BLA (Dec. 28, 2005) (unpub.), the Board affirmed the administrative law judge's finding of eighteen years of coal mine employment and his responsible operator finding as unchallenged on appeal.[2] The Board, however, vacated the administrative law judge's finding that the evidence established complicated pneumoconiosis, and remanded the case for the administrative law judge to reconsider whether the x-ray evidence and other medical evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (c), and to explain his findings. The Board instructed that if the administrative law judge found that the evidence supported a finding of complicated pneumoconiosis, then that evidence must be weighed against the contrary probative evidence, with the burden of proof on claimant. The Board further instructed that if the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis, then he should determine if the evidence of record established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On remand, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and thus, that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.205(c)(3), 718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his consideration of the medical evidence when he found that the evidence established the existence of complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge erred in relying on an

[1] Claimant is the miner's widow. The miner died on November 3, 2000 and claimant filed her survivor's claim on July 26, 2001. Director's Exhibit 2.

[2] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

unclassified x-ray reading to support invocation under the "other means" category of Section 718.304(c). Employer has filed a reply brief, reiterating its position.

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).

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-11 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Employer contends that the administrative law judge erred in invoking the irrebuttable presumption that the miner died due to pneumoconiosis, because the administrative law judge failed to follow the Board's instructions to consider all relevant evidence and to explain his findings that the existence of complicated pneumoconiosis was established.

Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, provides that there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner 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 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. Before determining whether invocation of the irrebuttable presumption has been established, the administrative law judge shall first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh together all relevant evidence pursuant to Section 718.304(a)-(c). *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Corp.*, 16 BLR 1-31 (1991) (*en*

banc). The administrative law judge in this case considered x-ray readings, hospital records, and medical reports.

Employer contends that the administrative law judge erred in his weighing of the x-ray evidence. The administrative law judge considered four x-ray readings: Dr. Barrett, who is a Board-certified radiologist and B reader, read the May 25, 2000 x-ray as positive for pneumoconiosis, Category 2/3 q/q, with category A large opacities. Director's Exhibit 10. Dr. Spitz, who is also a Board-certified radiologist and B reader, read the same x-ray as positive for simple pneumoconiosis, Category 2/1 q/q, and marked "O", indicating that no large opacities were present. Director's Exhibit 23. Dr. Spitz also noted emphysema and marked "ax" to indicate a "coalescence of nodules….in the upper lobes." *Id.* Dr. Barrett read the November 2, 2000 x-ray as positive for pneumoconiosis, Category 2/3 q/q, with category A large opacities. Director's Exhibit 10. Dr. Spitz indicated that the same x-ray was unreadable because it was a "portable" x-ray and was overexposed. Director's Exhibit 23.

The administrative law judge assigned "equal weight" to the readings of Drs. Barrett and Spitz to the extent that the physicians are equally qualified to interpret x-rays. Decision and Order on Remand at 3. The administrative law judge found that although Dr. Spitz diagnosed only simple pneumoconiosis based on the May 25, 2000 x-ray, his finding of a "coalescence of nodules" in the upper lobes "suggests that a larger mass exists," even though he did not diagnose complicated pneumoconiosis. *Id.* at 4. The administrative law judge further found that Dr. Spitz's diagnosis of simple pneumoconiosis is "one of degree rather than a diagnosis that is 'contrary'" to Dr. Barrett's diagnosis. *Id.* The administrative law judge therefore found that Dr. Spitz's interpretation did not detract from Dr. Barrett's finding of a large opacity, as both the physicians found the existence of pneumoconiosis on the x-ray. *Id.* Likewise, the administrative law judge found that Dr. Spitz's finding that the November 2, 2000 film was unreadable did not detract from Dr. Barrett's positive reading of the x-ray, since Dr. Barrett rated the quality of the x-ray as suboptimal, at quality level two. *Id.*

Employer contends that the administrative law judge erred in finding that Dr. Barrett's interpretation of the May 25, 2000 x-ray was sufficient to establish complicated pneumoconiosis because Dr. Spitz's reading was not contrary to it. We agree. Contrary to the administrative law judge's finding, Dr. Spitz's diagnosis of simple pneumoconiosis on the May 25, 2000 x-ray is contrary to and does not support Dr. Barrett's finding of complicated pneumoconiosis, as Dr. Spitz indicated that no Category A, B, C large opacities were present on the x-ray. Director's Exhibit 23. Likewise, Dr. Spitz's finding of "ax" coalescence on the x-ray, which indicates coalescence of small pneumoconiotic opacities, does not equate to a diagnosis of complicated pneumoconiosis. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Further, as employer contends, the administrative law judge failed to consider Dr. Milan's interpretation of the May 25,

2000 x-ray. Dr. Milan diagnosed "emphysema and bilateral upper lobe granulomatous scarring appearing unchanged from the last study of 1l-23-99." Director's Exhibit 9. The administrative law judge should consider Dr. Milan's reading pursuant to Section 718.304(a). *See Melnick,* 16 BLR at 1-33.

Moreover, as employer contends, the administrative law judge failed to adequately explain his reasons for according greater weight to Dr. Barrett's x-ray reading of the November 2, 2000 film, finding it of sufficient readable quality to make a diagnosis, over Dr. Spitz's finding that the x-ray was unreadable. *See* 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 §932(a). The administrative law judge also failed to consider Dr. Pulmano's interpretation of the November 2, 2000 x-ray. Dr. Pulmano found that the portable film was "slightly overpenetrated" and there was no evidence of pneumothorax and no significant changes in the nodular opacities in the upper lungs. Director's Exhibit 9.

We therefore vacate the administrative law judge's finding that complicated pneumoconiosis was established at Section 718.304(a) and remand the case to the administrative law judge to determine whether the x-ray evidence supports a finding of complicated pneumoconiosis.[3] *See Melnick,* 16 BLR at 1-33.

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 contends that the administrative law judge erred in invoking the irrebuttable presumption pursuant to 20 C.F.R. §718.304(c) based on Dr. Woodring's interpretation of the November 23, 1999 x-ray indicating, "Bilateral upper lobe coal workers' pneumoconiosis with early development of progressive massive fibrosis and secondary emphysema involving the mid and lower lung zones bilaterally." Director's Exhibit 9. The Director agrees, contending that the administrative law judge erred in relying on Dr. Woodring's unclassified x-ray reading to support invocation under the "other means" category of Section 718.304(c). Director's Brief at 2.

[3] On remand, the administrative law judge is instructed to consider Dr. Kibir's interpretation of the March 9, 1999 x-ray indicating no change since June of 1998, Dr. Larson's finding on a January 15, 1997 x-ray, of no change since August of 1995, and Dr. Purcell's finding on the February 16, 1995 x-ray, of changes secondary to granulomatous disease, which is unchanged from a 1991 film. Director's Exhibit 9.

The administrative law judge found Dr. Woodring's x-ray interpretation equated to a finding of complicated pneumoconiosis, or "at the very least" supported such a finding, as a the term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis," pursuant to the Department of Labor regulations at 65 Fed. Reg. 79,951 (Dec. 20, 2000). Decision and Order on Remand at 5. After weighing the hospital reports of record and the medical reports of Drs. Dahhan and Fino, the administrative law judge concluded that Dr. Woodring's interpretation was sufficient to establish complicated pneumoconiosis. The administrative law judge specifically found that although the narrative x-ray interpretations in the hospital reports cannot be considered x-ray evidence since they do not meet the quality standards and ILO reporting requirements pursuant to the regulations, all of the reports "support Dr. Woodring's finding that large opacities appeared in films taken from 1991 through the time of the miner's death in 2000." *Id.* at 5. The administrative law judge concluded that the opinions of Drs. Dahhan and Fino did not "detract from the remaining medical opinions that fully support Dr. Woodring's finding of complicated pneumoconiosis as neither physician "fully addressed the entire range of medical evidence contained in the record." *Id.* at 6.

We agree with the Director's contention that Dr. Woodring's x-ray reading must be properly classified according to the ILO system, before it can, by itself, support invocation of the irrebuttable presumption. *See* 20 C.F.R. §§718.102(b); 718.304(a). Moreover, x-ray evidence should not be considered under the "other means" category of Section 718.304(c), as x-ray evidence is specifically addressed in Section 718.304(a).[4] *See Melnick*, 16 BLR at 1-33.

Further, as employer argues, Dr. Woodring's unclassified x-ray notation of progressive massive fibrosis cannot support a finding of complicated pneumoconiosis at Section 718.304(c), absent any medical evidence to make an equivalency determination to a category, A, B or C opacity. *See Gray*, 176 F.3d 390, 21 BLR at 2-630. In light of the foregoing, the administrative law judge's reliance on Dr. Woodring's notation of progressive massive fibrosis in determining that complicated pneumoconiosis was established pursuant to Section 718.304(c) is not supported by substantial evidence.

[4] We agree with the Director that if Dr. Woodring's interpretation is considered pursuant to the "all relevant evidence" standard enunciated in *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999), the administrative law judge could find Dr. Woodring's interpretation supportive of Dr. Barrett's opinion as to invocation at Section 718.304(a). However, we also note that Dr. Woodring's interpretation could also be considered as not necessarily diagnosing an opacity of sufficient size to meet the requirements of Section 718.304(a), as the physician diagnosed "early development" of progressive massive fibrosis. Director's Exhibit 9.

Specifically, the administrative law judge's finding that some of the hospital report evidence[5] supports Dr. Woodring's finding "that large opacities appeared on films taken from 1991 through the time of the miner's death in 2000," and his accordance of less weight to the opinions of Drs. Fino and Dahhan because they did not address or explain Dr. Woodring's findings, is not supported by substantial evidence. Decision and Order on Remand at 5. We therefore vacate the administrative law judge's finding that complicated pneumoconiosis was established pursuant to Section 718.304(c), and remand the case to the administrative law judge to reweigh the relevant 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 on claimant. *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 evidence does not establish the existence of complicated pneumoconiosis, then he must determine if the evidence of record establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

[5] We agree with employer's contention that in this case the mere finding of nodular densities, particularly those ideutified as "granulomatous disease," on x-ray in some of the hospital report evidence, does not support a finding of complicated pneumoconiosis. Employer's Brief at 21.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge