BRB No. 02-0690 BLA

GROVER JUSTUS Claimant-Respondent v. RANDY & LISA HURLEY t/a MAY BRANCH TRUCKING and BITUMINOUS CASUALTY CORPORATION c/o OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Grover Justus, Hurley, Virginia, *pro* se.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2002-BLA-0020) of Administrative Law Judge Linda S. Chapman on a miner's 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] Adjudicating this claim pursuant to 20 C.F.R. Part 718, based on claimant's application for benefits dated January 9, 2001, the administrative law judge credited claimant with at least nineteen years of coal mine employment. Addressing the merits of entitlement, the administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis and, thus, sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits, commencing as of January 2001.

On appeal, employer contends that the administrative law judge erred in finding that the evidence of record was sufficient to establish the existence of complicated pneumoconiosis. Initially, employer contends that the administrative law judge impermissibly shifted the burden of proof to employer to disprove the existence of complicated pneumoconiosis pursuant to Section 718.304. In addition, employer contends that the administrative law judge erred in her weighing of the medical evidence of record. Claimant has not submitted a response in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[2]

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

[2] The parties do not challenge the administrative law judge's decision to credit claimant with at least nineteen years of coal mine employment, her findings that May Branch Trucking is the properly named responsible operator, the dismissal of Mack Coal Corporation No.2/4 as a putative responsible operator, that there are two dependents for purposes of augmentation, or that the claim was timely filed pursuant to 20 C.F.R. §725.308 (2000). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer contends that in weighing the evidence relevant to Section 718.304(a)-(c), the administrative law judge was required to apply a medical definition of complicated pneumoconiosis. We disagree. Before determining whether invocation of the irrebuttable presumption at Section 718.304(a)-(c), has been established, the administrative law judge must first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis and then all relevant evidence pursuant to Section 718.304(a)-(c) must be considered and weighed together, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (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*), to determine if the preponderance of the evidence, as a whole, establishes the presence of complicated pneumoconiosis.[3] 20 C.F.R. §718.304. However, the irrebuttable presumption under Section 411(c)(3) of the Act does not refer to the triggering condition for invocation of the presumption as "complicated pneumoconiosis," nor does it incorporate a medical definition of the condition identified in medical literature as "complicated pneumoconiosis," but rather the presumption is triggered by the application of Congressionally defined criteria. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999). Therefore,

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[3] Section 718.304, implementing the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ... if such miner is suffering ... 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 [pursuant to the International Classification of the International Labour Organization]; 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 under this paragraph shall accord with acceptable medical procedures.

contrary to employer's contention, the administrative law judge did not err in applying the statutory definition of complicated pneumoconiosis, as set forth at Section 718.304, in her weighing of the medical evidence. *Scarbro*, 220 F.3d at 257-258; 22 BLR at 2-103; *see also Blankenship, supra; Lester, supra*.

Employer next contends that the administrative law judge erred in shifting the burden to employer to disprove the existence of complicated pneumoconiosis. This contention has merit. In weighing the medical evidence of record, the administrative law judge found that the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a). The administrative law judge found that the record contains eleven interpretations of four x-ray films dated between January 21, 2001 and July 20, 2001, and that two interpretations of the January 22, 2001 x-ray film were positive for the existence of Category A large opacities. Decision and Order at 10-11; Director's Exhibits 20, 22. The administrative law judge found that while the remainder of the x-ray interpretations were negative for the existence of complicated pneumoconiosis, a majority contained statements indicating a finding of infiltrates or densities of greater than one centimeter. Decision and Order at 11-13; Director's Exhibits 21, 49; Employer's Exhibits 1, 3, 4. Therefore, relying upon her view that the ILO classification form defines Category A, B, and C opacities solely in terms of the size of such opacities, the administrative law judge found that the negative x-ray interpretations provided by Drs. Scott, Wheeler, Patel, Renn and Fino, were not properly classified under the ILO system since the physicians acknowledged the presence of infiltrates or densities of sufficient size, and, thus, did not credit these readings.[4] Decision and Order at 13. Consequently, the administrative law judge did not accord any weight to the x-ray interpretations of Drs. Scott, Wheeler, Patel, Renn and Fino because they did not properly classify the irregularities seen on the x-ray films. *Id*.

[4] The administrative law judge found that Drs. Scott and Wheeler found densities which clearly satisfy the size definition of Category A, B, or C large opacities, but did not designate them as such on their ILO forms. Decision and Order at 13. The administrative law judge also found that Drs. Patel, Renn and Fino did not describe the dimension of the densities or infiltrates they saw on the x-ray films, but rather, determined that they were not complicated pneumoconiosis and thus, "declined to *properly* classify them." Decision and Order at 13 (emphasis supplied).

Contrary to the administrative law judge's interpretation of the regulation and also her interpretation of the requirements of the ILO form, complicated pneumoconiosis seen as Category A, B or C opacities on x-ray, is not determined solely by the dimensions of the irregularity. Section 718.304 establishes invocation of the irrebuttable presumption if "such miner is suffering from a chronic dust disease of the lung" which, when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B or C. 20 C.F.R. §718.304(a); *Scarbro, supra*; *Lester, supra; Melnick, supra*. The ILO classification form requires the physician interpreting the x-ray film to first determine whether there are "[a]ny [p]arenchymal [a]bnormalities [c]onsistent with [p]neumoconiosis." If the physician answers in the affirmative, then he/she proceeds to the sections regarding the size of the opacities, *i.e.*, small opacities or large opacities of size A, B, or C. *See* Form CM-933, questions 2A, 2B and 2C. However, if the physician answers the question in the negative, then he/she is to skip the section regarding the size of the opacities. *See* Form CM-933, question 2A. Therefore, the administrative law judge's finding that the readings by Drs. Scott, Wheeler, Renn and Fino are not credible because they did not classify their findings properly on the ILO form is not rational as the administrative law judge did not take into consideration that the physicians checked the "NO" box to Question 2A, thus opining that there were no parenchymal abnormalities consistent with pneumoconiosis and obviating the need to answer Question 2C regarding large opacities. *See* Director's Exhibit 49; Employer's Exhibits 1, 4; 20 C.F.R. §718.304(a); *Lester, supra; Melnick, supra*.

Consequently, we vacate the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a) and remand the case for the administrative law judge to reconsider the relevant evidence. In particular, the administrative law judge must determine whether the weight of the x-ray evidence, considered as a whole, establishes the existence of complicated pneumoconiosis as claimant retains the burden of proving the existence of complicated pneumoconiosis by a preponderance of the evidence. 20 C.F.R. §718.304; *Lester*, 993 F.2d at 1145; 17 BLR at 2-117; *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); *Scarbro, supra; Blankenship, supra; see also Compton, supra*. Moreover, on remand, as employer correctly contends in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, and consistent with Section 718.202(a)(1), where two or more x-ray interpretations are in conflict, the administrative law judge must take into consideration the professional qualifications of the physicians who provided the x-ray interpretations in determining the relative weight to accord the evidence. 20 C.F.R. §718.202(a)(1); s*ee also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Furthermore, we vacate the administrative law judge's weighing of the evidence pursuant to Section 718.304(c) as the administrative law judge has not considered all of the relevant medical evidence. In weighing the medical evidence under Section 718.304(c), the administrative law judge considered only the evidence relevant to the June 15, 2001 CT scan. Decision and Order at 14-15. However, Section 718.304(c) requires the administrative law judge to consider evidence that diagnoses a chronic dust disease of the lung "by means other than those specified in paragraphs (a) and (b) of this section" which would be reasonably expected to yield results such as those that would be described in paragraphs (a) and (b). 20 C.F.R. §718.304(c); *see also Melnick, supra*. Therefore, the administrative law judge is required to consider all of the relevant evidence, including the medical reports of record, and not solely the objective evidence, such as the CT scan. *Id*. Consequently, the administrative law judge's findings at Section 718.304(c) are vacated and the case is remanded to the administrative law judge to discuss all of the relevant evidence. *Id.; see Scarbro, supra; Blankenship; Lester, supra.*

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part, vacated in part 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge