BRB Nos. 10-0537 BLA
and 10-0537 BLA-A

FRED O. HUFFMAN	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
L & M MACHINERY COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/28/2011
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Timothy J. Baker (Washington and Lee University School of Law, Black Lung Legal Clinic), Lexington, Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order on Remand (2005-BLA-05141) of Administrative Law Judge Ralph A. Romano awarding benefits on a subsequent claim, filed on July 9, 2002, pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board for the second time. In his original Decision and Order, the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). The administrative law judge also found that the newly submitted evidence was sufficient to establish 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 concluded, therefore, that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d) and entitlement to benefits.

In response to employer's first appeal, the Board affirmed, as unchallenged, the administrative law judge's findings that claimant established the existence of simple pneumoconiosis and total disability at 20 C.F.R. §§718.202(a)(2), 718.204(b)(2). *F.H.* [*Huffman*] *v. L & M Machinery Co.*, BRB No. 07-0866 BLA, slip op. at 3 n.2 (July 31, 2008)(unpub.). However, the Board vacated the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a)-(c) and remanded the case for reconsideration of the relevant evidence. *Id.* at 5. With respect to the administrative law judge's findings under 20 C.F.R. §718.204(c), the Board held that the administrative law judge did not accurately characterize the opinions of Drs. Zaldivar and Spagnolo and failed to provide a rationale for his finding that the opinions of Drs. Mullins and Rasmussen are sufficient to establish

[1] Claimant filed his initial claim for benefits with the Social Security Administration (SSA) on May 18, 1973, which was denied by SSA on September 4, 1973 and June 8, 1979. Director's Exhibit 1. The claim was then transferred to the Department of Labor, which denied the claim on August 24, 1981, because claimant failed to establish any of the requisite elements of entitlement. *Id.* Claimant filed a second claim for benefits on May 9, 1995, which was denied by the district director because claimant failed to establish any of the elements of entitlement. Director's Exhibit 2. This claim was dismissed by Administrative Law Judge Henry B. Lasky on March 5, 1997, because claimant did not appear at the hearing or respond to an Order to Show Cause. *Id.* Claimant took no further action until filing his current application for benefits.

total disability causation. *Id*. at 8-9. Consequently, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.204(c) and instructed the administrative law judge to reconsider the issue of disability causation on remand, if reached. *Id*. at 8. The Board further instructed the administrative law judge to provide a detailed explanation of his weighing of the opinions of Drs. Mullins and Rasmussen, as well as his weighing of all of the evidence of record, including both the prior evidence and the newly submitted evidence, when determining whether claimant established disability causation pursuant to 20 C.F.R. §718.204(c). *Id*.

On remand, the administrative law judge found that the evidence was insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a)-(c). The administrative law judge further determined, however, that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination to credit the opinions of Drs. Rasmussen and Mullins over those of Drs. Zaldivar and Spagnolo, at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. On cross-appeal, claimant contends that the administrative law judge erred in finding that claimant did not prove that he has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. In response, employer urges affirmance of the administrative law judge's finding at 20 C.F.R. §718.304, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief in this appeal unless requested to do so by the Board.[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.[3] 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).

In order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

On remand, the administrative law judge noted the Board's instructions concerning the issue of disability causation at 20 C.F.R. §718.204(c) and stated:

> I continue to find the opinions of Drs. Rasmussen and Mullins most creditable. I find their opinions to be better reasoned and better documented. Drs. Rasmussen and Mullins take into account [c]laimant's smoking history and coal mine employment; whereas Drs. Zaldivar and Spagnolo did not even find [c]laimant had pneumoconiosis until they reviewed the biopsy evidence and they seem to casually dismiss the notion that [c]laimant's 22 years of coal mine employment and diagnosis of pneumoconiosis could be the cause of [c]laimant's total disability. Accordingly, I find that [c]laimant has proven by a preponderance of the evidence that pneumoconiosis caused his total respiratory disability.

Decision and Order on Remand at 5. Employer contends that the administrative law judge erred in according determinative weight to the opinions of Drs. Mullins and Rasmussen. Employer also maintains that the administrative law judge did not subject the opinions of Drs. Rasmussen and Mullins to the same degree of scrutiny as those of Drs. Zaldivar and Spagnolo.

Employer's allegations of error have merit. The administrative law judge indicated that, because Drs. Rasmussen and Mullins considered claimant's smoking and employment histories, their opinions are better reasoned and documented than the opinions of Drs. Zaldivar and Spagnolo. Decision and Order on Remand at 5. A review of the record shows that, contrary to the administrative law judge's suggestion, Drs. Zaldivar and Spagnolo also considered claimant's smoking and coal mine employment histories. Employer's Exhibits 5-7, 9. Additionally, the administrative law judge did not identify the evidence underlying his conclusion that Drs. Zaldivar and Spagnolo "seem to casually dismiss the notion that [c]laimant's 22 years of coal mine employment and diagnosis of pneumoconiosis could be the cause of [c]laimant's total disability." Decision and Order on Remand at 5. Because the administrative law judge did not accurately characterize the opinions of Drs. Zaldivar and Spagnolo and did not adequately identify the rationale underlying his weighing of their opinions, as required by the Administrative Procedure Act (APA),[4] we vacate his finding that claimant established

[4] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or

total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case to the administrative law judge for reconsideration of this issue. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). We also vacate the administrative law judge's finding that the opinions of Drs. Mullins and Rasmussen are sufficient to establish disability causation, as the administrative law judge merely concluded that these opinions, which take into account claimant's smoking and work history, were more "creditable," without providing an adequate rationale for his findings. Decision and Order on Remand at 5; *see Wojtowicz*, 12 BLR at 1-165.

On remand, the administrative law judge must reconsider the medical opinions of Drs. Rasmussen, Mullins, Zaldivar and Spagnolo, in their entirety, and render a finding as to the probative value of each opinion, based upon "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *See Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). The administrative law judge must also set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Because we have vacated the administrative law judge's determination that claimant proved that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c), we will address the allegations of error in claimant's cross-appeal. Claimant contends that the administrative law judge erred in finding that he did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Section 411(c)(3) of the Act, 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 that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit 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

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basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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).

administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by any other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray." *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, in determining whether claimant has established invocation, the administrative law judge must find that claimant has established a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis, by weighing together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *see Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

In our prior Decision and Order, we vacated the finding, pursuant to 20 C.F.R. §718.304(b), that the biopsy evidence supported a finding of complicated pneumoconiosis, and instructed the administrative law judge to resolve the conflict in the biopsy evidence between Dr. Anselmo's finding of complicated pneumoconiosis and Dr. Naeye's contrary finding.[5] *Huffman*, slip op. at 4-5; *see* Director's Exhibit 36; Employer's Exhibits 3, 8. We also vacated the administrative law judge's findings at 20 C.F.R. §718.304(c) and instructed him to consider all of the relevant medical opinions on remand. Regarding the x-ray evidence, we affirmed the administrative law judge's determination that the positive reading for a large opacity submitted by Dr. Patel, a Board-certified radiologist and B reader, supported a finding of complicated

[5] Dr. Anselmo, a pathologist, conducted a gross examination of the right upper lobe of claimant's lung, following lung resection surgery, and observed that the size of the lesion was well beyond one centimeter in diameter. Director's Exhibit 36. Dr. Anselmo determined that the biopsy evidence "was consistent with coal workers' pneumoconiosis, complicated type." *Id*. Dr. Naeye, also a pathologist, concluded that the lung tissue slides that he reviewed showed simple pneumoconiosis, but did not show the rapid growth at the margins that is characteristic of complicated pneumoconiosis. Employer's Exhibit 3. Dr. Naeye stated that he could not determine how large the nodules would appear if viewed on an x-ray because the tissue he examined was so small, but did testify that the changes he saw on the slides would "probably not" appear as greater than one centimeter on x-ray. Employer's Exhibit 8 at 11.

pneumoconiosis under 20 C.F.R. §718.304(a).[6] *Huffman*, slip op. at 5; Director's Exhibit 16. We also held that the administrative law judge rationally found that the negative readings by Drs. Binns, Gaziano and Wiot did not detract from Dr. Patel's positive interpretation, as their diagnoses of a possible neoplasm or cancer were contrary to the biopsy evidence. *Huffman*, slip op. at 5; Director's Exhibits 17, 37; Employer's Exhibit 1. We further noted, however, that because we vacated the administrative law judge's findings at 20 C.F.R. §718.304(b), (c), the administrative law judge was required to reconsider the x-ray evidence when determining whether claimant established the existence of complicated pneumoconiosis, by a preponderance of the evidence, as a whole. *Huffman*, slip op. at 5.

On remand, the administrative law judge acknowledged the Board's instructions and stated:

> I now resolve the conflicts [between] Dr. Anselmo's opinion and Dr. Naeye's opinion by taking into account Dr. Naeye's deposition testimony[,] that the lesions would probably not appear greater than one centimeter on [x]-ray, and finding that to be buttressed by more [dually] qualified physicians not finding a large opacity on the [x]-ray evidence, and the opinion of Dr. Spagnolo who credits Dr. Wiot's opinion the most. Therefore, when weighing the evidence as a whole, pursuant to [20 C.F.R.§]718.304(a)-(c), I now find that the evidence does not establish complicated pneumoconiosis.

Decision and Order on Remand at 3-4 (footnote omitted). Additionally, the administrative law judge indicated that he accorded no weight to the opinion in which Dr. Zaldivar ruled out the presence of pneumoconiosis. *Id*. at 4 n.5.

Claimant contends that the administrative law judge did not adequately explain how he resolved the conflict between Dr. Patel's positive x-ray reading for complicated pneumoconiosis and the negative readings of Drs. Binns, Gaziano and Wiot. Claimant also alleges that the administrative law judge did not provide a rationale for his resolution of the conflict between the pathology findings of Drs. Anselmo and Naeye and his decision to credit Dr. Spagnolo's opinion. Claimant's arguments have merit.

The administrative law judge rendered a finding in which he gave greatest weight to Dr. Naeye's opinion, that the lesion observed on biopsy would not appear as greater

[6] Dr. Patel read the August 6, 2002 x-ray as showing a 1.5 centimeter mass in the right upper lung and described it as a Category A large opacity or neoplasm. Director's Exhibit 16.

than one centimeter in diameter on x-ray, as it was supported by the negative x-ray readings of Drs. Binns, Gaziano and Wiot and Dr. Spagnolo's opinion. Decision and Order on Remand at 3-4. The administrative law judge did not explain, however, the apparent shift in his analysis of the negative x-ray readings, from his initial determination that they were entitled to little weight, and his finding on remand that they bolstered Dr. Naeye's opinion. In addition, the administrative law judge did not identify the rationale underlying his apparent determination that Dr. Spagnolo's opinion, that claimant does not have complicated pneumoconiosis, is reasoned and documented. Accordingly, the administrative law judge's findings under 20 C.F.R. §718.304(a)-(c) do not comply with the APA and must be vacated. On remand, the administrative law judge must reconsider the evidence relevant to 20 C.F.R. §718.304(a)-(c) in its entirety and render a finding as to the probative value of each item of evidence. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335. The administrative law judge must also set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge