BRB No. 03-0464 BLA

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| CLYDE C. LAMBERT | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CLINCHFIELD COAL COMPANY | ) | |
| | ) | DATE ISSUED: 03/26/2004 |
| 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 on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp (Gerald F. Sharp, P.C.), Lebanon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Jennifer U. Toth (Howard Radzely, Solicitor of Labor; Donald S. Shire, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (00-BLA-0298) of Administrative Law Judge Linda S. Chapman 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).[1] This case has a lengthy procedural history. Claimant filed a claim for benefits on September 13, 1979. After Administrative Law Judge Joseph E. Kane denied benefits in a Decision and Order dated January 22, 1999,[2] claimant filed an appeal with the Board. Claimant subsequently filed a motion to remand the case to the district director for consideration of additional medical evidence. By Order dated April 16, 1999, the Board held that claimant's request was a motion for modification. *Lambert v. Clinchfield Coal Co.*, BRB No. 99-0544 BLA (Apr. 16, 1999) (unpublished). The Board, therefore, dismissed claimant's appeal and remanded the case to the district director for modification proceedings. *Id.*

In a Decision and Order dated January 31, 2001, Administrative Law Judge Linda S. Chapman (the administrative law judge) found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge also found, *inter alia*, that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). Based on these findings, the administrative law judge found that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and awarded benefits.

By Decision and Order dated March 8, 2002, the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) as unchallenged on appeal. *Lambert v. Clinchfield Coal Co.*, BRB No. 01-0514 BLA (Mar. 8, 2002) (unpublished). The Board, however, vacated the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(4) and remanded the case for further consideration. *Id.* The Board also agreed with employer that the administrative law judge erred in failing to address whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). *Id.* The Board further instructed the administrative law judge that, on remand, if necessary, she could consider invocation or rebuttal under any of the methods provided at 20 C.F.R. §727.203(a)(1)-(4) and (b)(1)-(4). *Id.* The Board also instructed the administrative law judge to address whether the evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to the

[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] A complete procedural history of this case can be found in *Lambert v. Clinchfield Coal Co.*, BRB No. 01-0514 BLA (Mar. 8, 2002) (unpublished).

standard set out in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). *Id.*

On remand, the administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304.[3] Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in re-opening the record on remand and admitting new evidence. Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response to employer's appeal, contending that the administrative law judge acted within her discretion in re-opening the record on remand.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 initially contends that the administrative law judge erred in re-opening the record on remand. By Decision and Order dated March 8, 2002, the Board, *inter alia*, vacated the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(4) and remanded the case for further consideration. *Lambert v. Clinchfield Coal Co.*, BRB No. 01-0514 BLA (Mar. 8, 2002) (unpublished). In remanding the case, the Board instructed the administrative law judge to address whether the evidence of record was sufficient to establish the existence of complicated pneumoconiosis. *Id.*

After the case was remanded to the administrative law judge, claimant, on August 15, 2002, submitted three x-ray interpretations of a November 26, 2001 x-ray and three interpretations of a December 2, 2001 x-ray. On August 30, 2002, claimant submitted an additional interpretation of the November 26, 2001 x-ray and an additional interpretation

[3] The administrative law judge erred in considering whether claimant was entitled to the irrebuttable presumption set out at 20 C.F.R. §718.304. Because claimant's claim, arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, was filed before March 31, 1980 and involves a miner with ten or more years of coal mine employment, claimant is not entitled to have his claim considered under 20 C.F.R. Part 718. *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981). The administrative law judge should have considered claimant's entitlement under 20 C.F.R. Part 410, Subpart D and addressed whether claimant was entitled to the irrebuttable presumption set out at 20 C.F.R. §410.418.

of the December 2, 2001 x-ray. Employer objected to the admission of this evidence. By Order dated September 5, 2001, the administrative law judge stated:

> I consider the submission of this new evidence by the Claimant to be a request that the record be re-opened, and I find that it is appropriate and judicially efficient to re-open the record to consider updated medical information in this claim. However, it is appropriate that the Employer have a reasonable time to submit new medical evidence in response.

Order dated September 5, 2002.

The administrative law judge ordered that employer be given ninety days from the date of the Order to submit new readings of the November 26, 2001 and December 2, 2001 x-rays. On December 2, 2002, employer submitted new interpretations of claimant's November 26, 2001 and December 2, 2001 x-rays. By Order dated December 19, 2002, the administrative law judge admitted employer's new x-ray interpretations into the record. *See* Employer's Exhibits 27-38. The administrative law judge also admitted the three interpretations of the November 26, 2001 x-ray and the three interpretations of the December 2, 2001 x-ray submitted by claimant on August 15, 2002. By Order dated March 10, 2003, the administrative law judge noted that she had inadvertently failed to admit the two x-ray interpretations submitted by claimant on August 30, 2002. The administrative law judge, therefore, also admitted these two interpretations into the record.

The decision as to whether to reopen the record on remand is within the province of the administrative law judge. 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(*en banc*); *Toler v. Eastern Associated Coal Corp.*, 12 BLR 1-49 (1988)(*en banc*). In this case, the issue of whether claimant suffered from complicated pneumoconiosis was properly before the administrative law judge. Under the circumstances of this case, we hold that the administrative law judge acted within her discretion in admitting additional evidence relevant to the issue of whether claimant suffered from complicated pneumoconiosis.

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis.

Section 411(c)(3) of the Act provides that:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of

> Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that at the time of death he was totally disabled by pneumoconiosis, as the case may be.

30 U.S.C. §921(c)(3).[4]

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §410.418. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Employer argues that the administrative law judge committed numerous errors in finding that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis.[5] In her weighing of the x-ray evidence, the administrative law judge stated that:

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[4] The implementing regulations are found at 20 C.F.R. §§410.418 and 718.304. As previously noted, the administrative law judge erred in considering whether claimant was entitled to the irrebuttable presumption set out at 20 C.F.R. §718.304. The administrative law judge should have considered claimant's entitlement under 20 C.F.R. Part 410, Subpart D and addressed whether claimant was entitled to the irrebuttable presumption set out at 20 C.F.R. §410.418. However, as employer concedes, 20 C.F.R. §§410.418 and 718.304 are virtually identical regulations.

[5] The administrative law judge, in her earlier Decision and Order dated January 31, 2001, found that the x-ray evidence as a whole was insufficient to establish the existence of simple pneumoconiosis. 2001 Decision and Order at 22. On remand, the administrative law judge did not reconsider whether the x-ray evidence was sufficient to establish the existence of simple pneumoconiosis. Numerous physicians have interpreted claimant's x-rays, including the two most recent films, as negative for not only complicated pneumoconiosis, but also for simple pneumoconiosis.

> [I]f [claimant] establishes a condition that manifests itself on x-rays with opacities greater than one centimeter, he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, unless there is affirmative evidence under prong A, B or C that persuasively establishes either that these opacities do not exist, or that they are the result of a disease process unrelated to his exposure to coal mine dust.

2003 Decision and Order on Remand at 5.

The administrative law judge found that Drs. Ahmed, Miller, Pathak, Cappiello, Alexander, Mathur, DePonte and Patel rendered x-ray interpretations that were positive for Category A large opacities.[6] 2003 Decision and Order on Remand at 12. The administrative law judge further found that a majority of the interpreters who reviewed x-rays taken since 1998, and who did not designate on the ILO form the presence of any large opacities, nevertheless, indicated the presence of some process in claimant's lungs, whether it was a mass, infiltrate, scarring, fibrosis or atelectasis. *Id.* at 11. Relying upon her view that the ILO form "requires that an opacity be designated as Category A, B, and C solely on the basis of the size of the opacity," the administrative law judge found that the fact that these physicians did not attempt to properly classify these findings casts doubt on the reliability of their opinions. *Id.* The administrative law judge, therefore, discredited the opinions of Drs. Wheeler, Scott, Gogineni, Abramowitz, Binns, Fino, Scatarige and Hayes since these physicians failed to properly classify the size of infiltrates or densities that they identified on claimant's x-rays. *Id.*

Contrary to the administrative law judge's interpretation of the regulation and 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 410.418 establishes invocation of the irrebuttable presumption if a miner is suffering from a chronic dust disease of the lung which, when diagnosed by x-ray, yields one or more large opacities which would be classified as Category A, B or C. 20 C.F.R. §410.418; *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (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*). The ILO classification form requires the physician interpreting the x-ray film to first determine whether there are any parenchymal abnormalities consistent with pneumoconiosis. If the

[6] In her consideration of whether the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis, the administrative law judge considered interpretations of ten x-rays taken on August 27, 1990, January 14, 1997, April 14, 1997, August 2, 1998, August 18, 1998, April 23, 1999, May 4, 1999, December 13, 1999, November 26, 2001 and December 2, 2001. All of the interpretations of these x-rays were rendered by physicians qualified as B readers and/or Board-certified radiologists.

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 instructed 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 x-ray readings by Drs. Wheeler, Scott, Gogineni, Abramowitz, Binns, Fino, Scatarige and Hayes are not credible because they did not properly classify their findings 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. Consequently, the administrative law judge erred in her consideration of whether the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis.

Moreover, the administrative law judge erred in discrediting the opinions of physicians who found abnormalities consistent with tuberculosis or other diseases because she found no evidence in the record to support a finding that tuberculosis or another disease process could be responsible for these findings. The Board has long held that the interpretation of the objective data is a medical determination for which an administrative law judge cannot substitute her own opinion. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Many of the physicians interpreted claimant's x-rays as revealing other abnormalities.[7] The fact that the record does not reveal that claimant suffered from tuberculosis does not undermine the interpretations of those physicians who found that claimant's x-rays revealed abnormalities consistent with the disease.

The administrative law judge also failed to address the significance of the fact that Dr. DePonte interpreted claimant's August 2, 1998, August 18, 1998 and April 23, 1999 x-rays as revealing complicated pneumoconiosis despite finding these x-rays negative for simple pneumoconiosis. Director's Exhibit 186. Moreover, although Dr. DePonte interpreted claimant's December 13, 1999 x-ray as positive for both simple and complicated pneumoconiosis, the administrative law judge failed to address Dr. DePonte's narrative report wherein she stated that "a large opacity in the right apex…*could* represent a conglomerate mass of complicated coal workers' pneumoconiosis." Claimant's Exhibit 3 (emphasis added). The administrative law judge erred in crediting Dr. Deponte's interpretation of claimant's December 13, 1999 x-ray

[7] For example, Dr. Wheeler interpreted claimant's November 26, 2001 and December 2, 2001 x-rays as revealing a mass compatible with an inflammatory disease (tuberculosis) or a possible tumor. Employer's Exhibits 29, 32. In his interpretation of these x-rays, Dr. Scott identified focal scarring representing probable healed tuberculosis. Employer's Exhibits 28, 31.

without addressing its speculative nature.[8] *See U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

The administrative law judge also erred in failing to consider all of the x-ray evidence of record. Employer notes that many physicians who interpreted claimant's x-rays as negative for pneumoconiosis, noted other abnormalities, such as scarring or fibrosis due to tuberculosis or other healed infections, as far back as the 1980s. Employer's Brief at 14. When an administrative law judge finds the evidence sufficient to establish modification under 20 C.F.R. §725.310 (2000), the administrative law judge must consider all of the evidence of record to determine whether claimant is entitled to benefits on the merits of the claim. *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).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis and remand the case to the administrative law judge for her reconsideration of all of the relevant x-ray evidence pursuant to 20 C.F.R. §410.418(a).

Although the record does not contain any biopsy evidence, thereby precluding a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(b), the record contains numerous CT scan interpretations. CT scan evidence falls into the "other

[8] Employer also contends that the administrative law judge erred in failing to address the significance of the fact that Dr. Patel, in interpreting claimant's April 23, 1999 x-ray as positive for complicated pneumoconiosis, noted that a two centimeter mass in the left lower lung zone was "indeterminate" for a Category A opacity. While Dr. Patel found that a mass infiltrate in claimant's left lower lung zone was indeterminate for a Category A opacity, he also unequivocally identified a "Category A opacity in the right apex." *See* Director's Exhibit 183. Employer also asserts that because Dr. Patel found a "spiculated, noncalcified nodule, under 0.8 cm. in diameter" in the right apex (a finding Dr. Patel noted was consistent with a coal dust granuloma), his interpretation does not support a finding of complicated pneumoconiosis. However, Dr. Patel's finding of a nodular density in claimant's right upper lung zone was made only after the doctor noted the presence of a Category A large opacity. *Id.* Moreover, Dr. Patel, in completing an ILO classification form, indicated that claimant's April 23, 1999 x-ray revealed a Category A large opacity. *Id.* Consequently, we reject employer's contention that the administrative law judge erred in her consideration of Dr. Patel's interpretation of claimant's April 23, 1999 x-ray.

means" category of establishing complicated pneumoconiosis at 20 C.F.R. §410.418(c).[9] *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). The record contains thirteen interpretations of three CT scans taken on November 10, 1998, July 12, 1999 and December 13, 1999.

Employer contends that the administrative law judge erred in her consideration of the CT scan evidence. In this case, the administrative law judge failed to independently evaluate whether the CT scan evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(c).[10] 2003 Decision and Order on Remand at 15-16. The administrative law judge only addressed whether the CT scan evidence called into question the x-ray evidence of complicated pneumoconiosis. Consequently, on remand, the administrative law judge must independently address whether the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(a) and whether the CT scan evidence is

[9] Section 410.418(c) provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he is suffering or suffered from a chronic dust disease of the lung which:

> (c) When established by diagnoses 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 diagnoses been made as therein prescribed: *Provided, however,* That any diagnosis made under this paragraph shall accord with generally accepted medical procedures for diagnosing pneumoconiosis.

20 C.F.R. §410.418(c).

[10] In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the Fourth Circuit observed that because prongs (a), (b), and (c) are stated in the disjunctive, a finding of statutory complicated pneumoconiosis may be based on evidence presented under a single prong. However, in every case, the administrative law judge must review the evidence under each prong for which relevant evidence is presented to determine whether complicated pneumoconiosis is present.

sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(c).[11]

We, therefore, vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of complicated pneumoconiosis and remand the case to the administrative law judge for reconsideration of all relevant evidence pursuant to 20 C.F.R. §410.418. On remand, should the administrative law judge find the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(a) and/or (c), the administrative law judge must weigh all of the relevant evidence pursuant to the standard set out in *Scarbro*.

Should the administrative law judge, on remand, find that claimant is not entitled to the irrebuttable presumption set out at 20 C.F.R. §410.418, she must reconsider claimant's entitlement to benefits under 20 C.F.R. Part 727 as instructed by the Board in its March 8, 2002 Decision and Order. *See Lambert v. Clinchfield Coal Co.*, BRB No. 01-0514 BLA (Mar. 8, 2002) (unpublished).

[11] As was the case with her consideration of the x-ray evidence, the administrative law judge erred in discrediting the opinions of physicians who interpreted claimant's CT scans as revealing abnormalities consistent with tuberculosis or other diseases because the administrative law judge found no evidence in the record to support a finding that tuberculosis or another disease process could be responsible for these findings. *See* discussion, p. 7, *supra*.

Accordingly, the administrative law judge's 2003 Decision and Order on Remand awarding benefits is vacated and the case is remanded 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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BETTY JEAN HALL
Administrative Appeals Judge