BRB No. 10-0358 BLA

RANDALL L. VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MCCOY ELKHORN COAL CORPORATION	)	DATE ISSUED: 03/24/2011
	)	
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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

James W. Herald, III and Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 Awarding Benefits (2009-BLA-5025)

of Administrative Law Judge Alice M. Craft with respect to a claim filed on September 18, 2007 pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. 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). The administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. Noting employer's concession to thirty-five years of coal mine employment, the administrative law judge found that the record supported a finding of at least thirty-five years of coal mine employment. Addressing the merits of entitlement, the administrative law judge found that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1) and (4). In addition, the administrative law judge found the evidence sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that the evidence established that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Consequently, the administrative law judge found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge awarded benefits.

On appeal, employer first contends that, pursuant to 20 C.F.R. §725.406, the administrative law judge erred in considering Dr. DePonte's readings of both the August 20, 2007 and November 14, 2007 x-rays. Employer also contends that the administrative law judge erred in finding complicated pneumoconiosis established at Section 718.304. Employer contends, therefore, that the award of benefits must be vacated and the case "remanded to the [a]dministrative [l]aw [j]udge for additional findings of fact and conclusions of law with regard to the issues of pneumoconiosis, total disability and disability causation[.]" Employer's Brief at 13. In response, claimant urges affirmance of the administrative law judge's award of benefits, based on substantial evidence. Claimant also contends that employer waived its right to challenge the administrative law judge's admission of Dr. DePonte's x-ray readings, by failing to challenge the issue before the administrative law judge.

The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response to employer's appeal, stating that he will not address employer's specific arguments regarding the administrative law judge's weighing of the evidence on the merits. However, the Director contends that the administrative law judge properly admitted Dr. DePonte's x-ray readings. Further, the Director contends that, if the Board vacates the administrative law judge's award of benefits, the case should be remanded to the administrative law judge for consideration under amended Section 411(c)(4),[1] in light of the post-January 1, 2005 filing date of the claim, the fact that the

[1] Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling

claim was pending on March 23, 2010, and the fact that over fifteen years of qualifying coal mine employment were established.

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.[2] 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).

Admission of Dr. DePonte's X-ray Readings

Initially, we address the procedural issue raised by employer's challenge to the administrative law judge's consideration of Dr. DePonte's readings of both the August 20, 2007 and November 14, 2007 x-rays. Employer contends that the administrative law judge erred in not striking one, or both, of the readings, because the admission of both readings violates Section 725.406(b). Specifically, employer contends that Dr. DePonte's readings of the August 20, 2007 and the November 14, 2007 x-ray cannot both be admitted because, under Section 725.406(b), claimant may not, as part of his Department of Labor (DOL) evaluation, "select [a] physician who has examined or provided medical treatment to [claimant] within the twelve months preceding the date of [claimant's] application." 20 C.F.R. §725.406(b). Thus, employer contends that, because "Dr. DePonte read the August 20, 2007 x-ray, her reading of that x-ray and her subsequent reading of the November 14, 2007 x-ray cannot both be admitted into the record pursuant to Section 725.406(b). Employer's Brief at 14.

In response, however, the Director urges that the Board reject employer's argument, as without merit. The Director contends that Section 725.406(b) governs only *claimant's selection* of the physician to provide his mandatory DOL-sponsored pulmonary evaluation and that, in this case, claimant selected Dr. Habre, and not Dr. DePonte. The Director notes that because Dr. DePonte was selected by the DOL to provide a rereading of the November 14, 2007 x-ray, as part of claimant's DOL-sponsored pulmonary evaluation, and not by claimant, admission of Dr. DePonte's readings of both the August 20, 2007 and November 14, 2007 x-rays was not prohibited

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respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

under Section 725.406(b).[3] Director's Letter Brief at 3, *see* Director's Exhibits 10, 12, 13.

Based on the foregoing, we reject employer's contention that one, or both, of Dr. DePonte's x-ray readings should have been excluded pursuant to Section 725.406(b). The Director correctly contends that Section 725.406(b) applies only to *claimant's selection* of a physician to provide the DOL-sponsored pulmonary evaluation. In this case, the physician chosen by claimant was Dr. Habre, and not Dr. DePonte. *See* Director's Exhibit 10. The fact that the DOL selected Dr. DePonte to provide a rereading of the x-ray obtained by Dr. Habre, as part of claimant's pulmonary evaluation, does not violate Section 725.406(b). Director's Exhibits 10, 12. Consequently, we conclude that the administrative law judge did not violate Section 725.406(b) by admitting, into the record, Dr. DePonte's reading of the August 2007 x-ray, submitted by claimant in support of his case, and her reading of the November 2007 x-ray, submitted as part of the DOL-sponsored evaluation.[4]

Complicated Pneumoconiosis – 20 C.F.R. §718.304

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, provides 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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically entitle

[3] Section 725.406(b) provides, in pertinent part, that "[t]he results of the complete pulmonary evaluation shall not be counted as evidence submitted by [claimant] under [20 C.F.R. §725.414]." 20 C.F.R. §725.406(b).

[4] Alternatively, the Director, Office of Workers' Compensation Programs (the Director), contends that employer has waived its right to challenge the administrative law judge's finding on this issue because it did not challenge the admission of either of Dr. DePonte's x-ray readings before the administrative law judge, when it agreed to the admission of all of the evidence contained in the Director's Exhibits and also Claimant's Exhibits. Director's Letter Brief at 2. Claimant agrees. Employer contends that it preserved the issue for appeal, by filing an objection and motion to strike with the district director. Director's Exhibit 52; Employer's Brief at 14. Because we affirm the administrative law judge's resolution of the issue, we need not address the argument regarding waiver. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

claimant to the irrebuttable presumption found at Section 718.304. Rather, claimant is entitled to the Section 718.304 presumption "because he has a 'chronic dust disease of the lung,' commonly known as complicated pneumoconiosis." *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993). To make such a determination, the administrative law judge must consider all of the evidence relevant to the issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis. The administrative law judge must weigh this evidence, resolve any conflict in the evidence, and make pertinent findings of fact thereon. 20 C.F.R. §718.304; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

The administrative law judge found that the x-ray evidence established complicated pneumoconiosis at Section 718.304(a). Of the properly classified films, the administrative law judge found that the March 30, 2006 x-ray, read by an unnamed B reader, as showing simple pneumoconiosis, 2/1, and Category C large opacities, established both simple and complicated pneumoconiosis. The administrative law judge further noted that the comments on the x-ray stated that infiltrate or mass could not be ruled out. Claimant's Exhibit 5. Nonetheless, she found the x-ray positive for both simple and complicated pneumoconiosis, because there were no negative readings of the film. Decision and Order at 20.

Turning to the August 20, 2007 x-ray, the administrative law judge found that it also established complicated pneumoconiosis. The administrative law judge noted that it was read as positive for simple and complicated pneumoconiosis by Dr. DePonte, a B reader and Board-certified radiologist, while it was read as negative by Dr. Wheeler, a B reader and Board-certified radiologist. Director's Exhibits 15, 16, 17. The administrative law judge noted that Dr. Wheeler also stated that the x-ray showed large masses in the lower lung zones, but that these masses were not large opacities of complicated pneumoconiosis because they were in the basal segments of lower lobes and there were no symmetrical small nodular infiltrates in the mid and upper zones. Director's Exhibit 17. In addition, the administrative law judge noted that Dr. Wheeler stated that, even though claimant was young, a diagnosis of complicated pneumoconiosis should have been made by now with biopsy or microbiology. *Id*. The administrative law judge accorded less weight to Dr. Wheeler's negative reading, despite his qualifications, however, because Dr. Wheeler's additional comments consisted of generalizations that represented speculation on Dr. Wheeler's part as to the amount of dust to which claimant was exposed. Decision and Order at 21.

Regarding the November 14, 2007 x-ray, which was read as positive for simple and complicated pneumoconiosis by Dr. DePonte and by Dr. Alexander, also a dually-qualified radiologist, Director's Exhibits 12, 21, and as negative for pneumoconiosis by

Dr. Wheeler, the administrative law judge found that this x-ray showed complicated pneumoconiosis because two of the dually-qualified radiologists read it as positive for complicated pneumoconiosis. The administrative law judge noted that Dr. Alexander commented that the opacities he saw could be complicated pneumoconiosis, rheumatoid pneumoconiosis, or lung cancer, and that further evaluation was needed. Nonetheless, the administrative law judge found Dr. Alexander's x-ray reading to be positive for complicated pneumoconiosis, because Dr. Alexander, like Dr. DePonte, identified Category C large opacities. The administrative law judge noted that Dr. Alexander's comments, while relevant to the cause of the opacities, did not detract from their presence.

As to the March 30, 2008 x-ray, which was read as positive for both simple and complicated pneumoconiosis by Dr. Anderson, a B reader, the administrative law judge found that it established complicated pneumoconiosis. The administrative law judge noted Dr. Anderson's comment that the large opacities seen on the x-ray were unusual because large opacities are usually coalescences of small opacities, and that he, therefore, doubted that they were true large opacities or progressive massive fibrosis. Employer's Exhibit 1. Nonetheless, the administrative law judge found that Dr. Anderson's comments were not sufficient to undermine his positive ILO classification, because his comments did not point to an alternative diagnosis. Decision and Order at 22.

Next, the administrative law judge found that the May 6, 2008 x-ray established complicated pneumoconiosis, as it was read as both positive for simple pneumoconiosis, q/q, 1/1, and complicated pneumoconiosis, Category C large opacities, by Dr. Poulos, a B reader and Board-certified radiologist. Claimant's Exhibit 3. The administrative law judge noted that Dr. Rosenberg, a B reader, read the film as negative because he found that the large masses in the lower lung zones were not complicated pneumoconiosis, due to their location and appearance. Director's Exhibit 22. However, based on Dr. Poulos's superior radiological qualifications, the administrative law judge determined that the film was positive for complicated pneumoconiosis. She stated that she would address Dr. Poulos's comment that, because of the atypical location of the large opacities, other disease processes, such as sarcoidosis, should be considered at Section 718.203(b). Decision and Order at 22; Claimant's Exhibit 3.

Lastly, with regard to the x-ray readings contained in claimant's treatment notes, the administrative law judge found that, while these films included descriptions of large masses or ill-defined densities suggestive of pneumoconiosis, they did not establish complicated pneumoconiosis because they were not properly classified under the ILO classification system. Decision and Order at 21, 23; Claimant's Exhibits 2, 3. Nonetheless, the administrative law judge found that the treatment films, while not properly classified, were not inconsistent with the properly classified x-ray films that found complicated pneumoconiosis. Decision and Order at 23. Additionally, the

administrative law judge found that the "other evidence" of record, including the May 15, 2008 digital x-ray, the July 2006 PET scan, the September 2007 and July 2008 CT scans, while not conclusive evidence of the presence of complicated pneumoconiosis, were supportive of such a finding.[5] Decision and Order at 23. Accordingly, the administrative law judge found that the x-ray evidence established complicated pneumoconiosis at Section 718.304(a).

The administrative law judge also weighed the evidence relevant to Section 718.304(b) and (c), along with the x-ray evidence, in determining that the x-ray evidence established complicated pneumoconiosis at Section 718.304(a). The administrative law judge found that, while no biopsy of lung tissue was performed, *see* 20 C.F.R. §718.304(b), the results of bronchial washings and fine needle aspirations that were performed on the lung masses did not show any evidence of malignancy in the masses, but did confirm the presence of anthracosis. Decision and Order at 23; Claimant's Exhibit 3. Further, the administrative law judge found that the weight of the medical opinion evidence, consisting of the opinions of Drs. Ammisetty, Cox, Habre, Fino, Rosenberg and Vuskovich, was sufficient to establish the existence of both simple and complicated pneumoconiosis. The administrative law judge found the existence of simple pneumoconiosis established, based on her finding that the well-reasoned and documented opinions of Drs. Ammisetty and Habre, as supported by Dr. Fino's opinion, outweighed the contrary opinions of Drs. Rosenberg and Vuskovich, which were documented, but not as well-reasoned. Decision and Order at 27. Moreover, the administrative law judge found that the opinion of Dr. Habre, which was supported by the opinion of Dr. Fino, established the existence of complicated pneumoconiosis. The administrative law judge found, therefore, that the medical opinion evidence supported the finding of complicated pneumoconiosis at Section 718.304(a). *Id.* at 25, 27.

[5] Specifically, the administrative law judge found the May 15, 2008 digital x-ray, which was read as both positive for simple and complicated pneumoconiosis and also negative for pneumoconiosis, to be of limited probative value because neither report of the x-ray contained a statement regarding the medical acceptability or relevance of digital x-rays in the diagnosis of pneumoconiosis, as required under 20 C.F.R. §718.107. Employer's Exhibit 3. Regarding the July 2006 PET scan, the administrative law judge noted that it was interpreted, in part, as having findings most likely compatible with areas of progressive massive fibrosis of coal workers' pneumoconiosis correlated with claimant's occupational exposure. Claimant's Exhibit 3. The administrative law judge noted that the September 2007 and July 2008 CT scans showed, among other things, consolidated infiltrate and nodularity throughout both lung fields, which could be related to a component of coal workers' pneumoconiosis. Claimant's Exhibit 4.

Employer contends that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis at Section 718.304(a). Specifically, employer contends that the administrative law judge failed to sufficiently consider the x-ray readings of Drs. Alexander and Wheeler who, while classifying the x-rays as showing Category C large opacities under the ILO classification system, included comments on their x-ray reports indicating that these opacities might not be opacities of complicated pneumoconiosis, but might, in fact, reflect another disease. Employer also contends that the x-ray reports of Drs. Anderson and Rosenberg indicated that the large opacities were not opacities of complicated pneumoconiosis, but were opacities caused by another disease. Additionally, employer contends that the administrative law judge erred in failing to accord greater weight to the readings of Dr. Wheeler, based on his superior radiological qualifications as a professor of radiology.

Initially, we reject employer's contention that the administrative law judge should have accorded greater weight to the negative readings of Dr. Wheeler because he was a professor of radiology. The administrative law judge was not required to accord greater weight to the readings of Dr. Wheeler, based solely on his status as a professor of radiology. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Further, the administrative law judge reasonably accorded less weight to Dr. Wheeler's negative reading of the August 20, 2007 x-ray, based on the equivocal nature of his comments. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Cranor v. Peabody Coal Co*., 22 BLR 1-1 (1999)(*en banc*); *Melnick*, 16 BLR at 1-37; Decision and Order at 21.

However, the administrative law judge erred in her evaluation of other x-ray readings, namely, by failing to sufficiently consider how the comments on the readings affected the diagnosis of complicated pneumoconiosis. Specifically, in crediting the March 30, 2006 x-ray, by an unnamed reader, which found Category C large opacities, as positive for complicated pneumoconiosis, the administrative law judge noted that comments on the x-ray reading stated that infiltrate or mass could not be ruled out. Claimant's Exhibit 5. However instead of determining whether this x-ray, in fact, showed complicated pneumoconiosis, namely a "chronic dust disease of the lung," the administrative law judge merely found it positive for complicated pneumoconiosis because there were no negative readings of the film. This was error. A diagnosis of complicated pneumoconiosis must be made based on a showing that the large opacities reflect the existence of complicated pneumoconiosis, "a chronic dust disease of the lung" and not reflective of some other disease process. *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117. The administrative law judge's failure to consider the impact of the comment on the diagnosis of complicated pneumoconiosis requires remand for her to do so. *See Cranor v. Peabody Coal Co.*, 22 BLR at 1-5; *Melnick*, 16 BLR at 1-37.

Likewise, the administrative law judge erred in failing to properly consider the comments on other x-ray readings. Regarding the November 14, 2007 x-ray, the administrative law judge found that it established complicated pneumoconiosis, based on the positive findings of Drs. DePonte and Alexander. The administrative law judge noted, however, that Dr. Alexander also commented that the large opacities seen could be opacities reflecting the presence of rheumatoid pneumoconiosis or lung cancer, and that further evaluation was needed. Director's Exhibit 21. The administrative law judge did not fully discuss Dr. Alexander's comments because she found that while they were relevant to the cause of the opacities, they did not detract from their presence. This was error, however, since the determination that must be made at Section 718.304 is whether the large opacities seen on x-ray are, in fact, opacities showing a "chronic dust disease of the lung," namely complicated pneumoconiosis, as opposed to some other disease process. *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117.

Similarly, the administrative law judge found that the March 30, 2008 x-ray established complicated pneumoconiosis, based on Dr. Anderson's findings of large opacities. The administrative law judge, however, failed to sufficiently address Dr. Anderson's comment that the large opacities seen on the x-ray were unusual, and that he doubted that they were true large opacities or progressive massive fibrosis. Employer's Exhibit 1.

Finally, the administrative law judge erred in finding that the May 6, 2008 x-ray was positive for complicated pneumoconiosis, based on the readings of Dr. Poulos, without addressing the impact of Dr. Poulos's comment that other disease processes, such as sarcoidosis, should be considered. The administrative law judge noted Dr. Poulos's comment, but erroneously stated that the comment was appropriate for consideration on causation at Section 718.203(b), rather than at Section 718.304. *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117. Because Dr. Poulos's comment is relevant to whether claimant has a "chronic dust disease of the lung," namely complicated pneumoconiosis, as opposed to another disease, however, the administrative law judge should have considered it in determining whether the May 6, 2008 x-ray established complicated pneumoconiosis. Accordingly, the administrative law judge's finding of complicated pneumoconiosis at Section 718.304(a), based on the x-ray evidence, must be vacated and the case remanded for the administrative law judge to consider the comments on the readings to determine whether a "chronic dust disease of the lung," namely complicated pneumoconiosis, was established. *Lester*, 993 F.2d at 1145, 17 BLR at 2-117. In making this determination, the administrative law judge must consider, along with the x-ray evidence, all other evidence relevant to a finding of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(b), (c); *Cranor*, 22 BLR at 1-5; *Melnick*, 16 BLR at 1-37; *see also* 20 C.F.R. §§718.107, 718.202(a).

Etiology of Complicated Pneumoconiosis – 20 C.F.R. §718.203

Employer also contends that the administrative law judge did not properly consider whether claimant's complicated pneumoconiosis arose out of coal mine employment, before finding that he was entitled to the irrebuttable presumption of totally disabling pneumoconiosis at 30 U.S.C. §921(c)(3). Citing *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007), employer argues that a finding of complicated pneumoconiosis at Section 718.304 "does not subsume a 20 C.F.R. §718.203 arising out of causation finding." Employer's Brief at 12. Rather, employer contends that claimant must establish both the existence of complicated pneumoconiosis and, also, that it arose, at least in part, out of coal mine employment, in order to be entitled to the irrebuttable presumption. We agree. Because we are remanding the case for consideration of whether complicated pneumoconiosis is established at Section 718.304, we also remand the case for consideration of whether complicated pneumoconiosis arose out of coal mine employment at Section 718.203(b), if reached.

Section 411(c)(4)

Further, if the administrative law judge finds that claimant is not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at 30 U.S.C. §921(c)(3), she must then consider whether claimant is entitled to the rebuttable presumption of totally disabling pneumoconiosis at 30 U.S.C. §921(c)(4).

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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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