BRB No. 03-0565 BLA

WESLEY EUGENE CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: 05/20/2004
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (01-BLA-1021) of Administrative Law Judge Gerald M. Tierney on modification of a miner's duplicate

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] Initially, the administrative law judge credited claimant[2] with "at least" twenty-six years of coal mine employment. Decision and Order at 2. The administrative law judge noted claimant's concession that he cannot prove that he suffers from a totally disabling respiratory impairment and, therefore, seeks to establish entitlement by invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[3] Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 3-8. The administrative law judge, therefore, found that claimant established a mistake in a

[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]Claimant is Wesley E. Clark, the miner, who filed five claims for benefits. The miner's first claim, filed on May 4, 1973, was finally denied by the Board on February 27, 1986. Director's Exhibits 29-1, 29-91. The miner's second claim, filed on May 8, 1987, was finally denied on November 4, 1987. Director's Exhibits 30-1, 30-15. The miner's third claim, filed on February 8, 1989, was finally denied on July 29, 1989. Director's Exhibits 31-1, 31-12. The miner's fourth claim, filed on December 27, 1995, was finally denied by Administrative Law Judge Edith Barnett on October 3, 1997. Director's Exhibits 32-1, 32-35. Claimant's present claim for benefits, filed on December 5, 1998, was denied by Administrative Law Judge Robert J. Lesnick on July 31, 2000. Director's Exhibits 1, 63. On August 4, 2000, claimant requested reconsideration of Judge Lesnick's denial, which Judge Lesnick denied on September 23, 2000. Director's Exhibits 64, 65. Claimant requested modification of Judge Lesnick's denial on February 15, 2001. Director's Exhibit 67. The district director denied claimant's request for modification and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 70, 71.

[3]Claimant's concession regarding total respiratory disability was made at the January 25, 2000 hearing before Administrative Law Judge Robert J. Lesnick, prior to modification. Director's Exhibit 58 at 7. The administrative law judge agreed to hear this case on the record pursuant to his April 10, 2002 Order.

determination of fact pursuant to 20 C.F.R. §725.310 (2000).[4] Decision and Order at 19. Accordingly, benefits were awarded, commencing on December 5, 1998.

On appeal, employer contends that the administrative law judge erred in his consideration of the x-ray evidence and CT scan evidence pursuant to Section 718.304. Employer's Brief at 11-22. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[5]

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).

Claimant requested modification of Administrative Law Judge Robert J. Lesnick's denial of benefits in February 2001, alleging that Judge Lesnick made a mistake in a determination of fact.[6] Director's Exhibit 67. Specifically, claimant asserted that the administrative law judge failed to consider the decision of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), in which the court stated that x-ray evidence is considered the benchmark for evidence that invokes Section 718.304. *Id.* Additionally, claimant asserted in his request for modification that Judge Lesnick failed to consider Dr. Cappiello's deposition testimony regarding the 1999 x-rays. *Id.*

In his May 2, 2003 Decision and Order, which is the subject of this appeal, Administrative Law Judge Gerald M. Tierney (the administrative law judge) considered all the evidence of record to determine whether there was a mistake in a determination of fact in Judge Lesnick's decision. The administrative law judge first considered the x-ray

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[4]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

[5]We affirm the administrative law judge's finding of twenty-six years of coal mine employment and his finding that claimant failed to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6]In his request for modification, claimant did not allege a change in conditions as a basis for modification. Director's Exhibit 67.

evidence pursuant to Section 718.304(a). Decision and Order at 3-4. The administrative law judge noted that Judge Lesnick did not consider that Drs. Patel and Gaziano identified a Category A large opacity on the February 24, 1999 x-ray and that Drs. Siner and Westerfield identified a Category A large opacity on the March 19, 1999, March 30, 1999, and June 24, 1999 x-rays.[7] *Id.* at 3. The administrative law judge noted that the "inclusion of the additional readings changes the balance of the readers who found a large opacity verses the readers who did not." *Id.* at 3-4. In reviewing Judge Lesnick's decision, the administrative law judge stated that Judge Lesnick concluded that claimant did not establish complicated pneumoconiosis because forty-four of the sixty-four readings were negative for pneumoconiosis. *Id.* at 4. The administrative law judge further noted that Judge Lesnick's consideration of the x-ray evidence "did not take into account the progressive nature of pneumoconiosis." *Id.* The administrative law judge explained:

> When the x-ray is viewed in light of the year in which it was taken, the ratio of negative readings to the positive readings is less disparate. The earlier x-rays of record, the majority of which were taken before Claimant filed this present claim, do not establish the existence of pneumoconiosis. In 1995 . . . all of the fifteen physicians who provided interpretations concluded that Claimant did not have pneumoconiosis. In 1996, three physicians found the February 21, 1996 and October 10, 1996 x-rays to be positive for pneumoconiosis and three physicians found the slides [sic] to be negative. Thereafter, in 1998, seven physicians found that no pneumoconiosis [sic] and one physician found COPD with multiple small pulmonary nodules.
>
> In 1999, the majority of the physicians who reviewed Claimant's [x-rays] identified complicated pneumoconiosis. Eighteen physicians, sixteen of which [sic] were duly [sic] qualified readers, found A opacities, while sixteen equally qualified physicians determined that claimant did not have pneumoconiosis.

Id. According more weight to the most recent x-ray evidence, the administrative law judge found the existence of complicated pneumoconiosis pursuant to Section 718.304(a). *Id.*

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[7]On the original copy of Judge Lesnick's July 31, 2000 Decision and Order contained in the record, a Category A opacity is "penciled in" on the x-ray chart for the readings by Drs. Patel and Gaziano of the February 24, 1999 x-ray and the readings by Drs. Siner and Westerfield of the March 19, 1999, March 30, 1999, and June 24, 1999 x-rays. Director's Exhibit 63.

Because the administrative law judge mischaracterized the x-ray evidence, as discussed below, we vacate his finding of the existence of complicated pneumoconiosis pursuant to Section 718.304(a) and remand this case for him to reconsider the x-ray evidence. *See generally Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). While all of the 1995 x-rays were interpreted as negative for simple or complicated pneumoconiosis, the administrative law judge erred in his characterization of the interpretations of the x-rays taken in 1996, 1998, and 1999. In fact, two physicians interpreted the February 21, 1996 x-ray as positive for the existence of pneumoconiosis, one found simple pneumoconiosis and one found complicated pneumoconiosis, and four physicians read the October 23, 1996 x-ray as negative for simple or complicated pneumoconiosis. Director's Exhibit 32 at 9, 10, 27, 31. The record reveals that the 1998 x-ray evidence consists of three findings of no evidence of simple or complicated pneumoconiosis, one finding of simple pneumoconiosis, and one finding of chronic obstructive pulmonary disease on the April 16, 1998 x-ray. The record also reveals three findings of no evidence of simple or complicated pneumoconiosis, one finding of simple pneumoconiosis, and one finding of no acute cardiopulmonary disease on the November 2, 1998 x-ray. The 1999 x-ray evidence consists of thirty-five interpretations of seven x-rays: fifteen are interpreted as negative for simple or complicated pneumoconiosis, three are interpreted as positive for simple pneumoconiosis, and seventeen show complicated pneumoconiosis.

On the October 1, 1999 x-ray, Dr. Aycoth found a "1 cm. left upper lung nodule" and a Category A large opacity. Director's Exhibit 34. As employer contends, the administrative law judge erroneously included Dr. Aycoth's x-ray interpretation in his count of the x-rays supportive of a finding of complicated pneumoconiosis. Dr. Aycoth's interpretation of the October 1, 1999 x-ray is insufficient to establish the presence of complicated pneumoconiosis because Section 718.304(a) requires an x-ray to show an opacity *greater than* one centimeter in diameter and a large opacity classified in Category A, B, or C to be interpreted as a reading of complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Gollie v. Elkay Mining Co.*, 22 BLR 1-306 (2003).

Employer asserts that the administrative law judge erred in failing to discuss that Dr. Cappiello reread the March 19, 1999 and March 30, 1999 x-rays as negative for complicated pneumoconiosis at his deposition. Employer's Brief at 15. The record contains two x-ray reports from Dr. Cappiello in which he read the March 19, 1999 and March 30, 1999 x-rays as showing Category A large opacities. Director's Exhibit 34. At his deposition, Dr. Cappiello testified after reviewing the March 19, 1999 and March 30, 1999 x-ray films, that he did not see a large opacity on either x-ray. Director's Exhibit 50 at 6-7. Because the administrative law judge failed to consider how the statements Dr. Cappiello made during his deposition affect the credibility of his interpretations of the March 19, 1999 and March 30, 1999 x-rays, we instruct the administrative law judge to consider Dr. Cappiello's testimony in conjunction with his x-ray readings on remand.

See McGinnis v. Freeman United Coal Mining Co., 10 BLR 1-4 (1987); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Employer also contends that the administrative law judge erred in "relying on the supposed 'progressive nature of pneumoconiosis'" and numerical superiority in weighing the x-ray evidence at Section 718.304(a). Employer's Brief at 12-15. Employer's contentions have merit. As employer asserts, the logic of the administrative law judge's reliance on the progressivity of pneumoconiosis is diminished in this case. Because only a few months separates the last x-ray taken in 1998 on November 2nd and the first x-ray taken in 1999 on February 24th, there is no reason to believe that progress of the disease would be a factor. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Stanley v. Director, OWCP*, 7 BLR 1-386, 1-389 (1984).

Moreover, it is unclear, without further elaboration, why the administrative law judge found that Judge Lesnick's "not tak[ing] into account the progressive nature of pneumoconiosis" resulted in this administrative law judge's finding that the x-ray evidence establishes the existence of complicated pneumoconiosis. Although the regulations recognize that pneumoconiosis is "a latent and progressive disease," 20 C.F.R. §718.201(c), claimant ultimately bears the burden of proving the existence of complicated pneumoconiosis. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). Accordingly, the administrative law judge on remand must reconsider the x-ray evidence pursuant to Section 718.304(a) inasmuch as the administrative law judge erred in according more weight to the most recent chest x-ray evidence to find complicated pneumoconiosis established. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). In weighing the x-ray evidence on remand, we instruct the administrative law judge to consider all of the following factors: the number of x-ray interpretations, the readers' qualifications, the dates of the film, the quality of the film, and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988).

The administrative law judge next considered the CT scan evidence and the medical opinion evidence pursuant to Section 718.304(c). He found that because the majority of the physicians concluded that the CT scan evidence does not establish the existence of complicated pneumoconiosis, the CT scan evidence alone is insufficient to establish complicated pneumoconiosis. Decision and Order at 7. The administrative law judge then weighed the x-ray and CT scan evidence together and found "that the chest x-ray evidence outweighs the conflicting evidence in the record." *Id.* The administrative

law judge noted that the chest x-ray evidence is consistent with claimant's twenty-six year coal mine employment history and the lack of evidence that claimant previously had tuberculosis. *Id.* The administrative law judge further stated that:

> although all but two physicians read the CT scans as negative for complicated pneumoconiosis, I find that less probative weight must be attached to such evidence since the physicians' opinions are inconsistent.

Id. The administrative law judge reiterated the negative findings Drs. Duren, Scott, Wheeler, and Zaldivar rendered after reviewing the CT scan evidence and stated, in contrast, that Drs. Younis and Cappiello found complicated pneumoconiosis established. *Id.* at 8.

Based on the abovementioned reasoning, the administrative law judge concluded "that the preponderance of the evidence, considered as a whole, is sufficient to invoke the §718.304 presumption." *Id.* Therefore, the administrative law judge found that a mistake in a determination of fact was made in Judge Lesnick's finding that claimant failed to establish complicated pneumoconiosis. *Id.*

Employer asserts that the administrative law judge failed to adequately review the CT scan evidence. Employer's Brief at 17-19. Employer's assertion has merit. Prior to discussing the CT scan evidence, the administrative law judge stated that Dr. Cappiello's testimony "provides the foundation for the evidentiary value of the CT scan" evidence in diagnosing complicated pneumoconiosis. Decision and Order at 5. The administrative law judge referred to Dr. Cappiello's discussion of Dr. Younis' CT scan report in which Dr. Cappiello testified that the purpose of Dr. Younis' report was to determine whether claimant has cancer, not to make a diagnosis of pneumoconiosis. *Id.* The administrative law judge further stated that Dr. Cappiello testified that if one wanted to make a stronger case regarding the presence or absence of pneumoconiosis, then one would review the CT scan films to specifically determine whether claimant has pneumoconiosis or subject claimant to a high resolution CT scan. *Id.*

As employer points out, the administrative law judge did not consider that the record contains a high resolution CT scan. A high resolution CT scan was taken on June 9, 1999 and reviewed by Drs. Zaldivar, Scott, and Wheeler.[8] Moreover, the

[8]On the June 9, 1999 CT scan, Dr. Zaldivar found large peripheral nodules that do not have the appearance of coal workers' pneumoconiosis, but appear to be a previous infective process. Director's Exhibit 24. However, Dr. Zaldivar could not completely rule out simple coal workers' pneumoconiosis. *Id.* Drs. Scott and Wheeler found nodules

administrative law judge did not discuss the testimony of Drs. Zaldivar and Tuteur regarding the value of CT scan evidence in rendering a diagnosis of pneumoconiosis in general. On this subject, Dr. Zaldivar stated that the high resolution CT scan "is the most precise tool we now have to try to look at small details in any given organ but specifically of the lungs." Director's Exhibit 52 at 11-12. Dr. Tuteur testified that he uses a CT scan when he cannot get enough information on a chest x-ray because a CT scan reveals higher resolution, less distraction, and better focus. Director's Exhibit 55 at 26-27.

Additionally, the administrative law judge mischaracterized the CT scan findings of Drs. Cappiello and Younis. The administrative law judge stated that "Dr. Cappiello discussed the June 16, 1999 CT scan . . . and concluded that Claimant has complicated pneumoconiosis." Decision and Order at 6. As employer states, contrary to the administrative law judge's suggestion, Dr. Cappiello did not review a CT scan in this case. Rather, at his deposition, Dr. Cappiello reviewed Dr. Younis' report of the June 16, 1999 CT scan and testified that in all probability it showed complicated pneumoconiosis. Director's Exhibit 50 at 22. Dr. Cappiello further stated, however, that the actual film would be more useful to review than Dr. Younis' report. *Id.* at 23. The administrative law judge also stated that Dr. Younis "identified abnormalities consistent with complicated pneumoconiosis." Decision and Order at 8. Contrary to the administrative law judge's statement, Dr. Younis did not identify complicated pneumoconiosis on the June 16, 1999 CT scan. Dr. Younis noted that the nodular densities were consistent with occupational lung disease, but did not indicate whether the occupational lung disease was simple or complicated pneumoconiosis. Director's Exhibit 41.

Employer's assertion, that the administrative law judge failed to offer a valid rationale for crediting the x-ray evidence over the CT scan evidence, also has merit. In this regard, the administrative law judge failed to explain why he finds the CT scan evidence to be "inconsistent." Additionally, the administrative law judge failed to consider whether the medical opinion evidence[9] affects the credibility of the x-ray evidence of complicated pneumoconiosis.

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compatible with tuberculosis on the June 9, 1999 CT scan and Dr. Wheeler also noted that there was no evidence of pneumoconiosis. Director's Exhibit 36.

[9]Dr. Zaldivar found that claimant does not have complicated pneumoconiosis. Director's Exhibit 45. Dr. Fino found simple pneumoconiosis present, but no complicated pneumoconiosis. Director's Exhibits 46, 59 at 7, 8. Dr. Tuteur found that claimant has simple coal workers' pneumoconiosis but that it is not clinically or physiologically significant. Director's Exhibit 49. Dr. Rasmussen found complicated pneumoconiosis. Director's Exhibit 9.

In light of the foregoing, we vacate the administrative law judge's consideration of the CT scan evidence pursuant to Section 718.304(c) and his consideration of all the evidence together pursuant to Section 718.304.[10] In doing so, we instruct the administrative law judge, in reconsidering the x-ray, CT scan and other evidence regarding the existence of complicated pneumoconiosis on remand, to provide a detailed analysis for his findings, as required by the Administrative Procedure Act.[11] *See* 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); *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Finally, because this case involves a request for modification on the denial of a duplicate claim, the administrative law judge must determine whether claimant can establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[12] *See 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). Therefore, we instruct the administrative law judge that if he again finds a mistake in fact on remand, he must then determine whether claimant can establish a material change in conditions since the denial of claimant's fourth claim. If the administrative law judge finds the evidence sufficient to establish a material change in conditions on remand, then he must consider this duplicate claim on the merits based on all the evidence of record.

[10]We instruct the administrative law judge on remand to render any necessary equivalency determinations in accordance with *Scarbro* and *Blankenship*. *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, 22 BLR 2-554 (4th Cir. 1999); *see Gollie v. Elkay Mining Co.*, 22 BLR 1-306 (2003); *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236 (2003).

[11]As employer contends, the administrative law judge must also determine on remand whether the opacities seen are related to a chronic dust disease of the lung pursuant to 20 C.F.R. §718.203(b). *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

[12]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.309 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part, 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