BRB No. 06-0684 BLA

HARLAN G. ADKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 05/31/2007
	)	
CANNELTON INDUSTRIES, INCORPORATED c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, LC), Charleston, West Virginia, for claimant.

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

Employer appeals the Decision and Order (03-BLA-5036) of Administrative Law Judge Robert D. Kaplan 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] Claimant's prior application for benefits, filed on November 29,

[1] By motion received July 18, 2006, the Director, Office of Workers' Compensation Programs (the Director), moved to reform the caption in this case. By

1972, was finally denied on August 7, 1986 because claimant failed to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment.[2] Director's Exhibit 3. On August 13, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order Awarding Benefits issued on May 16, 2006, the administrative law judge credited claimant with at least thirty-three years of coal mine employment[3] and found that the medical evidence developed since the prior denial of benefits established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Therefore, the administrative law judge found that claimant established a change in both applicable conditions of entitlement, total disability and total disability due to pneumoconiosis.[4] 20 C.F.R. §725.309(d); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 8. Considering the merits of the claim, the

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Order dated October 13, 2006, the Board granted the Director's motion. The caption is correct as it appears in this Decision and Order.

[2] Claimant's prior claim was adjudicated pursuant to 20 C.F.R. Part 727. The administrative law judge found the x-ray evidence sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1), but found rebuttal of the interim presumption established pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. Claimant took no further action on this prior claim. Director's Exhibit 1.

[3] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

administrative law judge found that claimant again established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray, CT scan, biopsy, and medical opinion evidence relevant to the existence of complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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).

The regulations provide that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows a large opacity greater than one centimeter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.[5]

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[5] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis...if such miner is suffering...from a chronic dust disease of the lung which:
>
>> (a) When diagnosed by chest X-ray...yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
>>
>> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>>
>> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any

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. §718.304. 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. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

Employer contends that in finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge improperly credited the biopsy report of Dr. Blue, diagnosing a two-centimeter nodule, as equivalent to a finding on chest x-ray of an opacity greater than one centimeter, and failed to weigh the medical opinion evidence together with the other evidence prior to invocation of the irrebuttable presumption. Employer's Brief at 4-6, 10-11. Employer further asserts that because the record contains no biopsy diagnoses of massive lesions, progressive massive fibrosis, or complicated pneumoconiosis, no x-rays or computerized tomography (CT) scans that are positive for the existence of large opacities or complicated pneumoconiosis, and no medical opinion stating that any of the lesions seen on biopsy would appear as one centimeter if viewed on x-ray, the administrative law judge's decision is not supported by substantial evidence in the record. Employer's Brief at 4-6, 10-11, 14-15. Employer's contentions have merit.

Dr. Blue, who prepared the surgical pathology report following claimant's August 9, 2002 mediastinoscopy, right thoracotomy, and right upper and middle lobectomy, described her findings for each of the four specimens biopsied. Claimant's Exhibit 1. She stated that the mediastinal adenopathy revealed benign anthracotic lymph nodes with fibrosis, and that the right lower lobe was markedly anthracotic and scarred, with two tan-white nodules that measured .4 and .5 centimeters, and dense fibrosis and anthracosis.

> diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); *see Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). The administrative law judge must, however, weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

The paratracheal node contained a firm black lymph node measuring 1.1 centimeter, in addition to several smaller lymph node fragments, characteristic of benign anthracotic lymph nodes with fibrosis. Finally, the right upper and middle lobe specimen contained "[m]ultiple firm nodular areas . . .[t]he largest of which measures 2 cm in diameter." Claimant's Exhibit 1. Serial sectioning of this area showed many additional black parenchymal and pleural nodules, measuring from 1 to 10 mm in diameter. Dr. Blue concluded that this specimen revealed "[e]xtensive severe fibrosis with anthracosis." Claimant's Exhibit 1.

In a report dated June 17, 2004, Dr. Mangano reviewed Dr. Blue's biopsy report and fifteen slides prepared from the biopsy specimens. Claimant's Exhibit 2. Dr. Mangano opined that the samples revealed, in pertinent part, diffuse and nodular fibrosis with anthracotic pigment, with the largest area of fibrosis measuring one centimeter. Dr. Mangano concluded that the lung and lymph biopsies are "entirely consistent with coal workers' pneumoconiosis." Claimant's Exhibit 2.

Noting that the United States Court of Appeals for the Fourth Circuit stated, in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 244, 22 BLR 2-556, 2-561 (4th Cir. 1999), that "at least one lesion of two centimeters or greater in diameter is the minimum requirement for establishing 'massive lesions,'" the administrative law judge found that Dr. Blue's diagnosis of a two-centimeter nodule with extensive severe fibrosis constituted a diagnosis of massive lesions, and was equivalent to a finding on chest x-ray of an opacity greater than one centimeter. Decision and Order at 7. The administrative law judge further found that (1) Dr. Mangano's diagnosis of a one-centimeter fibrotic nodule; (2) the May 31, 2002 chest x-ray reading by Dr. Scatarige, showing a one-centimeter focal mass in the right apex; and (3) the February 6 and May 6, 2002 CT scan readings by Drs. Scott and Scatarige, showing the presence of lung lesions measuring greater than one centimeter, all supported his conclusion that Dr. Blue's finding on biopsy was sufficient to establish the existence of complicated pneumoconiosis. Decision and Order at 6, 7-8. The administrative law judge considered that Drs. Scott, Scatarige, and Wheeler opined that the x-ray and CT scans they reviewed showed no evidence of pneumoconiosis, and indicated that the pulmonary lesions they identified were probably tuberculosis or "UIP," but the administrative law judge concluded that their opinions were outweighed by the more persuasive biopsy evidence that clearly diagnosed the presence of pneumoconiosis. Decision and Order at 7 n.5, 8.

Initially, we hold that, contrary to employer's argument, the administrative law judge could find, in the exercise of his discretion, that Dr. Blue's biopsy diagnosis of a two-centimeter lesion and "extensive and severe fibrosis with anthracosis" was sufficient to constitute a diagnosis of "massive lesions," as described at 20 C.F.R. §718.304(b). *See Perry v. Mynu Coals, Inc.*, F.3d , 23 BLR 2-374, 2-384-5 (4th Cir. 2006); *Scarbro*, 220 F.3d at 259, 22 BLR at 2-106. In addition, the administrative law judge correctly

noted that the United States Court of Appeals for the Fourth Circuit has held that the "massive lesions" sufficient to invoke the irrebuttable presumption under 20 C.F.R. §718.304(b) are those that "when x-rayed . . . would show as opacities greater than one centimeter." *See Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; *Scarbro*, 220 F.3d at 256, 22 BLR 2-100. We agree with employer, however, that in making his equivalency determination, that is, in finding the two-centimeter lesion described in Dr. Blue's biopsy report to be the equivalent of a greater-than-one-centimeter opacity on x-ray, the administrative law judge substituted his own medical opinion for that of the experts, which is not a proper exercise of his discretion. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). The administrative law judge's equivalency determination is unsupported by substantial evidence because the record contains no medical evidence indicating that the lesion found by Dr. Blue on biopsy would be expected to yield an opacity of greater than one centimeter if seen on x-ray. *See Braenovich v. Cannelton Industries*, 22 BLR 1-236, 1-245 (2003); *Blankenship,* 177 F.3d at 243, 22 BLR at 2-561*; but see Scarbro*, 220 F.3d at 256, 258, 22 BLR at 2-101, 2-105.[6] Further, the administrative law judge failed to reconcile Dr. Blue's finding of a two-centimeter lesion, with Dr. Mangano's opinion that the largest area of fibrosis measured only one centimeter. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Moreover, as employer contends, while Drs. Scott and Scatarige both noted that the x-rays and CT scans they reviewed revealed lesions of one centimeter or greater, none of the x-rays or CT scans of record were read as showing a large *opacity* of one centimeter or greater, as set forth at 20 C.F.R. §718.304(a). Director's Exhibits 8-11, Claimant's Exhibit 1, Employer's Exhibits 1, 3. Finally, we agree with employer that the administrative law judge erred in failing to discuss the medical opinion evidence of record, together with the x-ray, CT scan, and biopsy evidence of record, prior to the invocation of the irrebuttable presumption at 20 C.F.R. §718.304. *Scarbro*, 220 F.3d at

[6]In *Scarbro*, the Fourth Circuit held that an administrative law judge's failure to make a proper equivalency determination did not undermine the administrative law judge's ultimate conclusion that both the x-ray and autopsy evidence established complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The court stated that, given the record in that particular case, the court was "given no reason to believe that nodules of 1.7 centimeters would not produce x-ray opacities of greater than one centimeter." *Scarbro,* 220 F.3d at 258, 22 BLR at 2-105. Specifically, the court noted that seven of eight x-ray interpretations of an x-ray in that case indicated that there were large opacities greater than one centimeter, which the court found was persuasive evidence that the miner's lesions on the autopsy slides would show opacities of that size. *Id*. In the instant case, however, there are no x-rays that were interpreted as showing large opacities of greater than one centimeter, that would be classified as Category A, B, or C. Director's Exhibits 8-11, Claimant's Exhibit 1, Employer's Exhibits 1, 3. Therefore, the instant case is distinguishable from the court's decision in *Scarbro*.

256, 22 BLR at 2-101; *Braenovich*, 22 BLR at 1-239. Accordingly, we vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(b). On remand, the administrative law judge must reconsider the evidence supporting equivalency, and must further consider all of the relevant evidence under 20 C.F.R. §718.304(a), (b), and (c). If, on remand, the administrative law judge determines that the evidence of record is insufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304, he should reconsider whether claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). If claimant establishes a change in an applicable condition, the administrative law judge should reconsider the merits of the claim.

Accordingly, the administrative law judge's Decision and Order is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge