BRB No. 06-0818 BLA

JOHNNY M. McCARTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 05/24/2007
	)	
U.S. STEEL MINING COMPANY, LLC/ U.S. STEEL CORPORATION	)	
	)	
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 Granting Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (05-BLA-5054) of Administrative Law Judge Alice M. Craft rendered on a subsequent 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). Claimant filed this claim for benefits on

March 5, 2003.[1] Director's Exhibit 3. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), because employer in its post-hearing brief conceded that claimant has simple pneumoconiosis, an element of entitlement that was previously adjudicated against him. Considering the claim on the merits, the administrative law judge credited claimant with at least twenty-three years of coal mine employment and found that claimant has pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202 and 718.203. The administrative law judge additionally found that claimant has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the x-ray and medical opinion evidence pursuant to Section 718.304.[2] Claimant responds in

[1] Claimant filed his first claim for benefits on May 18, 1994. Director's Exhibit 1, internal exhibit 1. The district director denied the claim after an informal conference was held, because claimant did not establish pneumoconiosis and that he is totally disabled due to pneumoconiosis. Director's Exhibit 1, internal exhibit 27. Claimant subsequently requested a formal hearing before an administrative law judge, but did not appear at the hearing despite being given notice of it. February 11, 1999 Hearing Transcript at 3. Thus, Administrative Law Judge Edward Terhune Miller issued an order on April 8, 1999 dismissing claimant's claim for his "unexcused failure to appear at a scheduled hearing and for failure to prosecute." Order of Dismissal dated April 8, 1999. Claimant took no further action on this claim. Director's Exhibit 1.

[2] We affirm the administrative law judge's decision to credit claimant with at least twenty-three years of coal mine employment, and the administrative law judge's findings

support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 411(c)(3) of the Act, as implemented by Section 718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in

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pursuant to 20 C.F.R. §§718.202, 718.203, and 725.309(d), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[3] In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis, including evidence of simple pneumoconiosis and of no pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-1146, 17 BLR 2-114, 2-117-2-118 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-1-34 (1991)(*en banc*).

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[3] 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 diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

Pursuant to 20 C.F.R. §718.304(a)-(c), the administrative law judge considered x-ray, biopsy, and medical opinion evidence. The January 8, 2005 x-ray was interpreted as positive for complicated pneumoconiosis by one Board-certified radiologist and B reader, Dr. DePonte, but negative for complicated pneumoconiosis by two Board-certified radiologists and B readers, Drs. Abramowitz and Binns.[4] Claimant's Exhibit 1; Employer's Exhibits 1, 3. The April 16, 2003 x-ray was interpreted by one B reader, Dr. Forehand, as positive for complicated pneumoconiosis, but was interpreted as negative for complicated pneumoconiosis by two Board-certified radiologists and B readers, Drs. Baek and Binns. Director's Exhibits 17, 31; Employer's Exhibit 2. The June 16, 1995 x-ray was interpreted as positive for complicated pneumoconiosis by Board-certified radiologists and B readers, Drs. Ahmed, Aycoth, and Cappiello, and by B reader Dr. Ranavaya, but was read as negative for simple and complicated pneumoconiosis by two Board-certified radiologists and B readers, Drs. Cole and Francke. Director's Exhibit 1, internal exhibits 14-16, 26.

There are two biopsy reports of record. Dr. Koss rendered a biopsy report on October 5, 1990, after reviewing slides of tissue from claimant's right lung, and

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[4] The term "B reader" refers to a physician who has demonstrated designated levels of proficiency in classifying x-rays according to the ILO-UC standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51. A "Board-certified radiologist" is a radiologist who is certified by the American Board of Radiology. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 213 n.5 (1985).

diagnosed noncaseating granulomas of unknown etiology. Director's Exhibit 1, internal exhibit 11. Dr. Naeye rendered a biopsy report on August 21, 1997, based upon his review of the same slides of the lung tissue sample as that reviewed by Dr. Koss, and also diagnosed noncaseating granulomas of unknown origin, but added that coal workers' pneumoconiosis was absent. Director's Exhibit 1, internal exhibit 34.

The medical opinion evidence consists of Dr. Forehand's report and deposition testimony, as well as Dr. Piracha's treatment notes. Dr. Forehand diagnosed coal workers' pneumoconiosis due to coal dust exposure and stated that claimant's coal workers' pneumoconiosis is the "sole factor contributing to [his significant] respiratory impairment." Director's Exhibit 14 (Dr. Forehand's report at 4). In his deposition, Dr. Forehand testified that the results of the chest x-ray he performed showed complicated pneumoconiosis. Director's Exhibit 34 at 5. Dr. Forehand also testified that the 2 x 2 centimeter density that he found in the left lower lung zone was not cancer because the density had not changed in size, and because claimant had not lost weight. Director's Exhibit 34 at 6, 12, 14. Dr. Forehand testified that the density was not caused by an infection because claimant did not have a fever. Director's Exhibit 34 at 11. Dr. Piracha, claimant's treating physician, followed claimant for pneumoconiosis, chronic obstructive pulmonary disease, osteoarthritis, and hypertension from November 26, 2002 through February 24, 2005. Claimant's Exhibit 2. On November 26, 2002, Dr. Piracha stated that a CT scan of claimant's chest showed pneumoconiosis but no evidence of any malignancy. *Id.*

The administrative law judge pointed out that all of the readers of the 2003 and 2005 x-rays noted a mass or nodule in claimant's left lung, and that they attributed it to either complicated pneumoconiosis, or to a coalescence of pneumoconiotic lesions but not complicated pneumoconiosis, or possible cancer. Decision and Order at 11. The administrative law judge noted that Dr. Forehand's opinion that claimant did not have cancer was consistent with Dr. Piracha's treatment notes, which did not indicate that Dr. Piracha was concerned about the presence of cancer, and which stated that a CT scan showed no malignancy. Decision and Order at 11-12. The administrative law judge then found that Dr. Forehand's opinion that claimant has complicated pneumoconiosis but not cancer was reliable, persuasive, well reasoned, and well supported. Decision and Order at 12. The administrative law judge found that Dr. Forehand thoroughly explained why he eliminated cancer and infection as a cause for claimant's x-ray changes, noting that claimant did not have a history of fever or significant recent weight loss, and that the mass had been stable for some time. *Id*. The administrative law judge further found that Dr. Forehand's opinion of complicated pneumoconiosis was consistent with Dr. Piracha's treatment notes diagnosing pneumoconiosis but not cancer, and with Dr. Binns's report of the January 8, 2005 x-ray showing a stable mass.[5] *Id*.

[5] Dr. Binns, a Board-certified radiologist and B reader, interpreted claimant's January 8, 2005 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 1. Dr. Binns reported a three-centimeter density in the left lower lung zone, which appeared to be stable since February 10, 2004. *Id*.

The administrative law judge concluded that the x-ray readings of complicated pneumoconiosis outweighed the contradictory readings, because the opinions of the readers who concluded that the mass may be due to cancer were less persuasive, given the administrative law judge's reliance on Dr. Forehand's opinion that claimant does not have cancer. *Id.* She therefore found that the readings of the 1995 x-ray by Drs. Cole and Francke, and the readings of the 2003 and 2005 x-rays by Drs. Abramowitz and Baek, which attribute the significant changes to possible cancer, were less persuasive than the x-ray readings showing large opacities. *Id.* The administrative law judge found that Dr. Binns's interpretations of the 2003 and 2005 x-rays, reporting a mass of unknown etiology, were not sufficient to outweigh the readings of Dr. Forehand, as well as those of Drs. Ahmed, Aycoth, Cappiello, and DePonte, which concluded that the changes are due, at least in part, to complicated pneumoconiosis. *Id.* Although the 1990 biopsy was negative for complicated pneumoconiosis, the administrative law judge found the biopsy outweighed by the more recent x-ray reports and by Dr. Forehand's more recent medical opinion.

Employer argues that the administrative law judge erred in relying on Dr. Forehand's opinion to credit the positive x-ray readings, because the administrative law judge did not consider the qualifications of the readers when weighing the conflicting x-rays. Employer also argues that the administrative law judge erred in weighing the x-ray and medical opinion evidence of complicated pneumoconiosis based upon an apparent assumption that the exclusion of cancer compels the conclusion that complicated

pneumoconiosis is present, or that claimant cannot have a type of pathology other than complicated pneumoconiosis, such as a granuloma.

We agree with employer that the administrative law judge erred in weighing the x-ray and medical opinion evidence pursuant to Section 718.304. In crediting the positive x-ray readings based on Dr. Forehand's opinion that claimant has complicated pneumoconiosis but not cancer, the administrative law judge failed to weigh the x-ray evidence, taking into account the radiological qualifications of the readers. *See Adkins v. Director, OWCP,* 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Melnick*, 16 BLR at 1-37; 20 C.F.R. §718.202(a)(1). We therefore vacate the administrative law judge's finding pursuant to Section 718.304(a). On remand, the administrative law judge must take into account the radiological qualifications of the readers.

In this regard, the administrative law judge should consider that Dr. Forehand, although a B reader, is not Board-certified in radiology. Director's Exhibit 34 at 5. However, contrary to employer's contention, the administrative law judge on remand is not required to defer to the numerical superiority of the x-ray interpretations by dually qualified readers. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-138 (2006)(*en banc*)(Boggs, J., concurring). On remand, the administrative law judge must also consider that all of the x-ray readers but Dr. Forehand, not merely those who read the x-rays as negative for complicated pneumoconiosis,

interpreted the x-rays as showing possible cancer.[6] *See Melnick*, 16 BLR at 1-37; *see also Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1984)(holding that an administrative law judge should not selectively analyze evidence); Decision and Order at 12; Director's Exhibits 1, internal exhibits 14-16, 26; 17, 31; Claimant's Exhibit 1; Employer's Exhibits 1-3. Finally, we agree with employer that Drs. Abramowitz, Baek, Cole, and Francke did not conclude that claimant does not have complicated pneumoconiosis because he has cancer; a review of the record discloses that they affirmatively opined that claimant's x-rays are negative for large opacities, and stated that cancer could not be excluded. *See* Director's Exhibit 1, internal exhibits 14, 15; Employer's Exhibits 2, 3. Accordingly, the administrative law judge should consider the evidence on remand in recognizing that it is claimant's burden to establish the presence of large opacities under Section 718.304(a).

[6] Drs. Cole and Francke noted probable or possible metastases of the left lung on the June 16, 1995 x-ray. Director's Exhibit 1, internal exhibits 14, 15. The remaining readers of the June 16, 1995 x-ray, Drs. Ahmed, Aycoth, Cappiello, and Ranavaya, also noted a possible neoplasm such as cancer in the left lung. Director's Exhibit 1, internal exhibits 16, 26. Drs. Baek, Binns, and Forehand all noted a 2-2.5 centimeter nodule in the left lower lung on the April 16, 2003 x-ray; Drs. Baek and Binns thought it could be cancer, but Dr. Forehand did not offer an opinion on his x-ray report as to its etiology. Director's Exhibits 17, 31; Employer's Exhibit 2. Drs. Abramowitz, Binns, and DePonte noted a 2.5-3 centimeter density in the left lower lung on the January 8, 2005 x-ray. Claimant's Exhibit 1; Employer's Exhibits 1, 3. Dr. DePonte stated that, "The stability speaks for benignity, however this should be followed for at least 2 years to confirm." Claimant's Exhibit 1. Drs. Abramowitz and Binns both noted that a neoplasm could not be excluded, although Dr. Binns thought that the mass appeared stable. Employer's Exhibits 1, 3.

The administrative law judge must separately weigh all of the medical opinions pursuant to Section 718.304(c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that "experts' respective qualifications are important indicators of the reliability of their opinions." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998)*; see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-2-276 (4th Cir. 1997). Thus, in weighing the medical opinion evidence, the administrative law judge must consider that Dr. Forehand is Board-certified in the specialty of allergy but not internal medicine or pulmonary disease, and that the qualifications of Dr. Piracha, claimant's treating physician, are not of record. Director's Exhibit 34 at 3-4.

In light of the foregoing, we vacate the administrative law judge's finding pursuant to Section 718.304, and remand this case to her for further consideration. On remand, the administrative law judge must first consider whether the evidence in each category tends to establish complicated pneumoconiosis. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. The administrative law judge then must weigh all the evidence together before determining whether complicated pneumoconiosis is established. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-1146, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. Claimant

retains the burden of establishing that he has complicated pneumoconiosis.[7] *Lester*, 993 F.2d at 1146, 17 BLR at 2-118.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[7] We affirm the administrative law judge's weighing of the biopsy evidence pursuant to 20 C.F.R. §718.304(b) as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711. The administrative law judge found that the biopsy reports were outweighed by the x-ray readings and Dr. Forehand's opinion because the biopsy was performed in 1990 – many years before the x-rays, performed in 1995, 2003 and 2005, and Dr. Forehand's 2003 opinion. Decision and Order at 12. Moreover, the administrative law judge found that the record did not include the reports of claimant's lung surgery or the original biopsy report. *Id.*