BRB No. 08-0438 BLA

C.V.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 05/29/2009
	)	
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 and the Decision and Order Awarding Attorney Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Kathy L. Snyder and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order Awarding Attorney Fees (2007-BLA-5320) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim[1] filed pursuant to the provisions of

[1] Claimant filed his first claim on July 30, 1985. Director's Exhibit 1. It was denied by Administrative Law Judge Giles J. McCarthy and that decision was subsequently affirmed by the Board on February 13, 1992. Claimant filed a duplicate claim on August 23, 1995. Director's Exhibit 2. It was denied by Administrative Law

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with thirty-three years of coal mine employment and adjudicated this subsequent claim, filed on February 13, 2006, pursuant to the regulations at 20 C.F.R. Part 718 and 20 C.F.R. §725.309(d). The administrative law judge found the newly submitted evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), but found it sufficient to establish the existence of complicated pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.202(a)(3), 718.304, 725.309(d). Reviewing the entire record on the merits of claimant's entitlement, the administrative law judge found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(3), 718.304, 718.203(b), and thus claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits, and subsequently awarded attorney fees.

On appeal, employer challenges the administrative law judge's finding that the weight of the evidence was sufficient to establish the presence of complicated pneumoconiosis at Section 718.304, and challenges the administrative law judge's award of attorney fees. Claimant responds, urging affirmance of the award of benefits and attorney fees. The Director, Office of Workers' Compensation Programs, has declined to file a response 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.[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).

Judge Jeffrey Tureck, and that decision was subsequently affirmed by the Board on August 14, 1998, because the evidence was insufficient to establish total disability. Director's Exhibits 2-32, 2-35. Claimant's request for modification was denied by the district director on August 19, 1999, and denied by Administrative Law Judge Linda S. Chapman on July 12, 2000. Director's Exhibits 2-38, 2-52. Claimant's subsequent requests for modification were denied by the district director on November 8, 2001, February 25, 2004, and September 17, 2004. Director's Exhibit 2. Claimant took no further action with respect to the denial of his August 23, 1995 claim.

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also 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 "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

In the present case, the administrative law judge determined that claimant established a change in an applicable condition of entitlement by establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Decision and Order at 15. Section 411(c)(3) of the Act, as implemented by Section 718.304 of the regulations, 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 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 United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by any other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at Section 718.304. Rather, in determining whether claimant has established invocation, the administrative law judge must find that claimant has established a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis, by weighing together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *see Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). The burden of establishing that the large opacities, as defined at Section 718.304, are due to coal mine dust exposure, rests with claimant. *See Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006)(unpub.).

Employer challenges the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at Section 718.304. Specifically, employer argues that the administrative law judge applied the wrong legal standard on the issue of complicated pneumoconiosis, by shifting the burden to employer to show that the opacities,[3] seen radiographically, were inconsistent with a diagnosis of complicated pneumoconiosis or did not arise out of coal dust exposure, contrary to the holding in *Scarbro*, 220 F.3d 250, 22 BLR 2-93. Employer's Brief at 9-15. Employer's argument has merit.

In considering the relevant evidence under Section 718.304, the administrative law judge noted that the regulations provide for an irrebuttable presumption of total disability due to pneumoconiosis if a claimant suffers from a chronic dust disease of the lung and satisfies one of the prongs at Section 718.304(a)-(c). Decision and Order at 10. Citing *Scarbro*, the administrative law judge noted that all relevant medical evidence must be considered in determining the validity of the claim, and that "once [claimant] has provided evidence satisfying one of these prongs, if employer can affirmatively show that the opacity is not there or is something other than pneumoconiosis, the x-ray loses force, and [claimant] is not entitled to the benefits of the presumption." *Id*.

The evidence considered by the administrative law judge under Section 718.304(a) consisted of ten interpretations of four x-rays.[4] Drs. Rasmussen, Alexander, and DePonte diagnosed Category A opacities for five of the interpretations, Director's Exhibits 17, 19, 20, 22, Claimant's Exhibit 4, and Drs. Wheeler, Castle, and Scatarige found simple

[3] Employer also contends that the administrative law judge applied the incorrect legal standard for finding complicated pneumoconiosis by referring to findings of "opacities of one centimeter or greater" on the x-rays. Employer's Brief at 13; Decision and Order at 12, 13; 20 C.F.R. §725.304.

[4] Drs. Rasmussen and Alexander indicated that the x-ray dated May 9, 2006, contained Category A large opacities and was positive for simple pneumoconiosis. Director's Exhibits 17, 19. Dr. Wheeler classified this film as 1/0 with no large opacities. With respect to the July 6, 2006 x-ray, Dr. DePonte read the film as 2/2 with Category A opacities, and Dr. Wheeler read the film as 0/1 with no large opacities. Director's Exhibit 22, Employer's Exhibit 8. Dr. DePonte read the October 3, 2006 film as 2/2 with Category A opacities, and Dr. Wheeler read the film as 1/0 with no large opacities. Director's Exhibit 20, Employer's Exhibit 2. The October 10, 2006 film was interpreted as 2/2 with Category A opacities by Dr. DePonte, as 2/1 with no large opacities by Dr. Castle, and as 1/1 with no large opacities by Dr. Scatarige. Employer's Exhibits 1, 4; Claimant's Exhibit 4. Drs. Alexander, Wheeler, DePonte, and Scatarige also noted a two to three centimeter mass on x-ray.

pneumoconiosis, but diagnosed no large opacities of pneumoconiosis. Drs. Wheeler, Scatarige, Alexander, and DePonte further identified a two to three centimeter mass on x-ray. In finding prong A satisfied, the administrative law judge reviewed the ten interpretations and determined that "five of these interpretations include findings of Category A opacities" and "[t]hus, in this case, there is x-ray evidence that satisfies the requirements of prong A." Decision and Order at 11. However, because there was other x-ray evidence, the administrative law judge stated that "all the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Id*. (internal quotation marks and citation omitted). After discussing the x-ray interpretations of Drs. Wheeler, Castle, and Scatarige, along with the CT scan interpretations by Drs. Pugh and Wheeler, the administrative law judge found that "while these interpretations . . . do not include findings of Category A opacities, neither do they contradict the presence of the masses." Decision and Order at 12-13.

We agree with employer that the administrative law judge has shifted the burden of proof to employer to establish that the opacities are not there or that they are from a disease process other than complicated pneumoconiosis. The court in *Scarbro* held that where the x-ray evidence vividly displays the presence of large opacities as defined in prong A, this evidence only loses force if the other types of medical evidence described in Section 921(c)(3) of the Act affirmatively show that the opacities are not there or are not what they seem to be. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *see also* 20 C.F.R. §718.304(b), (c). In this case, the administrative law judge found that because claimant submitted x-ray readings that were positive for Category A opacities, employer was required to submit evidence that affirmatively establishes either the absence of the large opacities or that they were not related to pneumoconiosis or coal dust exposure. The administrative law judge's analysis is incorrect because in *Scarbro*, the issue was whether evidence under the other prongs of 30 U.S.C. §923(c) undermined x-rays that demonstrated large opacities that met the requirements set forth in prong A, whereas here, the issue was whether the conflicting x-ray readings actually met these requirements, *i.e.*, whether they contain diagnoses of large opacities of pneumoconiosis under the ILO-U/C, International Labor Office, or UICC/Cincinnati classification systems. We vacate, therefore, the administrative law judge's finding that the newly submitted evidence satisfies the requirements of prong A, and remand this case for the administrative law judge to reconsider the relevant, conflicting x-ray evidence thereunder and determine whether claimant has established the existence of large opacities consistent with pneumoconiosis. In so doing, the administrative law judge must bear in mind that the burden of proof remains on claimant, and that Drs. Wheeler, Castle and Scatarige indicated that there were "0" large opacities consistent with pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-116-17.

Employer also contends that the administrative law judge erred in her consideration of the CT scan evidence,[5] and further erred by not making specific credibility findings with respect to the medical opinion evidence when crediting the medical opinions of Drs. Rasmussen, DePonte, and Alexander,[6] over the assessments of Drs. Castle, Wheeler, and Spagnolo at Section 718.304(c). Employer's Brief at 14-27. Some of employer's arguments have merit.

Dr. Castle diagnosed simple pneumoconiosis on x-ray, but opined that no large opacity existed, as the area of increased density seen on x-ray was, in fact, evidence of axillary coalescence where discrete nodules come together and may touch. He further stated that it is possible that some of these changes could be due to granulomatous disease. Employer's Exhibits 1, 7. Dr. Wheeler also diagnosed simple pneumoconiosis and a two to three centimeter mass compatible with granulomatous disease, based upon his review of several chest x-rays from 1990 to 2006. Dr. Wheeler opined that the three to four centimeter mass seen on CT scan is a stable granulomatous lesion, as it has not grown over time. Employer's Exhibit 6. Dr. Spagnolo reviewed medical records from 1984 through 2006, and agreed with the diagnosis of simple pneumoconiosis based on Dr. Wheeler's interpretations, the clinical testing, and lack of impaired lung function, but stated that the lack of significant radiographic changes over twenty years would not be consistent with complicated pneumoconiosis. Employer's Exhibit 5.

The administrative law judge determined that Dr. Wheeler reviewed the February 1, 2006 CT scan and diagnosed granulomatous disease, while Dr. Pugh diagnosed coalescent opacities. Claimant's Exhibit 2; Employer's Exhibit 9. The administrative law judge found that while Dr. Pugh's interpretation "[did] not independently support a finding of statutory complicated pneumoconiosis, . . .it certainly [did] not detract from such a finding." Decision and Order at 12. Regarding the medical opinion evidence, the administrative law judge found Dr. Castle's opinion unpersuasive given that he acknowledged the area of increased density in claimant's lung, but "offered no support" for his opinion that the mass represented axillary coalescence rather than a Category A

[5] Employer further asserts that claimant is unable to satisfy the equivalency requirement of 20 C.F.R. §718.304(c) because the record does not contain a medical opinion that specifically addresses whether the masses identified on claimant's CT scans would correspond to a large opacity for pneumoconiosis when x-rayed. Employer's Brief at 14-16.

[6] Employer contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in failing to explain why she credited the opinions of Drs. Rasmussen, DePonte, and Alexander. Employer's Brief at 24.

opacity. Decision and Order at 13. The administrative law judge determined that Dr. Wheeler failed to adequately explain how he was able to categorically distinguish the mass as a granulomatous disease, as opposed to a pneumoconiotic disease, when he stated that both diseases can do exactly the same thing, and because the doctor "required an exact analysis by biopsy in order to designate large masses on x-ray or CT scan as complicated pneumoconiosis." Decision and Order at 14. Dr. Spagnolo's conclusions were found to be equivocal and not well reasoned, because while the doctor acknowledged that the opacities were consistent with simple pneumoconiosis, "he offered no rationale for his opinion other than placing the greatest weight on Dr. Wheeler's interpretations." Decision and Order at 15. Relying on the opinions of Drs. Rasmussen, Alexander, and DePonte, the administrative law judge found that claimant was entitled to the irrebuttable presumption because "there is no consistent, corroborated, or affirmative evidence that the large opacities identified by Drs. Rasmussen, Alexander, and DePonte are not there, or that they are due to an intervening pathology." Decision and Order at 15.

The administrative law judge's analysis again shifts the burden of proof to employer and fails to comport with the Administrative Procedure Act (APA) 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2),[7] because she failed to make credibility determinations with respect to claimant's evidence and failed to make specific findings under the distinct provisions of Section 718.304(a) and (c) as to whether claimant satisfied his burden of proving the existence of complicated pneumoconiosis based on the x-ray or CT scan and medical opinion evidence. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Furthermore, because the administrative law judge failed to specifically address whether the CT scans and medical evidence satisfy the equivalency requirements of Section 718.304(c), she is instructed to do so on remand. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006).

Employer further contends that the administrative law judge erred in her assessment of the opinions of Drs. Castle, Wheeler, and Spagnolo. Employer's Brief at 17-23. Employer argues that, contrary to the administrative law judge's findings, Dr. Castle offered support for his diagnosis of axillary coalescence over a diagnosis of a Category A opacity seen on claimant's x-ray; and Dr. Spagnolo offered a valid rationale for his reliance on Dr. Wheeler's x-ray interpretation. We agree. Dr. Castle testified that on x-ray he found evidence of r and q type opacities in all lung zones with a profusion of 2/1, but that he did not find any evidence of large opacities. He further diagnosed atherosclerosis and evidence of axillary coalescence, and stated that "axillary coalescence is a coming together of nodules, but you can still see discrete nodules . . . and they may

[7] The APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law.

be touching . . . [and] it may be that they are actually in different planes, [whereas] an actual large opacity is defined as a solid area at least one centimeter or greater . . .so that you cannot distinguish individual nodularity in the large opacity." Employer's Exhibit 7. Thus, the administrative law judge's determination that Dr. Castle offered no support for his diagnosis is factually incorrect, and because the interpretation of objective data is a medical determination, the administrative law judge may not substitute her opinion for that of a physician. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Dr. Spagnolo prepared a consulting report and, relying on the x-ray interpretations performed by Dr. Wheeler, along with clinical testing and claimant's lack of impaired lung function, diagnosed simple pneumoconiosis. As Dr. Spagnolo identified Dr. Wheeler as a "pre-eminent radiologist in the evaluation . . . of occupational exposure and related lung disease," Employer's Exhibit 5, the administrative law judge erroneously concluded that Dr. Spagnolo "offered no rationale for placing the greatest weight on Dr. Wheeler's interpretations." Consequently, on remand, the administrative law judge must reassess the conflicting medical opinions and provide valid reasons for her credibility determinations. We note, however, that the administrative law judge could properly discount Dr. Wheeler's diagnosis of granulomatous disease on the ground that the physician failed to satisfactorily explain how he was able to ascribe claimant's condition completely and categorically to granulomatous disease. Decision and Order at 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

Because the administrative law judge relied upon her determination that claimant invoked the irrebuttable presumption to find that the newly submitted evidence established a change in an applicable condition of entitlement under Section 725.309(d), we must vacate this finding. The issue of whether claimant has established the requisite change in an applicable condition of entitlement must be reconsidered before reaching the merits of entitlement. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3.

To summarize, we instruct the administrative law judge on remand to reconsider whether claimant has satisfied his burden to establish that he has complicated pneumoconiosis. The administrative law judge must first determine whether the evidence in each category at Section 718.304(a) or (c) tends to establish the existence of complicated pneumoconiosis, and then she must weigh together the evidence at Sections 718.304(a) and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Lester*, 993 F.2d 1143, 17 BLR 2-114; *Melnick*, 16 BLR at 1-33-34. The administrative law judge should review the CT scan evidence under Section 718.304(c), taking into consideration the equivalency requirement that an opacity or a mass appear as greater than one centimeter if seen on x-ray. In determining the weight to accord the conflicting medical evidence, the administrative law judge must consider "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical

judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge must also comply with the APA by resolving all conflicts in the evidence and setting forth the rationale underlying her findings. If, on remand, the administrative law judge finds that claimant has established the existence of complicated pneumoconiosis pursuant to Section 718.304 based on the new evidence, and has therefore satisfied his burden to establish a change in an applicable condition of entitlement at Section 725.309, the administrative law judge must determine whether claimant has established, based on a review of all of the record evidence, that he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *See White*, 23 BLR at 1-3; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18. If so, the administrative law judge must then determine whether claimant's pneumoconiosis arose, at least in part, out of coal mine employment pursuant to Section 718.203. *See* 20 C.F.R. §718.203; *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion. We decline to address employer's challenges to the administrative law judge's Decision and Order Awarding Attorney Fees, as the award is premature.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge