BRB No. 09-0617 BLA

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| JOHNNY V. BLEDSOE | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 05/27/2010 |
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| SENECA ENERGY, LIMITED LIABILITY 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 Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices PLLC), Harlan, Kentucky, for claimant.

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5253) of Administrative Law Judge Alice M. Craft with respect to a miner's claim filed on March 2, 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). After crediting claimant with at least nineteen years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. 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), 718.203(b), 718.304, and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits, effective November 1, 2006.

Employer argues on appeal that the administrative law judge did not properly weigh the x-ray evidence relevant to 20 C.F.R. §718.304(a). Employer also asserts that the administrative law judge erred in determining that claimant was entitled to benefits beginning on November 1, 2006, and that claimant's adult children are eligible dependents. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to employer's appeal.[1]

By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[2] The Director and claimant have responded and agree that if the Board affirms the award of benefits, the amendments will have no impact on this claim, based on claimant's successful invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Employer has also responded and maintains that the amendment making the presumption set forth in Section 411(c)(4), 30 U.S.C. §921(c)(4), potentially available to claimant would not affect this claim, as there are no qualifying objective

[1] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established at least nineteen years of coal mine employment and her finding that the existence of pneumoconiosis was not established at 20 C.F.R. §§718.202(a)(2), 718.304(b). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[2] Section 1556 reinstated the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *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*)). In this case, claimant filed his claim after January 1, 2005, and has established at least nineteen years of coal mine employment.

studies establishing that claimant has a totally disabling respiratory or pulmonary impairment.

Based upon the parties' responses, and our review, we hold that the disposition of this case is not affected by Section 1556. As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant successfully invoked the irrebuttable presumption of total disability due to pneumoconiosis, there is no need to consider whether claimant could establish entitlement to the rebuttable presumption reinstated by Section 1556. Accordingly, we will proceed with the adjudication of employer's 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.[3] 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).

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

### A. The Regulatory Requirements

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §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 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. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must consider all relevant evidence on this issue, i.e., evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Gray*

[3] The record reflects that the miner's last year of coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

*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*).

**B. The Administrative Law Judge's Findings**

In considering the evidence at 20 C.F.R. §718.304(a), the administrative law judge examined nine interpretations of four x-rays, dated November 14, 2006, April 18, 2007, May 22, 2007, and August 7, 2008. All of the physicians providing x-ray interpretations are B readers. Director's Exhibits 16, 35; Claimant's Exhibits 1-3; Employer's Exhibits 2-4. Drs. Poulos and Wheeler are also Board-certified radiologists. Director's Exhibit 35; Claimant's Exhibit 1.

The November 14, 2006 x-ray was read by Drs. Poulos, Broudy, Dahhan, and Powell as positive for simple pneumoconiosis. Claimant's Exhibits 1-2; Employer's Exhibits 2, 4. In addition, Dr. Poulos and Powell found it to be positive for complicated pneumoconiosis with size A opacities. Claimant's Exhibits 1-2. Based on the qualifications of the physicians, the administrative law judge found that this x-ray was positive for complicated pneumoconiosis. Decision and Order at 10.

The April 18, 2007 film was read as positive for complicated pneumoconiosis, with size A opacities, by Dr. Powell, and as negative for both simple and complicated pneumoconiosis by Dr. Wheeler. Director's Exhibits 16, 35. Dr. Wheeler further noted in the comments portion of the form that coal workers' pneumoconiosis "is possible, but unlikely."[4] Director's Exhibit 35. The administrative law judge stated that she would ordinarily give the dually-qualified physician's reading more weight, but because Dr. Wheeler was the only physician to interpret an x-ray as negative for both simple and complicated pneumoconiosis, the credibility of his reading was undermined. Decision and Order at 10. The administrative law judge found that Dr. Wheeler's reading was also entitled to diminished weight, due to its equivocal nature. The administrative law judge concluded, therefore, that the April 18, 2007 film was positive for complicated pneumoconiosis. *Id*.

Dr. Lockey, the only physician to interpret the May 22, 2007 x-ray, found it to be positive for complicated pneumoconiosis, with size A opacities. Claimant's Exhibit 3. Therefore, the administrative law judge found that the x-ray was positive for complicated pneumoconiosis. Decision and Order at 10.

[4] The April 18, 2007 x-ray was also read by Dr. Barrett for quality purposes only. Director's Exhibit 17.

Dr. Dahhan found that the August 7, 2008 x-ray was positive for simple pneumoconiosis only. Employer's Exhibit 3. As a result, the administrative law judge found that this film was negative for complicated pneumoconiosis. Decision and Order at 10.

Based on her findings with respect to the individual x-rays, the administrative law judge concluded that claimant established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id*.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the medical opinions of Drs. Powell and Dahhan. The administrative law judge noted that both physicians diagnosed at least simple pneumoconiosis, based solely on the x-ray readings they performed. Decision and Order at 11; *see* Director's Exhibit 16; Employer's Exhibit 3. Consequently, the administrative law judge found that Dr. Dahhan's opinion, that claimant does not have complicated pneumoconiosis, conflicted with her finding that the x-ray evidence was positive for complicated pneumoconiosis. Decision and Order at 11; Employer's Exhibit 3. In contrast, the administrative law judge accorded more weight to Dr. Powell's opinion, since it was better supported by the weight of the positive x-ray evidence. Decision and Order at 11. Therefore, the administrative law judge determined that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Id*.

Based upon her findings under 20 C.F.R. §718.304(a), (c), the administrative law judge concluded that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Decision and Order at 11. The administrative law judge also determined that claimant invoked the presumption, set forth in 20 C.F.R. §718.203(b), that his complicated pneumoconiosis arose out of coal mine employment and employer did not rebut it. *Id*.

**C. Arguments on Appeal**

Employer contends that the administrative law judge did not properly weigh the x-ray evidence at 20 C.F.R. §718.304(a). Employer states that Dr. Wheeler's negative reading for complicated pneumoconiosis is well-reasoned and entitled to greater weight, based on his qualifications. In addition, employer asserts that Dr. Lockey's positive reading of the May 22, 2007 film is unreliable and unpersuasive because Dr. Lockey did not indicate the film quality and because employer believes that there are other conditions that account for the findings in claimant's right upper lung. Employer cites Dr. Broudy's determination that there is a coalescence of nodules in claimant's right upper lung zone, "indicat[ing] that the physicians who have found a large opacity in this region are mistaking the coalescence for a large opacity." Employer's Brief at 5. Similarly, employer argues that since Dr. Powell did not state where the large opacity that he

observed on the film dated April 18, 2007, was located, it could be an area of coalescence mistakenly interpreted as a large opacity.

Employer's contentions are without merit. The administrative law judge acted within her discretion in according less weight to Dr. Wheeler's interpretation of the April 18, 2007 x-ray, based on the equivocal nature of his opinion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*); *Melnick*, 16 BLR at 1-37. Furthermore, the fact that Dr. Lockey did not record the quality of the May 22, 2007 x-ray does not make his reading unreliable, as a film is assumed to be of acceptable quality, absent contrary proof, if it is read. *Auxier v. Director, OWCP*, 8 BLR 1-109 (1985); *Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983).

In addition, we reject employer's assertion that, relying on Dr. Broudy's interpretation of the November 14, 2006 x-ray, there are other conditions, including coalescence, which could account for the large opacity observed by several physicians. While Dr. Broudy stated that there "may [be] some coalescence of nodulation in the right upper zone," neither he, nor any other physician, opined that the other physicians were mistaking this coalescence for a large opacity. Employer's Exhibit 2. We affirm, therefore, the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), based on her rational weighing of the relevant evidence. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Employer has not raised any additional allegations of error regarding the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §718.304(c), so we affirm the administrative law judge's finding the claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(c). Accordingly, we affirm the administrative law judge's determination that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and the award of benefits.

## II. Onset of Disability – 20 C.F.R. §725.503

Based on a review of the evidence, the administrative law judge determined that when claimant was examined by Dr. Powell in April 2007, he was already totally disabled due to complicated pneumoconiosis. Decision and Order at 12. The administrative law judge also found that the November 14, 2006 x-ray established that claimant had complicated pneumoconiosis by that date. *Id.* Therefore, the administrative law judge awarded benefits effective November 1, 2006. *Id.*

Employer argues that, because claimant was receiving unemployment benefits in November 2006, which required him to affirm that he was ready, willing and able to work, claimant could not also receive benefits under the Act.[5] Consequently, employer asserts that, if the administrative law judge's award of benefits is affirmed, benefits should not commence until March 1, 2007, the first day of the month in which claimant filed his claim.

As a general rule, once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). When a claimant has established the existence of complicated pneumoconiosis, the relevant date is the month when the miner's simple pneumoconiosis became complicated pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

We affirm the administrative law judge's finding that the date for the commencement of benefits in this case is November 1, 2006, as employer has not contested the administrative law judge's determination that this is the month in which claimant developed complicated pneumoconiosis. Contrary to employer's suggestion, claimant's alleged affirmation that he was ready, willing and able to work while receiving unemployment benefits in November 2006, does not constitute a medical determination that claimant did not have complicated pneumoconiosis at that time.

## III. Claimant's Dependents – 20 C.F.R. §725.209

The administrative law judge stated at the hearing that she would hold the record open for claimant to submit documentation that his adult children were full-time students.[6] Hearing Transcript at 17. Claimant did not proffer any such documentation.

[5] Claimant testified that after his employment with Seneca Energy ended in September 2006, he filed for, and received, unemployment benefits for almost six months. Hearing Transcript at 13-14.

[6] At the hearing, employer's counsel questioned claimant as follows:

In her Decision and Order, the administrative law judge noted that claimant had testified that his two children, aged eighteen and twenty, were in school. Decision and Order at 3; Hearing Transcript at 15. The administrative law judge further indicated that the record contains a certificate reflecting that one of claimant's children was attending high school on a full-time basis in November 2007. Decision and Order at 3; Director's Exhibit 13. The administrative law judge determined that, because the record did not contain any evidence to the contrary, claimant's adult children were dependents under 20 C.F.R. §725.209.[7] *Id*.

Employer contends that because claimant bears the burden of proving that the persons he has identified as dependents satisfy the requirements of 20 C.F.R. §725.209, claimant must provide proper documentation regarding the dependency issue. We agree. *See Hamilton v. Island Creek Coal Co.*, 4 BLR 1-548 (1982). Claimant did not comply with the administrative law judge's directive to submit documentation supporting his assertion that his children were dependents, based on their status as full-time students. In addition, by stating that the dependent status of claimant's children was established in the absence of contrary evidence, the administrative law judge impermissibly shifted the burden of proof from claimant to employer, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Thus, we remand this case to the

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> Q. Will you provide the Court with documentation, whatever you have up to date as far as dependency, and present it after the hearing?
>
> A. Yes, sir, I can.
>
> Q. Any school records or anything that you have, you need to submit to the Court, okay?
>
> A. Okay.

Hearing Transcript at 15. The administrative law judge stated that the record would be held open for thirty days for the submission of additional evidence. *Id*. at 17.

[7] The administrative law judge found that claimant is married and that his wife is a dependent. Decision and Order at 3. We affirm this determination, as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

administrative law judge for reconsideration of whether claimant has established the dependent status of his children pursuant to 20 C.F.R. §725.209.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge