BRB No. 09-0638 BLA

DONALD R. HENLEY Claimant-Respondent v. COWIN & COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)))))))))))))))	DATE ISSUED: 05/25/2010 DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand – Award of Benefits (2004-BLA-5607) of Administrative Law Judge Richard T. Stansell-Gamm with respect to a subsequent claim filed on July 15, 2002, 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).[1] This case is before the Board for a third time. Pursuant to the Board's most recent

[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. *Henley v. Cowin & Co.*, BRB No. 09-0638 BLA (Mar. 30, 2010)(unpub. Order).

Decision and Order, the administrative law judge reconsidered the relevant evidence and again concluded that the newly submitted evidence was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304, and, therefore, sufficient to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d).[2] Weighing all the evidence of record, the administrative law judge also determined that claimant invoked the irrebuttable presumption pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge erred in finding that the newly submitted evidence, and the evidence as a whole, established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304.[3] Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to employer's appeal.

The Director, Office of Workers' Compensation Programs, and employer have responded, agreeing that Section 1556 does not apply to the instant claim as it was filed prior to January 1, 2005. Based upon the parties' responses, and our review, we hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as the claim was filed prior to January 1, 2005.

[2] Claimant's prior claim, filed on July 26, 1993, was finally denied because claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1-1. In the Board's most recent decision, it affirmed, as unchallenged on appeal, the administrative law judge's findings that the miner has eighteen years of coal mine employment and that employer is the responsible operator. *See D.R.H.* [*Henley*] *v. Cowin & Co.*, BRB No. 07-0993 BLA, slip op. at 2 n.2, (Sept. 29, 2008)(unpub.). However, the Board vacated the award of benefits because the administrative law judge did not properly weigh the newly submitted evidence relevant to invocation of the irrebuttable presumption at 20 C.F.R. §718.304. *Id*. at 5. Based on this determination, the Board also vacated the administrative law judge's findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) and that the evidence of record, as a whole, was sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. *Id*. at 5-6.

[3] Employer preserves its argument that, because the source of the opacities and masses observed on claimant's x-rays and CT scans is not a condition subject to change, the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Employer's Brief at 8 n.2.

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.[4] 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).

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §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 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 weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007); *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).

I. <u>The Administrative Law Judge's Findings on Second Remand</u>

In reconsidering the newly submitted evidence at 20 C.F.R. §718.304, the administrative law judge reviewed six ILO-classified interpretations of three x-rays, dated February 12, 2002,[5] October 3, 2002, and December 8, 2003; two interpretations not classified under the ILO system, dated February 12, 2002 and November 24, 2003; interpretations of CT scans taken on February 27, 2002 and December 1, 2003; the results of claimant's lung biopsy on January 14, 2004; and the medical opinions of Drs. Forehand, Rasmussen, Shantha, and Mehta.

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[4] The record reflects that claimant previously worked in other states, including Missouri, Tennessee, and Virginia. Director's Exhibit 4. However, his last full year of coal mine employment was in Alabama. *Id*. Accordingly, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] While the parties consistently refer to this x-ray as dated February 15, 2002, the date recorded on the ILO form is February 12, 2002. *See* Employer's Exhibit 1.

Regarding the x-ray evidence at 20 C.F.R. §718.304(a), the administrative law judge determined that Dr. Wheeler's interpretation of the February 12, 2002 x-ray was ambiguous because he initially determined that the film was negative for pneumoconiosis but, in his subsequent comments, he noted that the two masses he observed could be large opacities of pneumoconiosis and that some of the small nodular infiltrates could also be pneumoconiosis. Decision and Order on Second Remand at 9. As a result, the administrative law judge found this x-ray to be inconclusive regarding the existence of simple pneumoconiosis or a large opacity. *Id.* Similarly, the administrative law judge found the October 3, 2002 film to be inconclusive because, although all three physicians who interpreted the film found pneumoconiosis and a large opacity consistent with or questionably consistent with, complicated pneumoconiosis, they also provided alternative diagnoses.[6] *Id.*

However, the administrative law judge determined that the December 8, 2003 chest x-ray was positive for simple pneumoconiosis and a large pulmonary opacity consistent with complicated pneumoconiosis, based on the interpretations of Drs. Alexander and DePonte. Decision and Order on Second Remand at 9. The administrative law judge stated that, if he set aside the inconclusive chest x-rays from February 12, 2002 and October 3, 2002, the remaining December 8, 2003 x-ray is positive for simple pneumoconiosis and a large opacity consistent with complicated pneumoconiosis. *Id.* The administrative law judge concluded, therefore, 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(b), the administrative law judge considered the January 14, 2004 lung biopsy results and determined that Dr. Soike's findings of anthracotic pulmonary lymph nodes and interstitial fibrosis with macrophages supported a diagnosis of pneumoconiosis. Decision and Order on Second Remand at 11; Claimant's Exhibit 5. In addition, the administrative law judge noted that Dr. Soike's negative findings for granulomas and active fibrogensis, and Dr. Mehta's comment on

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[6] Dr. Forehand stated that he could not rule out tuberculosis or malignancy as a cause of the masses he identified. Director's Exhibit 9. Dr. Scott found that the size C opacities he identified "could be due to [tuberculosis], unknown activity." Employer's Exhibit 3. On the ILO form, Dr. Wheeler checked the boxes for "zero" and "size C" regarding the existence of large opacities and placed question marks over his notations. Employer's Exhibit 4. He identified the same masses that he observed on the February 12, 2002 x-ray and indicated that a CT scan needed to be performed as "[l]arge opacities of [coal workers' pneumoconiosis] would require high dust exposure without respiratory protection and advanced conglomerate [tuberculosis] or other granulomatous diseases can cause all [the] lung findings in this case." *Id.*

January 23, 2004, that the biopsy findings did not reveal sarcoidosis, assisted in eliminating those ailments as possible causes of the large pulmonary opacities. *Id.* The administrative law judge determined that, "[p]ossibly due to the small size of the lung tissue samples," Dr. Soike did not offer an opinion on whether a large opacity was present in claimant's lungs. *Id.*

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the medical opinions of Drs. Ebeo and Mehta, which contained x-ray readings that had not been classified in accordance with the ILO system. The administrative law judge found that the February 15, 2002 x-ray interpretation by Dr. Ebeo and the November 24, 2003 x-ray interpretation by Dr. Mehta, both of which were negative for complicated pneumoconiosis, did not outweigh a finding of a category C large opacity. Decision and Order on Second Remand at 10; Claimant's Exhibit 5. The administrative law judge, determined, therefore, that the preponderance of the newly submitted x-ray evidence is positive for a large opacity. Decision and Order on Second Remand at 10.

In addition, the administrative law judge found that while Dr. Ebeo opined that the fibrosis was due to sarcoidosis, the subsequent 2004 lung biopsy, as noted by Dr. Mehta, did not provide any clear evidence of the disease. Decision and Order on Second Remand at 10. Further, the administrative law judge determined that Dr. Mehta's alternative diagnosis of sarcoidosis and/or pneumoconiosis, which he rendered prior to his review of the 2004 lung biopsy, was ambiguous and, thus, inconclusive regarding the presence of pneumoconiosis. *Id.* The administrative law judge also noted that, after reviewing the lung biopsy, Dr. Mehta did not include sarcoidosis as a "working diagnosis" of claimant's condition. *Id.*

The administrative law judge found that Dr. Stevens's identification of claimant's pulmonary fibrosis as sarcoidosis, based on a review of a February 27, 2002 CT scan, was undermined by the subsequent lung biopsy, which did not show the presence of the disease. Decision and Order on Second Remand at 10; Claimant's Exhibit 5. However, the administrative law judge determined that, although Dr. Gunter did not identify pneumoconiosis on the CT scan dated December 1, 2003, his observation of "consolidative masses," and his finding that there was a moderate increase in the reticular nodular pattern, supported a diagnosis of a large opacity and was consistent with the progressive nature of pneumoconiosis. Decision and Order on Second Remand at 10; Claimant's Exhibit 5.

The administrative law judge gave diminished weight to Dr. Forehand's opinion, that claimant has complicated pneumoconiosis, because Dr. Forehand was unable to rule out tuberculosis or malignancy as the cause of claimant's large opacity. Decision and Order on Second Remand at 15; Director's Exhibit 9. Referencing his August 16, 2007 Decision and Order on Remand, the administrative law judge stated that he continued to

give diminished weight to Dr. Rasmussen's opinion because it was based, in part, on a chest x-ray interpretation that was not admitted into the record. Decision and Order on Second Remand at 15; Director's Exhibit 10. The administrative law judge also gave diminished weight to Dr. Shantha's opinion because he did not mention a large opacity, did not review any other radiographic evidence, and did not consider the biopsy evidence, which the administrative law judge stated did not reveal sarcoidosis. Decision and Order on Second Remand at 15; Claimant's Exhibit 5. While the administrative law judge determined that Dr. Mehta's opinion was well documented, he found it to be ambiguous because Dr. Mehta diagnosed either coal workers' pneumoconiosis or idiopathic pulmonary fibrosis. Decision and Order on Second Remand at 15-16; Claimant's Exhibit 5. Also, the administrative law judge noted that Dr. Mehta did not diagnose complicated pneumoconiosis or identify a large pulmonary mass, contrary to the administrative law judge's findings at 20 C.F.R. §718.304(a). Decision and Order on Second Remand at 15-16. Therefore, the administrative law judge gave diminished weight to Dr. Mehta's opinion. Decision and Order on Second Remand at 16. Consequently, the administrative law judge concluded that the four recent medical opinions did not alter his finding that complicated pneumoconiosis was established at 20 C.F.R. §718.304(a). *Id.*

The administrative law judge concluded that claimant established the existence of complicated pneumoconiosis, based on the newly submitted evidence and, therefore, invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order on Second Remand at 16. Further, the administrative law judge determined that claimant established a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). *Id.* Upon consideration of the record as a whole, the administrative law judge gave less weight to the older evidence of record, due to the latent and progressive nature of pneumoconiosis. *Id.* at 17. The administrative law judge found that the previous evidence of sarcoidosis did not preclude the development of complicated pneumoconiosis ten years later and stated that, as Dr. Mehta noted, the January 2004 biopsy did not provide evidence of sarcoidosis. *Id.* Thus, the administrative law judge concluded that the evidence of record, as a whole, was sufficient to establish the presence of complicated pneumoconiosis and to invoke the irrebuttable presumption at 20 C.F.R. §718.304. *Id.*

II. <u>Arguments on Appeal</u>

Employer contends that the administrative law judge erred in his consideration of the x-ray evidence by impermissibly relying on his own opinion to find that the x-ray interpretations in which the physicians did not identify complicated pneumoconiosis, were "inconclusive" or "ambiguous." Employer's Brief at 5-6. Regarding Dr. Wheeler's opinion, employer maintains that it was not inconclusive, as Dr. Wheeler explained that he did not diagnose complicated pneumoconiosis because the x-rays he reviewed were inadequate to assess advanced upper lung disease, other conditions could have caused the

lung findings, and claimant was too young to have developed a condition attributable to extensive coal dust exposure over a significant period of time. Employer also argues that the administrative law judge's attempt to discredit the opinions of Drs. Ebeo and Mehta, based on the preponderance of the ILO classifications, is erroneous because the classification of a large opacity alone is not conclusive evidence of complicated pneumoconiosis.

Employer further asserts that the administrative law judge's discrediting of the physicians' opinions diagnosing sarcoidosis, based on the results of a limited lung biopsy, is impermissible because it again represents the administrative law judge's substitution of his own opinion for that of the medical experts. Employer maintains that, although Dr. Mehta found that the biopsy did not provide clear evidence of sarcoidosis, he did not opine that sarcoidosis was an incorrect diagnosis. Therefore, employer states that the opinions of Drs. Ebeo, Mehta, Stevens, and Shantha cannot be rejected, based on the administrative law judge's interpretation of what the lung biopsy revealed. In addition, employer argues that the administrative law judge impermissibly relied on his own view of the conclusions rendered by Drs. Gunter and Soike to determine that their opinions supported a finding of complicated pneumoconiosis. Employer also contends that the administrative law judge did not give rational reasons for determining that two positive x-ray interpretations outweighed all of the other medical evidence regarding complicated pneumoconiosis.

Further, employer argues that the administrative law judge erred in finding that the evidence, as a whole, establishes that claimant has complicated pneumoconiosis because his findings that claimant contracted complicated pneumoconiosis, since the prior denial, or did not have sarcoidosis, are unsupported by the medical evidence. Employer asserts that the possible progressivity of pneumoconiosis alone cannot justify the administrative law judge's conclusions because the Department of Labor has not created a presumption that pneumoconiosis is progressive.

III. <u>Holdings</u>

Contrary to employer's argument, the administrative law judge rationally found that Dr. Wheeler's interpretations of the February 12 and October 3, 2002 x-rays were internally inconsistent regarding the presence of a large opacity consistent with complicated pneumoconiosis. While Dr. Wheeler initially indicated on the ILO form for the February 12, 2002 film, that there were no large opacities, in his subsequent comments, Dr. Wheeler stated that the large masses in claimant's lungs could be large opacities of coal workers' pneumoconiosis. Employer's Exhibit 1. On the ILO form for the October 3, 2002 x-ray, Dr. Wheeler placed question marks over the boxes corresponding to "zero" large opacities and "size C" large opacities and commented that the masses greater than one centimeter in diameter that he observed are "compatible with

conglomerate granulomatous disease or large opacities of [coal workers' pneumoconiosis]." Employer's Exhibit 4.

In addition, the administrative law judge rationally determined that Dr. Scott's reading of the x-ray dated October 3, 2002, was ambiguous. On the ILO form, Dr. Scott indicated that the x-ray was positive for simple pneumoconiosis and marked the box corresponding to a Category C large opacity and commented, "all changes could be due to [tuberculosis], unknown activity." Employer's Exhibit 3.

Based on these reasonable findings, the administrative law judge acted within his discretion in declining to credit the x-ray readings of Drs. Wheeler and Scott as negative for complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999)(*en banc*); *see also Melnick*, 16 BLR at 1-37. Consequently, we affirm the administrative law judge's determination that the preponderance of the newly submitted x-ray evidence was positive for complicated pneumoconiosis.

Nevertheless, we find merit in employer's contention that the administrative law judge impermissibly relied on his own opinion when weighing the evidence at 20 C.F.R. §718.304(b)-(c). With respect to the biopsy evidence relevant to 20 C.F.R. §718.304(b), the administrative law judge indicated that he would treat Dr. Soike's biopsy report, in which Dr. Soike noted the presence of interstitial fibrosis and anthracotic lymph nodes, as consistent with a diagnosis of pneumoconiosis. Decision and Order on Second Remand at 11. The administrative law judge excused the omission of findings consistent with a diagnosis of complicated pneumoconiosis, stating, "[p]ossibly due to the small size of the lung tissue samples, Dr. Soike did not address whether a large opacity was present in [claimant's] lungs." *Id.* The administrative law judge did not take the limited nature of the biopsy into consideration, however, when he relied on the fact that Dr. Soike did not diagnose sarcoidosis to discredit the opinions of the physicians who attributed the masses in claimant's lungs to this condition. In addition, employer is correct in asserting that, contrary to the administrative law judge's determination that Dr. Mehta indicated that there was no biopsy evidence of sarcoidosis, Dr. Mehta opined that the biopsy did not reveal "clear" evidence of sarcoidosis. Claimant's Exhibit 5.

Further, we agree with employer that the administrative law judge impermissibly substituted his own opinion for that of a physician in determining the medical significance of Dr. Soike's findings on biopsy. Without identifying any objective support, the administrative law judge found that Dr. Soike's observations of anthracotic pulmonary lymph nodes and interstitial fibrosis with macrophages supported a diagnosis of pneumoconiosis. Decision and Order on Second Remand at 11. The administrative law judge also found, without explanation, that Dr. Soike's statement, that granulomas and active fibrogenesis were not present, "eliminate[s] those ailments as possible causes of the large pulmonary opacities." *Id.* We must vacate, therefore, the administrative law

judge's weighing of Dr. Soike's opinion at 20 C.F.R. §718.304(b). *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

The administrative law judge's consideration of Dr. Gunter's CT scan reading under 20 C.F.R. §718.304(c) also reflects an improper substitution of his opinion for that of the physician. The administrative law judge determined that Dr. Gunter's statements, noting the presence of masses and an increased reticular nodular pattern on claimant's December 1, 2003 CT scan, were consistent with a diagnosis of complicated pneumoconiosis. However, Dr. Gunter did not render this diagnosis nor did the administrative law judge identify objective evidence in support of his finding. Accordingly, we vacate the administrative law judge's weighing of Dr. Gunter's CT scan interpretation at 20 C.F.R. §718.304(c). *See Marcum*, 11 BLR at 1-24.

Because we have vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.304(b) and (c), we also vacate his determination that the newly submitted evidence, and the evidence of record as a whole, are sufficient to establish invocation of the irrebuttable presumption.[7] In addition, we vacate the administrative law judge's finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309.

On remand, the administrative law judge must first determine whether the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. If the administrative law judge finds that claimant has met this burden, he should then determine whether the evidence of record, as a whole, is sufficient to establish the existence of complicated pneumoconiosis.[8] *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-14 (1999). Whether weighing the newly submitted evidence or all of the evidence of record, the administrative law judge must first determine whether claimant has established the existence of complicated pneumoconiosis under each subsection of 20 C.F.R. §718.304. The administrative law

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[7] The administrative law judge's finding at 20 C.F.R. §718.203(b), which is unchallenged on appeal, is subject to reinstatement by the administrative law judge, should he again find invocation of the irrebuttable presumption established at 20 C.F.R. §718.304 on remand.

[8] While employer is correct that there is no presumption that pneumoconiosis is always a latent and progressive disease, the Board has held that it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates the newer evidence from the older evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

judge must then determine whether the evidence supportive of a finding of complicated pneumoconiosis outweighs the contrary probative evidence. *Melnick*, 16 BLR at 1-33.

Finally, when weighing the evidence on remand, the administrative law judge must set forth his findings in detail and identify the underlying rationale, including the evidence that supports his findings, as required by the Administrative Procedure Act, 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). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the administrative law judge finds that claimant has not established invocation of the irrebuttable presumption under 20 C.F.R. §718.304, either based on the newly submitted evidence or the evidence of record as a whole, he must determine whether claimant has demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309 or entitlement to benefits on the merits under 20 C.F.R. Part 718, without application of the irrebuttable presumption.

Accordingly, the administrative law judge's Decision and Order on Second Remand – Award of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge