BRB No. 11-0635 BLA

TAMMIE LABOR (o/b/o the Estate of HARDY R. LABOR) Claimant-Petitioner v. SUN VALLEY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/10/2012 DECISION and ORDER

Appeal of the Decision and Order Denying Claimant's Second Petition for Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Tammie Labor, Keota, Oklahoma, *pro se.*

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Claimant's Second Petition for Modification (10-BLA-5161) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on a claim filed 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). This case involves a miner's claim filed on June 21, 2004.[2] Director's Exhibit 2.

Initially, Administrative Law Judge Clement J. Kennington denied benefits on December 17, 2008, because the miner did not establish the existence of pneumoconiosis. Director's Exhibit 56. The miner timely requested modification of the denial of his claim pursuant to 20 C.F.R. §725.310, which the district director denied. Director's Exhibits 63, 64. The miner timely requested modification a second time. Director's Exhibit 68. The district director again denied modification, and the miner requested a hearing, which the administrative law judge held on June 20, 2010.[3] Director's Exhibits 89, 91, 93.

In his Decision and Order, the administrative law judge credited the miner with sixteen years of coal mine employment,[4] pursuant to the parties' stipulation. On the merits of the claim, the administrative law judge found that the autopsy evidence submitted by claimant was legally insufficient to establish the existence of complicated pneumoconiosis and, therefore, insufficient to invoke the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Further, the administrative law judge found that the evidence of record did not establish

[1] Claimant, the miner's widow, is pursuing the miner's claim on behalf of his estate. Claimant's Exhibit 5. By Order dated September 10, 2010, the administrative law judge substituted the miner's widow as the claimant.

[2] Because the miner filed his claim before January 1, 2005, a recent amendment to the Act does not affect this case. *See* Pub. L. No. 111-148, §1556(a),(c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[3] The miner died a month after the hearing, and claimant submitted the report of the miner's autopsy. Claimant's Exhibit 5. Employer responded with an autopsy report and an autopsy rebuttal report. Employer's Exhibits 18, 19.

[4] The record reflects that the miner's last coal mine employment was in Oklahoma. Director's Exhibits 3, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge found that claimant did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied modification, and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief. In a footnote to his letter, however, the Director argues that the administrative law judge applied the wrong standard in determining whether the report of the miner's autopsy established complicated pneumoconiosis.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was 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). When a request for modification is filed, the administrative law judge has the authority to reconsider all the evidence to determine whether claimant has established a change in conditions, or a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310(a); *see Bridger Coal Co. v. Director, OWCP* [*Ashmore*], 669 F.3d 1183, 1196 (10th Cir. 2012).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by Section 718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffered 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 that 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 invocation of the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See* 20 C.F.R. §718.304; *Ashmore*, 669 F.3d at 1187; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(en banc).

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered the autopsy reports of Drs. Distefano, Oesterling, and Caffrey. Dr. Distefano, who is Board-certified in Forensic Pathology, conducted the miner's autopsy. Claimant's Exhibit 5. Upon microscopic examination of the lung tissue, Dr. Distefano reported "extensive parenchymal destruction with fibrosis throughout the . . . middle and lower lung fields," along with "scattered aggregates of anthracotic pigment within the fibrosis." Claimant's Exhibit 5 at 4. Dr. Distefano further described "'honeycomb' lung involving the majority of the pulmonary parenchyma." *Id*. In the "Summary" section of his report, Dr. Distefano opined that "[t]hese findings . . . are consistent with complicated coal workers['] pneumoconiosis (pulmonary massive fibrosis)." Claimant's Exhibit 5 at 5. Among his "Pathologic Diagnoses," Dr. Distefano listed "Severe Pulmonary Fibrosis (Honeycomb Lung) Consistent With Complicated Coal Worker's Pneumoconiosis (Pulmonary Massive Fibrosis)." Claimant's Exhibit 5 at 1.

Drs. Oesterling and Caffrey, both of whom are Board-certified in Anatomical and Clinical Pathology, reviewed the autopsy report and slides and opined that the miner did not have pneumoconiosis. Employer's Exhibits 18, 19. Dr. Oesterling detected "marked fibrosis" and "honeycombing of the lung," but found only "minimal interstitial anthracotic pigment," with "no suggestion of nodular change due to dust inhalation." Employer's Exhibit 18 at 3, 5. Dr. Oesterling opined that, "without more significant dust and marked micronodular change, progressive massive fibrosis is not feasible." Employer's Exhibit 18 at 5. Dr. Oesterling diagnosed the miner with "usual interstitial pneumonitis," an "idiopathic process" that was unrelated to coal dust. Employer's Exhibit 18 at 6. Dr. Caffrey described fibrosis of the lung with "a mild amount of anthracotic pigment," but indicated that "no lesions of coal workers' pneumoconiosis" were present. Employer's Exhibit 19 at 2, 3. Dr. Caffrey diagnosed "[i]diopathic pulmonary fibrosis (usual interstitial pneumonia)." Employer's Exhibit 19 at 3.

Applying the law of the United States Court of Appeals for the Fourth Circuit, the administrative law judge stated that, to establish the presence of "massive lesions," autopsy evidence must include "an equivalency determination . . . that the lesions observed on autopsy would constitute a greater-than-one-centimeter opacity if viewed radiographically by chest x-ray." Decision and Order at 8, *citing Eastern Associated*

Coal Corp. v. Director, OWCP [*Scarbro*], 220 F.3d 250, 255-56, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Because Dr. Distefano's report lacked "nodule measurements," or a statement by Dr. Distefano that the lesions he observed on autopsy would appear as opacities measuring greater than one centimeter in diameter if seen on an x-ray, the administrative law judge found that Dr. Distefano's autopsy report was insufficient to establish the existence of complicated pneumoconiosis. Decision and Order at 8.

After the issuance of the administrative law judge's decision, the United States Court of Appeals for the Tenth Circuit held that the Act does not require an equivalency determination between autopsy evidence and an x-ray in order to establish massive lesions. *Ashmore*, 669 F.3d at 1194 (following *Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 986, 24 BLR 2-72, 2-94 (11th Cir. 2007)). Therefore, we must vacate the administrative law judge's determination that Dr. Distefano's autopsy report is insufficient to establish complicated pneumoconiosis because it lacks an equivalency determination, and remand this case for the administrative law judge to consider the conflicting autopsy evidence consistent with the standard enunciated in *Ashmore*. On remand, the administrative law judge must consider all relevant evidence in determining whether complicated pneumoconiosis is established. *Ashmore*, 669 F.3d at 1194; *Melnick*, 16 BLR at 1-33. In light of our holding, we also vacate the administrative law judge's finding that claimant did not establish a basis for modification under 20 C.F.R. §725.310, and instruct the administrative law judge to reconsider that issue.

Simple Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six readings of the June 4, September 22, and November 18, 2009 x-rays, submitted on modification,[5] in conjunction with the previously submitted x-ray readings. Decision and Order at 3, 9. Dr. Cade, a Board-certified radiologist and B reader, interpreted the June 4,

[5] The record reflects that the June 4 and September 22, 2009 x-rays are digital x-rays. Claimant's Exhibit 1; Employer's Exhibits 1, 4, 12. The admissibility and consideration of digital x-rays is governed by 20 C.F.R. §718.107, rather than 20 C.F.R. §718.202(a)(1). *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*). Upon review, we conclude that any error in the administrative law judge's oversight does not affect the case, as substantial evidence supports his finding that the weight of the newly submitted x-ray evidence does not establish the existence of clinical pneumoconiosis, even without the readings of the June 4 and September 22, 2009, digital x-rays. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

2009 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 4. Dr. Wiot, a Board-certified radiologist and B reader, and Dr. Repsher, a B reader,[6] both interpreted the September 22, 2009 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 12. Dr. Cade interpreted the November 18, 2009 x-ray as positive for pneumoconiosis, while Dr. Wheeler interpreted this x-ray as negative for pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 17.

After setting forth the readers' radiological qualifications, the administrative law judge found that the weight of the newly submitted x-ray evidence did not establish the existence of pneumoconiosis. Decision and Order at 3, 9. The administrative law judge further found that, weighing the previously submitted x-ray evidence with the newly submitted x-ray readings did not "shift the weight of the [x-ray] evidence to positive or establish a mistake in [a determination of] fact." *Id*. at 9.

The administrative law judge's finding that the weight of the newly submitted x-ray evidence did not establish the existence of pneumoconiosis is supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). Additionally, none of the previously submitted x-ray evidence contained a positive reading for pneumoconiosis. Director's Exhibits 10-11, 15, 16, 55; Employer's Exhibits 10, 11. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered the autopsy reports of Drs. Distefano, Oesterling, and Caffrey. As noted above, Dr. Distefano diagnosed complicated coal workers' pneumoconiosis and pulmonary massive fibrosis, while Drs. Oesterling and Caffrey found anthracotic pigment, but concluded that the miner did not have pneumoconiosis. Claimant's Exhibit 5; Employer's Exhibits 18, 19.

The administrative law judge found that, to the extent Dr. Distefano's autopsy report "include[s] a diagnosis of simple pneumoconiosis, his opinion is rejected based on the findings of Drs. Oesterling and Caffrey," that only anthracotic pigmentation was present. Decision and Order at 8. Review of the administrative law judge's Decision and Order does not disclose the administrative law judge's reasons for crediting the opinions

[6] The administrative law judge incorrectly identified Dr. Repsher as both a Board-certified radiologist and a B reader. Dr. Repsher's curriculum vitae indicates that Dr. Repsher is a B reader only. Decision and Order at 3; Employer's Exhibit 12.

of Drs. Oesterling and Caffrey over that of Dr. Distefano. Thus, the administrative law judge's decision does not comport with 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). We must therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(2), and remand this case for him to reconsider the autopsy evidence, and explain his findings. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-314 (10th Cir. 2010).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new opinions of Drs. Repsher and Tuteur, along with their previously submitted opinions, and the previously submitted opinions of Drs. Odgers and Coniglione. Drs. Repsher and Tuteur, who are Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and concluded that the miner did not have pneumoconiosis, but suffered from idiopathic pulmonary fibrosis. Director's Exhibit 55 (at Employer's Exhibits 5, 7, 19, 20, 24, 25); Employer's Exhibits 6, 14-16. Dr. Odgers, whose qualifications are not of record, examined the miner on behalf of the Department of Labor, and diagnosed him with hypoxia and mixed restrictive and obstructive disease. Director's Exhibit 10. In a section of the medical report form asking him to list the etiology of the cardiopulmonary diagnoses, Dr. Odgers noted that the miner was a "non-smoker with no known cardiac disease. Worked 26 yrs in coal mines." *Id*. Dr. Coniglione, whose qualifications are not of record, recorded in a treatment note that the miner "possibly" had pneumoconiosis. Director's Exhibit 15. Additionally, the record contained a June 10, 2009 medical report from Dr. Mitchell, who diagnosed the miner with severe lung disease due to coal mine dust exposure.[7] Director's Exhibit 68 at 4.

[7] Dr. Mitchell's report was submitted in support of the miner's second modification request. Director's Exhibit 68. Dr. Mitchell stated:

> [The miner] is a patient of mine [who] has had severe pulmonary problems for years and it appears the only thing that could have caused it was his working in the coal mines for years. He has no family history of lung disease, he has never smoked nor been exposed to second hand smoke. He has been diagnosed with Black Lung for years and chest x-rays and physical exam[ination] confirm this. It has worsened to the point that even with ambulatory oxygen he only has pulse oximetry measured in the mid 80s with any ambulation. Again, it appears the only cause of his severe lung disease is from working in the coal mines and his exposure to coal dust. I have enclosed recent labs and visits. Also[,] he had pulmonary function tests and Chest x-ray[;] I have also included the results of chest ct with contrast.

Based on the opinions of Drs. Repsher and Tuteur, which the administrative law judge found to be thorough, and persuasively explained, the administrative law judge determined that the medical opinion evidence did not establish the existence of pneumoconiosis. Decision and Order at 10-11. The administrative law judge, however, did not address Dr. Mitchell's medical opinion submitted on modification. Director's Exhibit 68 at 4. We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and instruct him to consider Dr. Mitchell's opinion, along with the other medical opinions. In determining whether the medical opinion evidence establishes the existence of pneumoconiosis, the administrative law judge should consider "'the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases for their diagnoses.'" *Gunderson*, 601 F.3d at 1024, 24 BLR at 2-315, *quoting Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996).

Director's Exhibit 68 at 4. A printout contained in Director's Exhibit 68 describes Dr. Mitchell as a "Family Practice Physician." Director's Exhibit 68 at 3.

Accordingly, the administrative law judge's Decision and Order Denying Claimant's Second Petition for Modification is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge