BRB No. 07-0207 BLA

C.R. (Widow of V.R.) Claimant-Respondent v. READING ANTHRACITE COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/21/2007 DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2004-BLA-00032 and 2004-BLA-05251) of Administrative Law Judge Ralph A. Romano (the administrative law judge) denying modification of an award of benefits on a miner's claim and awarding benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for a second time. When this case was previously before the Board, the Board vacated the awards of benefits on both claims. [*C.R.*] *v. Reading*

Anthracite Coal Co., BRB Nos. 05-1077 BLA and 05-1077 BLA-A (Dec. 13, 2005) (unpub.).[1]

Initially, addressing several procedural assertions raised by the parties, the Board held that the administrative law judge properly excluded x-ray readings, found at MDX-76 and 89, from the record, noting that employer had waived any objection to claimant's motion to strike those readings, as employer had failed to file a post-hearing written objection to the motion. The Board also held that the administrative law judge correctly excluded Dr. Hurwitz's testimony, as it exceeded the scope of his May 2003 medical report and that the administrative law judge properly excluded Dr. Fisk's supplemental report, as claimant failed to demonstrate good cause for the untimely submission of Dr. Fisk's supplemental report pursuant to 20 C.F.R. §725.456(b)(3). The Board, however, held that the evidence at Claimant's Exhibit 6, consisting of multiple x-ray interpretations and a CT scan, was not timely exchanged in accordance with the 20–day rule set forth at 20 C.F.R. §725.456(b)(2), and that the administrative law judge failed to consider whether good cause existed for its untimely submission pursuant to 20 C.F.R. §725.456(b)(3). On remand the administrative law judge was directed to consider whether good cause existed for the untimely submission of Claimant's Exhibit 6. The Board held that if the administrative law judge determined that good cause existed for the untimely submission of Claimant's Exhibit 6, he must then determine whether to include the evidence or whether to remand the case to the district director for consideration of the evidence. The Board further held that if, on remand, the administrative law judge determined that good cause existed for the untimely submission of Claimant's Exhibit 6, the administrative law judge must also determine whether due process required that employer be allowed time to submit responsive evidence.

The Board further held that because these evidentiary rulings could affect the administrative law judge's findings as to whether complicated pneumoconiosis and death due to pneumoconiosis were established at 20 C.F.R. §§718.304 and 718.205(c), those findings were likewise vacated. The Board instructed the administrative law judge to consider all the evidence relevant to these issues on remand and to provide his rationale for any credibility determinations pursuant to the requirements of 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), which requires that every

[1] Claimant is the widow of the miner who died on May 2, 2002. The miner filed his claim for benefits on February 9, 1996. Claimant filed her claim for survivor's benefits on July 17, 2002. These claims were consolidated. The relevant procedural history of the claims is set forth in the Board's previous decision. [*C.R.*] *v. Reading Anthracite Coal Co.*, BRB Nos. 05-1077 BLA and 05-1077 BLA-A (Dec. 13, 2005) (unpub.).

adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. The Board noted, however, that if, on remand, the administrative law judge found the existence of complicated pneumoconiosis established pursuant to Section 718.304, claimant would be entitled to the irrebuttable presumption of total disability on the miner's claim and death due to pneumoconiosis on the survivor's claim. On remand, the administrative law judge excluded Claimant's Exhibit 6 from the record, holding that claimant failed to show good cause for its untimely submission. Turning to the merits, the administrative law judge concluded that the relevant evidence, as a whole, supported a finding of complicated pneumoconiosis pursuant to Section 718.304, and that claimant was, therefore, entitled to the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis, and that his death was due to pneumoconiosis. Accordingly, the administrative law judge again denied employer's request to modify the award of benefits on the miner's claim, and he awarded benefits on the survivor's claim.

On appeal, employer argues that the administrative law judge erred in declining to address its request to reopen the record and admit into evidence relevant x-ray rereadings from employer that were negative for complicated pneumoconiosis.[2] Employer further argues that, even without these additional x-ray readings, the administrative law judge erred in finding complicated pneumoconiosis established. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).[4]

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[2] We affirm, as unchallenged on appeal, the administrative law judge's exclusion of Claimant's Exhibit 6. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Claimant initially filed a cross-appeal in this case. By Order dated July 10, 2007, however, the Board dismissed claimant's cross-appeal for failure to file a Petition for Review and brief. 20 C.F.R. §802.402.

[4] We will apply the law of the United States Court of Appeals for the Third Circuit, as the miner was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Employer first contends that the administrative law judge erred in failing to admit x-ray rereadings from employer that were negative for complicated pneumoconiosis. This assertion was previously considered and rejected by the Board. As the Board's previous disposition of this issue constitutes the law of the case, we decline to revisit it because employer has presented no persuasive evidence that the law of the case doctrine is inapplicable in this case or that an exception to the doctrine has been demonstrated. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *rev'd on other grounds*, *Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).

Employer next argues that even if the administrative law judge properly refused to admit all of the relevant x-ray rereadings, the administrative law judge nevertheless erred in finding complicated pneumoconiosis demonstrated by the x-ray evidence of record at Section 718.304(a).[5] Employer asserts that the administrative law judge impermissibly relied on a mere "head count" of x-ray readings showing complicated pneumoconiosis

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[5] Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ... if such miner is suffering or 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 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original]; *see generally Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

from claimant; focused on the positive readings of the 1996 and 1997 x-rays, without considering that some of the physicians suggested that the large opacities seen on the 1996 and 1997 x-rays represented possible cancer; erred in finding Dr. Wheeler's diagnosis equivocal; and erred in finding that Dr. Smith's interpretations were definitive readings of complicated pneumoconiosis when Dr. Smith only stated that his readings were "compatible with" complicated pneumoconiosis.

The administrative law judge found that the record contained seven interpretations indicative of the presence of complicated pneumoconiosis; specifically, the readings of Drs. Smith, Mathur, Capiello and Brandon, MDXs 45, 46, 48, 49, of the April 23, 1996 x-ray, the readings of Drs. Brandon and Mathur, MDXs 46, 49, of the February 27, 1997, x-ray, and the reading of Dr. Smith, CX 5, of the June 22, 2001 x-ray. Decision and Order on Remand at 3.[6] The administrative law judge accorded great weight to these readings based on the physicians' status as B readers and Board-certified radiologists.

The administrative law judge found that the interpretations of the March 12, 1985 x-ray, by Drs. Conrad and Pittman, MDX 32, which did not indicate the presence of complicated pneumoconiosis, were entitled to little weight because several more recent x-rays were read as showing complicated pneumoconiosis. In addition, the administrative law judge found that while Dr. Kraynak did not find complicated pneumoconiosis present on the April 23, 1996 x-ray, MDX 13, and Dr. Levinson did not find it present on the February 27, 1997 x-ray, MDX 38, their interpretations were outweighed by the contrary interpretations of those x-rays by better qualified readers. The administrative law judge further found that although Drs. Scott and Wheeler found x-ray films taken on October 28, 2000 and June 29, 2001, DX 20, to be negative for complicated pneumoconiosis, Dr. Wheeler's interpretation was equivocal, as he could not rule out the presence of complicated pneumoconiosis,[7] and the unqualified positive interpretations of Drs. Smith,

[6] Drs. Smith and Mather classified the April 23, 1996 x-ray as 3/2 A. MDX 45, 46. Dr. Capiello classified the x-ray as 2/3 A and Dr. Brandon classified the x-ray at q/u 3/3 A. MDX 49. Drs. Brandon and Mather classified the February 13, 1997 x-ray as 3/3 A. MDX 46, 49. Dr. Smith classified the June 22, 2001 x-ray as 3/3 B. Claimant's Exhibit 5.

[7] Dr. Wheeler stated that the x-rays he reviewed, taken between October 28, 2000 and April 25, 2002, showed infiltrates compatible with advanced granulomatous disease with a conglomerate mass compatible with tuberculosis or histoplasmosis. He further noted that the miner had advanced lung disease and that while some of the nodules could be coal workers' pneumoconiosis, there were no large opacities of coal workers' pneumoconiosis, although he included both possibilities on his reading of the June 22, 2001 x-ray.

Mathur, Capiello and Brandon outweighed any contrary interpretations and were sufficient to establish complicated pneumoconiosis.

We reject employer's assertions regarding the administrative law judge's consideration of the x-ray evidence relevant to the issue of complicated pneumoconiosis. The administrative law judge's finding of complicated pneumoconiosis, based on a preponderance of the x-ray readings, was based on more than a mere "head-count" of the x-ray evidence, but was instead properly based on both qualitative and quantitative factors. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *see generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Further, contrary to employer's assertion, the administrative law judge permissibly found that the statements of some physicians that certain abnormalities present on the x-rays were "suggestive" of cancer, did not outweigh the more definitive positive readings of complicated pneumoconiosis. *See Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Further, contrary to employer's assertion, the administrative law judge could accord less weight to the negative readings for complicated pneumoconiosis of the earlier x-rays and accord greater weight to the positive readings of the earlier x-rays, as pneumoconiosis is a progressive disease. 20 C.F.R. §718.201(c); 20 C.F.R. §718.201(c); *see Woodward*, 991 F.2d at 319, 17 BLR at 2-84-85; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *see also Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). Moreover, contrary to employer's assertion that the administrative law judge required Dr. Wheeler to "rule out" the absence of complicated pneumoconiosis on his x-ray reading in order for the administrative law judge to consider it to be a credible x-ray interpretation, the administrative law judge rationally found that Dr. Wheeler's negative readings for complicated pneumoconiosis were outweighed by the weight of the positive readings for the disease. *See Taylor*, 9 BLR at 1-23. Likewise, the administrative law judge reasonably found that Dr. Smith's finding of a 2/3 A nodule, was sufficient to establish complicated pneumoconiosis. We, therefore, reject employer's assertions and affirm the administrative law judge's determination that the x-ray evidence of record is sufficient to establish complicated pneumoconiosis pursuant to Section 718.304(a).

Nevertheless, we vacate the administrative law judge's determination that the relevant evidence, as a whole, establishes complicated pneumoconiosis pursuant to Section 718.304. We agree with employer that the administrative law judge failed to again explain why he credited the x-ray evidence over the conflicting medical opinion evidence in finding complicated pneumoconiosis established pursuant to Section 718.304.

Specifically, after finding that there was no autopsy or biopsy evidence pursuant to Section 718.304(b), the administrative law judge reviewed the medical evidence at Section 718.304(c). Decision and Order on Remand at 3-4. The administrative law judge found that the medical opinions of Drs. Kraynak, Fisk and Hurwirtz supported a finding of complicated pneumoconiosis and/or progressive massive fibrosis, Director's Exhibits 21, 23; Claimant's Exhibit 4; Employer's Exhibit 8, but that these opinions were outweighed by that of Dr. Hippensteel, who found no evidence of complicated pneumoconiosis, Director's Exhibit 16, based on Dr. Hippensteel's superior credentials. *Id*. Thus, the administrative law judge determined that under Section 718.304(c), claimant did not establish complicated pneumoconiosis. Decision and Order on Remand at 4. The administrative law judge concluded that, on weighing all of the relevant evidence, "the definitive x-ray evidence [was] sufficient to outweigh any contrary medical opinion evidence." *Id*.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify claimant for the irrebuttable presumption. The administrative law judge is required to weigh all of the relevant evidence at Section 718.304(a)-(c) including evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, and to resolve any conflicts and make findings of fact. *See Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003). Here, as employer argues, the administrative law judge has provided no basis for his conclusion that the x-ray evidence of complicated pneumoconiosis was entitled to dispositive weight over the contrary medical opinion evidence. The failure of the administrative law judge to provide such a basis constitutes a violation of the APA. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding of complicated pneumoconiosis and remand the case in order for the administrative law judge to again consider all relevant evidence of record on the issue, 20 C.F.R. §718.304(a)-(c); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*), and to provide the rationale for his credibility determinations. If the administrative law judge again finds complicated pneumoconiosis established pursuant to Section 718.304, he may rely upon this determination to deny employer's request for modification of the award of benefits on the miner's claim and may award benefits in the survivor's claim. Otherwise, the administrative law judge must determine whether the weight of the evidence is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) on the miner's claim, and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) on the survivor's claim.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge