BRB No. 10-0177 BLA

EATHER McKAMEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
KEY MINING, INCORPORATED	)	
	)	DATE ISSUED:_____
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Ann Marie Scarpino (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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order – Denial of Claim (09-BLA-5118) of Administrative Law Judge Daniel F. Solomon, 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). The administrative law judge noted employer's stipulation to twenty-eight years of coal mine employment[1] and adjudicated the claim pursuant to the regulations contained in 20 C.F.R.

[1] Because claimant was last employed in the coal mining industry in Tennessee, the

Part 718. The administrative law judge found that the x-ray, biopsy, and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In so finding, he determined that a two-centimeter mass removed from claimant's right lung yielded biopsy evidence that "probably . . . would have qualified as complicated pneumoconiosis." Decision and Order at 5. The administrative law judge, however, found that claimant could not meet his burden to establish complicated pneumoconiosis because "there [was] no indication, post surgery[,] that there [was] continued evidence of pneumoconiosis" in his lungs. *Id*. Accordingly, the administrative law judge denied benefits.

On appeal, the Director asserts that the administrative law judge erred in finding that the biopsy evidence could not support a finding of the existence of pneumoconiosis unless claimant offered post-surgery evidence of pneumoconiosis. The Director, therefore, requests that the denial of benefits be vacated, and the case be remanded for the administrative law judge to determine whether claimant can establish complicated pneumoconiosis, and thereby, invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. If complicated pneumoconiosis is not established, the Director asserts that the administrative law judge must determine whether the biopsy evidence establishes the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Further, because the administrative law judge relied, in part, on his analysis of the biopsy evidence when he weighed the medical opinion evidence, the Director argues that the administrative law judge should reconsider whether the medical opinion evidence establishes pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. Claimant has not submitted a brief in this appeal.[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. 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 he is 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.

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*); Director's Exhibits 3, 13.

[2] We affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1), as this finding is not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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 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 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 all evidence before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

In considering the biopsy evidence, the administrative law judge reviewed Dr. Chiles's pathology report of a right upper lobectomy that was performed in 2007 "to excise a 2.0 CM mass that was determined to have been anthracotic material."[3] Decision and

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[3] Dr. Chiles provided the pathology report, dated October 8, 2007. Her final microscopic diagnosis for the right upper lung lobectomy identified:

> -stellate-shaped sclerotic nodules, largest 2.0 cm in maximum dimension, with marked associated anthracosis and obliterated vasculature
> -surgical resection margins
> bronchi: negative
> vascular: negative
> -visceral pleura: negative
> -lymph nodes: two lymph nodes, both negative for malignancy
> -adjacent lung tissue: marked septal fragmentation, consistent with emphysematous change.

Director's Exhibit 19. In the comment section, Dr. Chiles stated:

> The clinical history of coal workers[']pneumoconiosis is noted. A stellate nodule in this setting measuring greater than 1-3 cm is designated progressive massive fibrosis (PMF). Microscopically, sections consist of irregular bundles of collagen between which dust is deposited. There is associated

Order at 5. Dr. Chiles reported that the biopsied lung tissue revealed "stellate-shaped sclerotic nodules, largest 2.0 cm in maximum dimension, with marked associated anthracosis and obliterated vasculature." Director's Exhibit 19. Dr. Chiles opined that "[a] stellate nodule in this setting measuring greater than 1-3 cm is designated progressive massive fibrosis (PMF)." *Id*. The administrative law judge found that, despite Dr. Chiles's diagnosis, the biopsy evidence could not establish pneumoconiosis, because claimant submitted no proof that pneumoconiosis remained in his lungs after the surgery:

> Normally, the mass would probably have qualified as evidence of pneumoconiosis, and given the size, would have qualified as complicated pneumoconiosis. However, as of the date of the claim, January 13, 2008, the Claimant has not proved that there has been any residual evidence of pneumoconiosis on biopsy. The biopsy [is] referenced in the OWCP evaluation by Dr. Burrell, which is the lone medical report designated by Claimant. However, there is no indication, post[-]surgery that there is continued evidence of pneumoconiosis. Therefore, I find that Claimant has not met his burden to prove pneumoconiosis or complicated pneumoconiosis by biopsy.

Decision and Order at 5 (citations omitted).

The Director contends that the administrative law judge's finding that the biopsy evidence could not be used to establish that claimant suffers from pneumoconiosis is contrary to the regulations. The Director cites 20 C.F.R. §718.106(c), which provides, in part, that "where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis." The Director states that, contrary to the administrative law judge's analysis, the regulation does not require "evidence of residual pneumoconiosis after a biopsy is performed to demonstrate that a miner suffers from that condition. . . ."[4] Director's Brief at 4. Consequently, the Director argues that the

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> chronic inflammatory infiltrate present. The surrounding arteries and vein show near luminal obliteration. In addition, there is muscularization of the pulmonary arteries in adjacent lung parenchyma. There is no evidence of malignancy.

Id.

[4] The Director argues further that the administrative law judge's determination "appears to be based on the premise that the removal of part of the Claimant's right lung 'cured' his pneumoconiosis. That premise is erroneous, as pneumoconiosis is a progressive, incurable disease." Director's Brief at 5, *citing Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995).

administrative law judge must reconsider the biopsy evidence, and make specific findings as to whether it establishes complicated pneumoconiosis. *Id*.

The Director's contention has merit. One method of establishing the existence of pneumoconiosis is with biopsy evidence of the disease. 20 C.F.R. §§718.202(a)(2),(3); 718.304(b). As the Director notes, the regulations provide that "where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis." 20 C.F.R. §718.106(c). The regulations do not require a claimant to also prove that residual pneumoconiosis remains after the biopsy, and the administrative law judge cited no authority for imposing that requirement. Therefore, the administrative law judge erred by finding that the existence of pneumoconiosis could not be established by the biopsy evidence unless claimant also demonstrated "continued evidence of pneumoconiosis" after the biopsy.

Employer argues that the administrative law judge's analysis of the biopsy evidence constituted harmless error, for three reasons: First, employer contends that the biopsy report "was not properly in evidence," because claimant did not "properly identify the biopsy study in his evidence summary form. . . ." Employer's Brief at 2. Second, employer argues that the biopsy was not in "substantial compliance" with the quality standard set forth at 20 C.F.R. §718.106(a), and that therefore, it merited no weight. *Id*. at 3-4. Third, employer argues that "the evidence as a whole" does not establish pneumoconiosis. *Id*. at 4.

We reject employer's assertion that the biopsy report considered by the administrative law judge was not properly in evidence. The record reflects that claimant designated, as his initial biopsy evidence, a report by Dr. "Melissa Chiles" dated October 8, 2007, which he mislabeled as "Director's Exhibit 27." Claimant's Evidence Summary at 6. A review of the record reveals that Director's Exhibit 27 is the district director's proposed Decision and Order awarding benefits issued on August 29, 2008; the biopsy report of Dr. Chiles is contained in Director's Exhibit 19.[5] Although claimant's Evidence Summary incorrectly identified the number of the exhibit containing Dr. Chiles's pathology report, the form correctly referred to Dr. Chiles's October 8, 2007 report. Moreover, Director's Exhibit 19 was admitted into evidence.[6] Hearing Transcript at 9.

[5] Attached to the district director's proposed Decision and Order is a summary of the evidence, which includes a summary of Dr. Chiles's report. Director's Exhibit 27.

[6] In addition, the record reflects that employer's physicians, Drs. McSharry and Dahhan, reviewed Dr. Chiles's pathology report. Employer's Exhibits 1, 2.

Therefore, we reject employer's argument that the biopsy report was not properly in evidence.[7]

Further, we reject employer's assertion that Dr. Chiles's biopsy report could not be considered because it does not conform to the quality standards of 20 C.F.R. §718.106(c).[8] The quality standards apply only to evidence developed in connection with a claim for benefits. 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). In this case, the record reflects that the biopsy was performed during claimant's hospitalization at St. Mary's Medical Center in October 2007, three months before he filed his claim. Director's Exhibits 2, 19. Because Dr. Chiles's biopsy report was not generated in connection with claimant's claim for benefits, it is not subject to the quality standards set forth at 20 C.F.R. §718.106.[9] *Stowers*, 24 BLR at 1-92. Therefore, we reject employer's assertion that the biopsy evidence merited no weight because it may not be in substantial compliance with those standards.

Lastly, employer's argument, that the medical evidence as a whole does not establish pneumoconiosis, constitutes a request that the Board weigh the evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. As the Director notes, once the administrative law judge determined that the biopsy evidence was insufficient because it was unaccompanied by post-surgery evidence of pneumoconiosis, he made no definitive findings as to the existence of complicated pneumoconiosis.[10] Decision and Order at 4-7.

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[7] Contrary to employer's characterization of the decision below, the administrative law judge did not find that the biopsy report was not admitted into evidence. He stated that claimant did not "designate" the biopsy report contained in Director's Exhibit 19 on his Evidence Summary. The administrative law judge, however, treated the biopsy report as evidence admitted into the record, and he considered it. Decision and Order at 4-5.

[8] Employer argues that, although the biopsy report includes a gross description and a "Final Microscopic Diagnosis," it lacks a detailed microscopic description of specific tissue slides. Employer's Brief at 3.

[9] The administrative law judge must determine the reliability of this evidence and the weight to which it is entitled. *See* 65 Fed.Reg. 79920, 79928 (Dec. 20, 2000).

[10] As summarized by the administrative law judge, the Director, and employer, in addition to the x-ray and biopsy evidence, the record contains the medical reports of Drs. McSharry, Dahhan, and Burrell. Dr. McSharry opined that claimant does not have "radiologic evidence of pneumoconiosis," but that the mass removed from his right lung "may represent a 2 cm lesion of coal workers' pneumoconiosis. . . ." Employer's Exhibit 1. Dr. Dahhan, by contrast, "question[ed] the validity of the diagnosis that the resected lesion from the right upper lobe was indeed that of complicated coal workers'

Therefore, we reject employer's argument that the administrative law judge's erroneous analysis of the biopsy evidence was harmless.

Consequently, we vacate the administrative law judge's finding that the biopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). On remand, the administrative law judge must reconsider whether the biopsy evidence tends to establish the existence of complicated pneumoconiosis. The administrative law judge must also determine whether the relevant evidence in the other categories under 20 C.F.R. §718.304(a),(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh the evidence at subsections (a)-(c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established.[11] *Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33.

Impact of the Recent Amendments

After the issuance of the administrative law judge's Decision and Order, amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted by Section 1556 of Public Law No. 111-148. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

By Order dated September 14, 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. The Director and employer have responded. The Director maintains that the case

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pneumoconiosis," because, in Dr. Dahhan's opinion, the conclusion was not "supported by the description in the pathological sample." Employer's Exhibit 2. Dr. Burrell diagnosed, *inter alia*, "[p]neumoconiosis," based, in part, on the "pathology report . . . showing large nodules and marked associated anthracosis. . . ." Director's Exhibit 19. Additionally, the record contains medical treatment records from Statcare Pulmonary, *Id*., and from Dr. Cardwell. Employer's Exhibit 5. The administrative law judge, as the fact-finder, must take into account all of the relevant evidence to determine whether complicated pneumoconiosis is established. *Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999).

[11] Additionally, because the administrative law judge's analysis of the biopsy evidence affected his analysis of the medical opinion evidence under 20 C.F.R. §718.202(a)(4), we vacate his finding that the medical opinion evidence did not establish the existence of pneumoconiosis. Decision and Order at 6-7.

must be remanded to the administrative law judge for consideration of whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act. Employer responds that the amended regulations are impermissibly retroactive. Further, if the case is remanded for consideration under Section 411(c)(4), employer requests that the administrative law judge be instructed to reopen the record for the parties to submit evidence addressing the new legal standard. Employer further notes that, if the case is remanded, employer will seek to withdraw its stipulation to twenty-eight years of coal mine employment, since claimant bears the burden to establish at least fifteen years of qualifying coal mine employment.

Based upon the parties' responses, and our review, we conclude that Section 1556 potentially affects this case. Because this case was filed after January 1, 2005, and claimant was credited with twenty-eight years of coal mine employment, if the administrative law judge, on remand, does not find claimant entitled to invocation of the irrebuttable presumption at Section 411(c)(3), he must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge should allow employer to withdraw its stipulation to twenty-eight years of coal mine employment, as the issue of whether claimant has sufficient qualifying coal mine employment is pertinent to entitlement to the application of the Section 411(c)(4) presumption. If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). If the evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Further, because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.[12]

Accordingly, the administrative law judge's Decision and Order – Denial of Claim is affirmed in part and vacated in part, and this case is remanded to the administrative law

[12] In the event that the administrative law judge determines that Section 411(c)(4) does not apply to this case, he must determine whether claimant has established entitlement to benefits without the aid of the presumption. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge