BRB No. 99-1285 BLA

ALVA H. PARTIN (Deceased)	)	
Claimant-Respondent	)	
v.	)	
CANADA MOUNTAIN COAL AUGURING	)	DATE ISSUED:
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand-Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole, Anderson, PSC), Barbourville, Kentucky, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration (97-BLA-0961) of

Administrative Law Judge Thomas F. Phalen, Jr. on a 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.

In his first Decision and Order, the administrative law judge found that the evidence of record was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). The administrative law judge further found that the x-ray evidence was sufficient to establish complicated pneumoconiosis and to invoke the irrebutable presumption at 20 C.F.R. §718.304(a). Accordingly, benefits were awarded.

Subsequent to an appeal by employer, the Board issued a Decision and Order vacating the award of benefits. *Partin v. Canada Mountain Augering*, BRB No. 98-0687 BLA (Feb. 11, 1999)(unpub.). The Board affirmed, as unchallenged on appeal, the administrative law judge's findings addressing the length of coal mine employment, dependency, claimant's smoking history, the designation of employer as the responsible operator and the existence of simple coal workers' pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b). *Partin*, slip op. at 2, n.1. The Board further concluded that substantial evidence supported the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.304(a). *Partin*, slip op. at 3. The Board, however, vacated the administrative law judge's finding that claimant established entitlement to the irrebutable presumption at Section 718.304 inasmuch as the administrative law judge failed to weigh all the relevant evidence of record at Section 718.304(a), (b) and (c), prior to invoking the presumption at Section 718.304, in a manner consistent with the holding in *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*). *Partin*, slip op. at 4. Accordingly, the Board vacated the award of benefits and remanded the case for further consideration.

On remand, the administrative law judge again found that the parties stipulated to a twenty-three year coal mine employment history and the presence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Decision and Order at 2. Likewise, the administrative law judge again found that the weight of the relevant evidence of record established the presence of complicated pneumoconiosis and that claimant was entitled to the irrebutable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 5-9. Accordingly, benefits were awarded. Subsequently, the administrative law judge denied employer's Motion for Reconsideration and reaffirmed the award of benefits.

On appeal, employer again contends that the administrative law judge erred in concluding that the x-ray evidence was supportive of a finding of complicated pneumoconiosis pursuant to Section 718.304(a). Employer further contends that the administrative law judge erred in failing to follow the Board's remand instructions and consider all of the relevant medical evidence pursuant to Section 718.304(b) and (c).

Claimant in response, urges affirmance of the award of benefits.[1] The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish invocation of the irrebutable presumption at Section 718.304, an administrative law judge must consider all relevant evidence found at each subsection pursuant to Section 718.304(a)-(c), and then weigh together such evidence to determine if the presumption is invoked. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir.1993); *Melnick, supra*.

Employer contends that the administrative law judge erred in concluding that the x-ray evidence of record supported a finding of complicated pneumoconiosis pursuant to Section 718.304(a).[2] When this case was previously before the Board, it held that the relevant x-ray evidence of record was sufficient to support a finding of complicated pneumoconiosis at Section 718.304(a). *Partin*, slip op. at 2-3. Employer acknowledges the Board's holding, but nonetheless urges the Board to "consider its earlier approval of the [administrative law judge's] decision, vacate the [administrative law judge's] findings and remand this matter for a fresh look." Employer's Brief at 15.

Inasmuch as the Board's previous finding regarding the x-ray evidence at Section

[1] On October 25, 1999, claimant submitted a "Motion to Consolidate" requesting the Board to consolidate the instant claim with the widow's survivor's claim. Inasmuch as that survivor's claim is not before the Board, however, claimant's motion is denied.

[2] Section 718.304(a) states, in pertinent part, that an x-ray demonstrates complicated pneumoconiosis when it "yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B, or C...." 20 C.F.R. §718.304.

718.304(a) was not challenged by employer through either a motion for reconsideration or appeal to the United States Court of Appeals, our holding on the issue constitutes the law of the case, *see Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984) and employer is precluded from raising the issue before us at this time as there has been no change in the underlying fact situation, no intervening controlling authority demonstrating that the initial decision was erroneous or that the previous holding was either clearly erroneous or caused a manifest injustice. *See Williams, supra*. Accordingly, we again conclude that the administrative law judge properly found that the x-ray evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Employer next contends that the administrative law judge's consideration of the evidence on remand failed to comply with the Board's instructions as the administrative law judge treated x-ray evidence as medical opinion evidence pursuant to Section 718.304(c) and erroneously concluded that the x-ray evidence of complicated pneumoconiosis, "always trumps the evidence under any other subsection." Employer's Brief at 16. Employer asserts that all the physicians of record, with the exception of Dr. Baker, found that claimant's lung function was normal and that even Dr. Baker acknowledged that the miner could perform his last coal mine employment. Thus, employer asserts that such "unanimous" agreement that claimant's lung function was normal constitutes relevant evidence of the absence of complicate pneumoconiosis pursuant to Section 718.304(c). Employer's Brief at 18. Further still, employer asserts that the administrative law judge erred in failing to address the opinions of claimant's treating physician, Dr. Mohan, who found no respiratory impairment, Claimant's Exhibit 3, as such a diagnosis was probative on the issue of the presence or absence of complicated pneumoconiosis. Finally, employer contends that the administrative law judge erred in failing to address the relative qualifications of the physicians of record in considering the evidence.

When this case was previously before the Board, it was remanded for the administrative law judge to consider and weigh together all the relevant evidence at Section 718.304(a)-(c). *Partin*, slip op. at 3-4. On remand, the administrative law judge found that the medical opinions of record supported a finding of complicated pneumoconiosis pursuant to Section 718.304(c).[3] In reaching this determination, the administrative law judge concluded that the opinions of those physicians "who explicitly refute the existence of complicated pneumoconiosis," specifically, Dr. Fino and Dr. Branscomb, Employer's Exhibits 1, 2, 3, 4, were entitled to little weight as these opinions were not supported by

[3] The administrative law judge found correctly that the record is devoid of autopsy or biopsy evidence and thus complicated pneumoconiosis could not be established pursuant to Section 718.304(b). Decision and Order on Remand at 3; 20 C.F.R. §718.304(b).

underlying medical documentation. Decision and Order on Remand at 5-6. Instead, the administrative law judge accorded greater weight to the contrary opinions of Drs. Powell and Myers, who found that claimant suffered from complicated pneumoconiosis as they were best supported by the underlying documentation. Director's Exhibits 12, 13, 14; Decision and Order at 5-6. Moreover, the administrative law judge found the opinions of Dr. Baker and Dr. Velamati, corroborative of the diagnosis of complicated pneumoconiosis. Director's Exhibit 16; Claimant's Exhibit 3. Accordingly, the administrative law judge found the relevant evidence sufficient to support a finding of complicated pneumoconiosis pursuant to Section 718.304(c), and that the weight of the evidence, therefore, supported a finding of invocation of the irrebutable presumption of total disability due to complicated pneumoconiosis.

After reviewing employer's assertions and the evidence of record, however, we must vacate the administrative law judge's Decision and Order on Remand awarding benefits. The administrative law judge permissibly concluded that the opinions of Drs. Fino and Branscomb were not well-reasoned as the physicians failed to provide adequate support for their conclusions. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However, the administrative law judge failed to weigh specifically the opinion of Dr. Vuskovich, who concluded that claimant suffered from no pulmonary disability, Director's Exhibit 15, and failed to explain why the opinions of claimant's treating physician, Dr. Mohan, who concluded that claimant suffered from no respiratory impairment, were discounted, Claimant's Exhibit 3. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). Accordingly, the administrative law judge's findings at Section 718.304(c) are vacated and the case is remanded for further consideration of all the relevant evidence. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).[4]

[4] As employer asserts, however, a review of the relevant evidence of record fails to demonstrate that the statements of Drs. Baker and Velamati, diagnosing the presence of complicated pneumoconiosis and relied upon as support for the finding of complicated pneumoconiosis at Section 718.304(c), are based on anything other than a review of x-rays. As such, the reports are not relevant opinions at Section 718.304(c). *See Melnick*, *supra*; *see generally Anderson*, *supra*.

The administrative law judge's finding that claimant was entitled to the presumption at Section 718.304 is, therefore, vacated and the case is remanded for further consideration. If, on remand, the administrative law judge concludes that claimant has not met his burden of proof at Section 718.304, the administrative law judge must review the evidence of record at 20 C.F.R. §718.204 and decide if claimant has established the presence of a totally disabling respiratory impairment due to pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration are affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge