BRB No. 10-0154 BLA

JIM SIMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SENECA ENERGY, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 10/29/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Claim (2009-BLA-05120) of Administrative Law Judge Daniel F. Solomon, which was issued pursuant to 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] In a Decision and Order dated October 13, 2009, the administrative law judge adjudicated this miner's claim, filed on October 31, 2005, under the regulations at 20 C.F.R. Part 718. The administrative law judge found that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The administrative law judge credited claimant with at least eighteen years of coal mine employment, as stipulated by the parties, and concluded that employer was unable to rebut the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. Accordingly, the administrative law judge found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis and awarded benefits.

On appeal, employer contends that the administrative law judge erred in weighing the x-ray evidence and did not explain why he rejected the negative CT scans and medical opinions supportive of a finding that claimant does not have complicated pneumoconiosis. Claimant is without counsel and has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to employer's appeal, unless specifically requested to do so by the Board.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc*., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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[1] In his Decision and Order, the administrative law judge incorrectly stated that, since claimant was previously denied benefits, he "must prove entitlement to one of the issues previously adjudicated against him." Decision and Order at 3. At the hearing, the parties and the administrative law judge agreed that this case involves an initial claim filed on October 31, 2005. Hearing Transcript at 7-8.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §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 the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered seven readings of three x-rays dated January 9, 2006,[3] August 21, 2006 and September 5, 2006. Dr. Ahmed, dually qualified as a Board-certified radiologist and B reader, read the January 9, 2006 x-ray as positive for simple pneumoconiosis, 2/2, r/q, and complicated pneumoconiosis, Category A. Director's Exhibit 12. He noted in the comments section of the ILO form:

> Nodule like densities in the lung fields in the perihilar region could be part of complicated pneumoconiosis; however, lung cancer cannot be excluded from this examination. No previous chest x-ray available for comparison. Follow up CT [scan] could be useful. Inform personal physician.

Id. Dr. Alexander, also a dually qualified Board-certified radiologist and B reader, read the same January 9, 2006 x-ray as positive for simple pneumoconiosis, 2/3, q/r, and complicated pneumoconiosis, Category A. Claimant's Exhibit 1. Dr. Alexander further stated on the ILO form that "[l]arge opacities bilaterally [were consistent with] complicated [coal workers' pneumoconiosis] – [a]lso, left lung cancer and hilar adenopathy need to be excluded[;] needs [follow up] with CT [scan]." Claimant's Exhibit 1. Dr. Wheeler, a dually qualified Board-certified radiologist and B reader, read the January 9, 2006 film as negative for simple and complicated pneumoconiosis. Director's Exhibit 14. Dr. Wheeler noted that the x-ray revealed "ill defined infiltrate or

[3] Dr. Barnett read the January 9, 2006 film for quality purposes only. Director's Exhibit 12.

fibrosis" and "small nodular infiltrate" and stated that it was "compatible with granulomatous disesase, [tuberculosis] or histoplasmosis, at least partly healed." *Id*. He further noted that a "few small nodules could be [coal workers' pneumoconiosis,] but [the] pattern is asymmetrical and best explained by granulomatous disease." *Id*. He indicated that a CT scan was needed for an exact diagnosis. *Id*.

Dr. Ahmed read the August 21, 2006 x-ray as positive for simple pneumoconiosis, 2/2, r/q, and complicated pneumoconiosis, Category A, while Dr. Dahhan, a B reader, read the same x-ray as positive for simple pneumoconiosis, 2/3, q/r, but negative for complicated pneumoconiosis. Director's Exhibits 15, 18. Dr. Ahmed also read the most recent x-ray of September 5, 2006, as positive for simple pneumoconiosis, 2/2, r/q, and complicated pneumoconiosis, Category A. Director's Exhibit 18.

In weighing the x-ray evidence at 20 C.F.R. §718.304(a), the administrative law judge noted that "the majority of the readings in evidence find complicated pneumoconiosis." Decision and Order at 5. With respect to the January 9, 2006 x-ray, the administrative law judge found that it was positive for complicated pneumoconiosis because there were two positive readings and one negative reading by dually qualified radiologists. *Id*. In resolving the conflicting interpretations of the August 21, 2006 x-ray, the administrative law judge found that, because Dr. Ahmed was dually qualified, his positive reading was entitled to controlling weight over the negative reading by Dr. Dahhan, a B reader. *Id*. The administrative law judge also found that the September 5, 2006 x-ray was positive for complicated pneumoconiosis, based on Dr. Ahmed's uncontradicted reading. *Id*. at 2. Based on his review of the x-ray evidence, the administrative law judge found that "the preponderance of the x-rays and the majority of the best qualified readers agree that the [c]laimant has complicated pneumoconiosis." *Id*. at 5.

The administrative law judge indicated that "there is no current biopsy or other evidence to the contrary that would outweigh the x-ray evidence." Decision and Order at 5. He did not discuss the CT scan or medical opinion evidence pursuant to 20 C.F.R. §718.304(c). Turning to the etiology of claimant's pneumoconiosis pursuant to 20 C.F.R. §718.203, the administrative law judge noted that he accepted the parties' stipulation of at least eighteen years of coal mine employment, and found that employer "has not provided evidence" to rebut the presumption, under 20 C.F.R. §718.203, that claimant's pneumoconiosis arose out of his coal mine employment. *Id*. at 6. The administrative law judge summarily stated, "I reject Drs. Vuskovich's and Dahhan's conclusions that the evidence does not disclose complicated pneumoconiosis." *Id*. The administrative law judge further stated, "Dr. Burrell related pneumoconiosis to work. I find that it is more reasonable that the complicated pneumoconiosis arose from work in mining." *Id*. Therefore, the administrative law judge awarded benefits.

Employer alleges that the administrative law judge erred in relying on the numerical weight of the positive readings for complicated pneumoconiosis without properly considering that Dr. Wheeler reviewed both x-rays and CT scans in this case, finding that claimant does not have either simple or complicated pneumoconiosis. Employer's Brief in Support of Petition for Review at 10-11. Employer maintains that, based on his review of both x-ray and CT scan evidence, Dr. Wheeler's opinion should be given controlling weight as to the existence of complicated pneumoconiosis. *Id*. In support of its argument, that Dr. Wheeler's opinion is the most credible, employer notes that even Drs. Ahmed and Alexander acknowledged, on the x-ray ILO classifications forms they completed, that "[f]ollow-up CT [scans] could be useful" in diagnosing claimant's condition, and they did not have the same opportunity to review the CT scan evidence, as did Dr. Wheeler. *Id*.

Contrary to employer's argument, the administrative law judge was not required to give controlling weight to Dr. Wheeler's negative x-ray readings for complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), simply because the physician also had the opportunity to read the CT scan evidence. The weight to accord Dr. Wheeler's CT scan readings is an issue for the administrative law judge to address pursuant to 20 C.F.R. §718.304(c).

The administrative law judge specifically rejected employer's assertion that Dr. Wheeler's negative x-ray readings were more credible, noting that Dr. Wheeler "takes a minority position in this record" to the extent that he "finds no pneumoconiosis, even Dr. Dahhan found simple pneumoconiosis. [Dr. Wheeler] stands alone." Decision and Order at 5. We consider employer's arguments relevant to 20 C.F.R. §718.304(a) to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Because the administrative law judge properly performed both a qualitative and quantitative review of the x-ray readings, and permissibly credited the majority of positive readings for complicated pneumoconiosis by the dually qualified radiologists, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *See Staton v. Norfolk and Western Railway 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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) *(en banc*).

Notwithstanding, we agree with employer that the administrative law judge erred in summarily rejecting the opinions of Drs. Dahhan and Vuskovich and in not properly

explaining, in accordance with the Administrative Procedure Act (APA),[4] the weight he accorded the conflicting evidence as to the existence of complicated pneumoconiosis.[5] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark*, 12 BLR at 1-155. Furthermore, the administrative law judge erred in failing to render specific findings pursuant to 20 C.F.R. §718.304(c), and did not weigh the contrary evidence, including the negative CT scans and medical opinions, prior to finding that claimant is entitled to invocation of the irrebuttable presumption. *See Gray*, 176 F.3d at 389, 21 BLR at 2-628-29. Thus, we vacate the administrative law judge's finding of complicated pneumoconiosis and his award of benefits pursuant to 20 C.F.R. §718.304.

On remand, in considering whether claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must first weigh the CT scan and medical opinion evidence at 20 C.F.R. §718.304(c), and then weigh the evidence supportive of a finding of complicated pneumoconiosis against the

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[4] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[5] Dr. Wheeler read CT scans dated May 25, 2005, October 31, 2005 and February 1, 2006. Director's Exhibit 17. Dr. Burrell examined claimant on January 9, 2006, at the request of the Department of Labor, and diagnosed complicated pneumoconiosis and emphysema, both of which he attributed to claimant's coal mine employment. Director's Exhibit 12. Dr. Dahhan examined claimant on August 28, 2006 and opined that, while claimant has simple coal workers' pneumoconiosis, he does not have complicated pneumoconiosis. Director's Exhibit 15. Dr. Dahhan stated that the "pulmonary function studies . . . showed normal [s]pirometry, lung volumes and diffusion capacity, all arguing against the presence of complicated coal workers' pneumoconiosis." *Id.* Dr. Vuskovich submitted a report dated April 28, 2009, based on his review of claimant's medical records and the x-ray evidence. Employer's Exhibit 4. He noted that claimant's medical history included a diagnosis of dermatomyositis, a connective tissue disease, which can mimic either simple or complicated pneumoconiosis and "can cause a variety of chest imaging stud[y] appearances including nodules, fibrosis, areas of consolidation and opacities." *Id.* Dr. Vuskovich also opined that claimant does not have complicated pneumoconiosis, as he has no pulmonary impairment. *Id.*

contrary evidence, with the burden of proof remaining on claimant to establish the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Melnick*, 16 BLR at 1-33. If the administrative law judge determines that claimant has complicated pneumoconiosis, he must further determine whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c).

The administrative law judge must also consider this case in light of the 2010 amendments to the Act. Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

Based on the filing date of this claim, the administrative law judge must consider whether claimant has established invocation of the Section 411(c)(4) presumption. If so, the administrative law judge must also determine whether employer has submitted sufficient evidence to rebut the presumption. On remand, the administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 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). Any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Furthermore, in rendering his Decision and Order on remand, the administrative law judge is specifically instructed to explain the bases for his credibility determinations, and his findings of fact and conclusions of law in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Award of Claim is vacated and the case is remanded to the administrative law judge 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