BRB No. 10-0182 BLA

BOBBY G. FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 10/27/2010
	)	
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 of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Jonathan Rolfe (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5938) of Administrative Law Judge Paul C. Johnson, Jr., awarding benefits 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 subsequent claim filed on October 18, 2007.[1] After crediting claimant with twenty years of coal mine employment,[2] the administrative law judge found that the new evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2007 claim on the merits. The administrative law judge found that the evidence, as a whole, established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the new evidence established the existence of complicated pneumoconiosis pursuant to

[1] Claimant filed four previous claims. Director's Exhibits 1-4. The first claim, filed on February 20, 1981, was denied on May 21, 1981, because claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. The second claim, filed on March 14, 1989, was denied by an administrative law judge because claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. The Board subsequently affirmed the denial of benefits. *Fields v. Clinchfield Coal Co.*, BRB No. 92-1855 BLA (June 29, 1994) (unpub.). The third claim, filed on April 7, 1997, was denied on April 30, 1998, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 3. Claimant's request for modification was denied on April 15, 1999. *Id.* The fourth claim, filed on April 9, 2001, was denied by an administrative law judge because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 4. The Board subsequently affirmed the denial of benefits. *Fields v. Clinchfield Coal Co.*, BRB No. 04-0847 BLA (Aug. 30, 2005) (unpub.).

[2] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Section 718.304. Claimant and the Director, Office of Workers' Compensation Programs (the Director), declined to file substantive responses to claimant's appeal.

The Board 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).

Impact of the Recent Amendments

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, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded.

The Director asserts that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits.[3] Employer agrees that Section 1556 is applicable to this claim, based on its filing date, but asserts that the administrative law judge must allow employer to develop any evidence that it considers relevant to the new standards created by Section 1556.

Based upon the parties' responses, and our review, we conclude that this case is affected by Section 1556. As will be discussed below, the administrative law judge's award of benefits cannot be affirmed. Because we must remand this case for the administrative law judge to reconsider whether claimant has established the existence of complicated pneumoconiosis, we will also instruct the administrative law judge, on remand, to consider this case in light of the amendments to the Act.

[3] Relevant to this living miner's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Supplemental Brief at 1. 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 will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

Section 725.309

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis. Director's Exhibit 4. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he suffers from pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

Complicated Pneumoconiosis

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, and was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 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 of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

Section 718.304(a)

The record contains eleven interpretations of three new x-rays taken on July 10, 2007, November 5, 2007, and March 13, 2008. After weighing the conflicting interpretations of the July 10, 2007 and November 5, 2007 x-rays in light of the readers' radiological qualifications,[4] the administrative law judge found that both of these x-rays are negative for complicated pneumoconiosis. Decision and Order at 18-19.

The administrative law judge next considered the conflicting interpretations of the March 13, 2008 x-ray. Dr. Ahmed, a B reader and Board-certified radiologist, interpreted the x-ray as "2/2" for simple pneumoconiosis, with Category B large opacities. Director's Exhibit 34. Dr. Ahmed commented that "Minute soft irregular and rounded parenchymal densities measuring up to 10 millimeters are seen scattered throughout the lungs. Pneumoconiotic opacities measuring over 10 millimeters in size are seen in the right and left lower lung fields and in the right upper lobe. Coalescence of small pneumoconiotic opacities is seen." Director's Exhibit 34. Dr. Scott, an equally qualified physician, interpreted the March 13, 2008 x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibit 18. Dr. Scott commented that he saw a "5 cm mass or focal infiltrates RLL – possible cancer. Focal infiltrates or mass left lower lung. Peripheral infiltrates and pleural thickening upper lungs; possible Tb, unknown activity. Advise CT!" Director's Exhibit 18.

In regard to Dr. Scott's x-ray interpretation, the administrative law judge found that, unlike Dr. Ahmed, "Dr. Scott did not record a large opacity in the right upper lobe, regardless of its etiology. I do not interpret his reading as impeaching Dr. Ahmed's interpretation; Dr. Scott simply made no findings on the existence of the opacity." Decision and Order at 20. Finding that Dr. Ahmed's diagnosis of a large opacity in the right upper lobe was, therefore, "uncontradicted," the administrative law judge determined that the March 13, 2008 x-ray was positive for complicated pneumoconiosis. *Id.* Crediting the more recent, March 13, 2008 x-ray over the two negative x-rays from 2007, the administrative law judge found that the x-ray evidence established the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a).

[4] Drs. Miller and Alexander, each of whom is dually qualified as a B reader and Board-certified radiologist, interpreted the July 10, 2007 and November 5, 2007 x-rays as positive for complicated pneumoconiosis. Director's Exhibits 24, 32; Claimant's Exhibits 1, 2. However, two equally qualified physicians, Drs. Scott and Wheeler, interpreted these x-rays as negative for both simple and complicated pneumoconiosis. Director's Exhibits 26, 30; Employer's Exhibits 4, 7. In addition, Dr. Forehand, a B reader, interpreted the November 5, 2007 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 15.

Employer argues that the administrative law judge erred in finding that Dr. Ahmed's interpretation of the March 13, 2008 x-ray was "uncontradicted." We agree. While Dr. Ahmed identified Category B large opacities, Dr. Scott found that the x-ray was negative for complicated pneumoconiosis, and did not classify any large opacities as "Category A, B, or C." Director's Exhibit 18. The administrative law judge found that Dr. Scott's failure to record a large opacity in the right upper lobe did not undermine Dr. Ahmed's finding of such an opacity in that location. However, the administrative law judge did not explain why Dr. Ahmed's finding of a large opacity in the right upper lobe was more credible than Dr. Scott's reading. Having already indicated that the x-ray did not reveal any large opacities that could be classified as A, B, or C, Dr. Scott was not required to address every area where they did not exist. Thus, contrary to the administrative law judge's characterization, Dr. Ahmed's interpretation of the March 13, 2008 x-ray is contradicted by Dr. Scott's interpretation.[5]

Section 718.304(c)

Employer argues that the administrative law judge erred in his consideration of the new CT scan evidence. CT scan evidence falls into the "other means" category of establishing complicated pneumoconiosis at 20 C.F.R. §718.304(c).[6] *Melnick*, 16 BLR at 1-34. Claimant underwent a CT scan on March 13, 2008, the same day that he underwent the x-ray interpreted by Drs. Ahmed and Scott. Dr. Hippensteel, a Board-certified internist and B reader, interpreted the CT scan as "most consistent with necrobiotic rheumatoid nodules . . . associated with rheumatoid pleural disease." Director's Exhibit 18. Dr. Hippensteel further opined that the findings were "not suggestive of either simple or complicated coal workers' pneumoconiosis." *Id.*

[5] In regard to 20 C.F.R. §718.304(b), the record contains pathology reports from biopsies conducted on June 13, 1996 and December 9, 1998. Claimant's Exhibit 3. However, because the biopsy reports do not include surgical notes, the administrative law judge found that they do not comply with the quality standards set forth at 20 C.F.R. §718.106. Decision and Order at 8. The administrative law judge, therefore, determined that this evidence would not be considered pursuant to 20 C.F.R. §718.304(b). Decision and Order at 8 n.4. The administrative law judge noted that, even if considered, the biopsy reports do not support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Decision and Order at 8 n.4.

[6] Section 718.304 requires the administrative law judge to first evaluate the evidence in each category and then weigh together the categories at Sections 718.304(a), (b), and (c), prior to invocation. See 20 C.F.R. §718.304; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*). In this case, the administrative law judge erred in considering the CT scan evidence in his evaluation of the x-ray evidence at Section 718.304(a). Decision and Order at 20.

In his consideration of Dr. Hippensteel's CT scan interpretation, the administrative law judge found that Dr. Hippensteel did not specifically address whether a large opacity was present in the right upper lung, and thus, he did not undercut Dr. Ahmed's positive x-ray reading:

> Dr. Hippensteel . . . observed "multiple large opacities that are mostly subpleural in location and are largest in lung bases bilaterally." He specifically identified two large opacities in the lower lungs, and determined that they were not opacities of pneumoconiosis, but did not describe or determine the origin of the other opacities included in his finding that there were "multiple large opacities." Crediting Dr. Hippensteel's opinion that CT scans are superior to plain view x-rays (EX 6 at p. 13), I find that the CT scan interpretation does not impeach Dr. Ahmed's finding of a large opacity of pneumoconiosis in Claimant's right upper lobe.

Decision and Order at 20.

Employer argues that the administrative law judge erred in his characterization of Dr. Hippensteel's CT scan interpretation. Employer's contention has merit. Dr. Hippensteel interpreted the CT scan as revealing nodules consistent with rheumatoid pleural disease, and not those of complicated pneumoconiosis. Director's Exhibit 18. Thus, contrary to the administrative law judge's analysis, Dr. Hippensteel's interpretation of the CT scan contradicts Dr. Ahmed's x-ray finding of complicated pneumoconiosis.

Moreover, employer correctly argues that the administrative law judge failed to consider relevant evidence at 20 C.F.R. §718.304(c). Drs. Hippensteel and Castle opined that the nodules in claimant's lungs are attributable to his rheumatoid arthritis, and that claimant does not suffer from complicated pneumoconiosis. Director's Exhibit 18; Employer's Exhibits 3, 5 at 31-32, 6 at 24. Moreover, Dr. Castle interpreted a December 16, 2008 digital x-ray as revealing "multiple nodules primarily in the lower zones consistent with rheumatoid nodules." Employer's Exhibit 3. Dr. Castle further noted that there was no evidence of complicated pneumoconiosis. *Id.* The administrative law judge erred in not addressing the conflicting evidence. 30 U.S.C. §923(b); *see Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester*, 993 F.2d at 1145, 17 BLR at 2-117.

In light of the above-referenced errors, we vacate the administrative law judge's findings at 20 C.F.R. §718.304(a), (c). Further, based on these determinations, we vacate the administrative law judge's finding that the new evidence, and the evidence as a whole, established complicated pneumoconiosis at 20 C.F.R. §718.304. We also vacate, therefore, the administrative law judge's finding of a change in an applicable condition of

entitlement at 20 C.F.R. §725.309(d), and his award of benefits. On remand, the administrative law judge must consider whether the weight of the x-ray evidence at 20 C.F.R. §718.304(a), and the weight of the CT scan and medical opinion evidence at 20 C.F.R. §718.304(c), support a finding of the existence of complicated pneumoconiosis. The administrative law judge should then weigh together all of the relevant evidence to determine whether the existence of complicated pneumoconiosis is established. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306 (2003); *Melnick*, 16 BLR at 1-33-34. Further, if the administrative law judge, on remand, finds that the new evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, he must address whether it arose out of claimant's coal mine employment. 20 C.F.R. §718.203(b); *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Application of the Recent Amendments

On remand, should the administrative law judge determine that claimant is not entitled to the irrebuttable presumption set forth at 20 C.F.R. §718.304, 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). If the administrative law judge, on remand, finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow both parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and the case is remanded to the administrative law judge for further proceedings 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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JUDITH S. BOGGS
Administrative Appeals Judge