BRB No. 99-0900 BLA

JEWELL C. BOYDEN (Widow of Chester Boyden) Claimant-Respondent	)	
v.	)	DATE ISSUED:
WESTMORELAND COAL COMPANY Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (97-BLA-1540) of Administrative Law Judge Lawrence P. Donnelly on claims 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 involves both a duplicate living miner's claim and a survivor's claim. The miner[1] filed a duplicate claim for benefits on March 21, 1989.[2] The

[1]The miner, Chester Boyden, died on December 13, 1990. Director's Exhibit 1. The miner's death certificate lists only non-small cell lung cancer as the cause of death. *Id*.

district director denied this claim on December 29, 1989, and the claim was subsequently transferred to the Office of Administrative Law Judges (OALJ). On December 13, 1990, before a hearing could be held, the miner died. In an Order of Remand dated April 16, 1991, Administrative Law Judge Sheldon R. Lipson granted claimant's request to cancel a hearing on the miner's claim and to remand the case to the district director for consolidation with a survivor's claim which claimant indicated she intended to file.[3] Judge Lipson further ordered that the record be held open for additional evidence, including autopsy evidence. On April 30, 1991, shortly after the case was remanded to the district director, claimant filed her survivor's claim, which was consolidated with the miner's claim. In a Proposed Decision and Order dated October 11, 1991, the district director found claimant entitled to benefits in both claims. Employer requested a hearing, and the consolidated claims were transferred to the OALJ, where a hearing was held before Administrative Law Judge Stuart A. Levin on May 11, 1993.

[2]The miner previously filed a claim for benefits on June 29, 1973, a claim which was finally denied on August 29, 1980 by the district director for the miner's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 33. The miner took no further action in pursuit of benefits until filing the instant duplicate miner's claim on March 21, 1989. Director's Exhibit 1.

[3]Claimant is the widow of the deceased miner.

In a Decision and Order dated November 22, 1993, Judge Levin found the evidence of record sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis and death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, he awarded benefits in both claims. Employer appealed, contending that Judge Levin committed numerous errors in finding the evidence sufficient to establish invocation of the irrebuttable presumption under Section 718.304. The Board vacated Judge Levin's finding under Section 718.304, and remanded the case for reconsideration of all of the relevant evidence thereunder.[4] *Boyden v. Westmoreland Coal Co.*, BRB No. 94-0529 BLA (June 21, 1995)(unpublished).

In an Order dated January 31, 1996, Judge Levin ordered that the record be reopened for employer to submit an evaluation by Dr. Crouch indicating the extent of damage to autopsy slide B-8, and how it affected his interpretation of the slide. Judge

[4]Specifically, the Board held that Judge Levin erred in failing to consider the CT scan evidence of record and in mechanically crediting the opinions of Drs. Babich and Roggli based upon Dr. Babich's status as the autopsy prosector and Dr. Roggli's status as an examining pathologist. *Boyden v. Westmoreland Coal Co.*, BRB No. 94-0529 BLA (June 21, 1995)(unpublished). The Board also held that Judge Levin improperly substituted his own opinion for that of Dr. Crouch in discounting Dr. Crouch's opinion under Section 718.304. *Id*. The Board further held that the administrative law judge erred in finding that to the extent a broken autopsy slide reviewed by several of the physicians of record raised a doubt as to whether the miner had complicated pneumoconiosis, any such doubt must be resolved in claimant's favor because employer was responsible for damage to the slide and may have impeded further pathological examination of the tissue. *Id*. Finally, the Board held that Judge Levin erred in relying upon the true doubt rule inasmuch as, subsequent to his Decision and Order, the United States Supreme Court held that the true doubt rule is invalid. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Id*.

Levin further ordered that the record be held open for thirty days from the date of receipt of Dr. Crouch's report to afford claimant an opportunity to obtain an evaluation of the slide in question. Employer submitted a report from Dr. Crouch dated February 8, 1996, but claimant did not submit any evidence or otherwise respond to Judge Levin's order. In a subsequent Order dated June 25, 1996, Judge Levin ordered claimant to indicate within thirty days "the status of her effort, if any, to respond to the January 31, 1996 Order Reopening." Director's Exhibit 121. Receiving no response from claimant, Judge Levin issued an Order dated August 5, 1996, in which he stated that because claimant failed to respond to either of the prior two orders, it "appears the claim has been abandoned within the meaning of 20 C.F.R. §725.409(a)(3)." Director's Exhibit 122. Judge Levin consequently remanded the case to the district director for "further appropriate action." *Id*.

In a letter to claimant dated August 27, 1996, the district director stated that "your claim has been determined to be abandoned within the meaning of 20 C.F.R. §725.409(a)(3), and accordingly your claim was remanded to this office for appropriate action by the district director." Director's Exhibit 123. The district director informed claimant that, therefore, her benefits were being suspended effective in August 1996. *Id*. Subsequently, the district director issued an Order dated November 8, 1996, ordering claimant to show cause within thirty days why her claims should not be denied by reason of abandonment with an overpayment being declared. Claimant responded in a letter dated November 26, 1996, indicating her intent to have the autopsy slides reread by a qualified pathologist, and requesting sixty days in which to submit a report. Claimant stated further that she had not abandoned her claim, and requested a formal hearing. By letter dated December 10, 1996, the district director granted claimant sixty days per her request and informed claimant that her benefits would be reinstated and that the claim "has **not** been considered abandoned at this time." Director's Exhibit 128 (emphasis in the original). Claimant did not submit a report evaluating the slides, however, and consequently, the district director corresponded with claimant again in a letter dated April 2, 1997, advising her that she was to submit her evidence by April 18, 1997, or the case would be returned to the OALJ. Receiving no evidence, the district director referred the case to the OALJ on July 24, 1997, and a hearing was held before Administrative Law Judge Lawrence P. Donnelly (the administrative law judge),[5] on April 22, 1998.

Employer filed a motion on May 13, 1998, requesting that claimant's case be dismissed by reason of abandonment. The administrative law judge denied employer's motion in an Order dated June 22, 1998. In his Decision and Order on the merits, dated May 5, 1999, the administrative law judge initially determined that, as no party was disputing the existence of simple pneumoconiosis, the issue in the duplicate miner's claim of whether claimant established a material change in conditions pursuant to 20 C.F.R.

[5]The case was referred to Judge Donnelly because Judge Levin was unavailable.

§725.309 was resolved in claimant's favor.[6] The administrative law judge then determined that claimant established that the miner suffered from complicated pneumoconiosis and that, therefore, claimant established entitlement to the irrebuttable presumption of total disability due to pneumoconiosis and death due to pneumoconiosis under Section 718.304. Consequently, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in denying its motion to dismiss the instant miner's and survivor's claims as abandoned, and challenges the administrative law judge's findings at Section 718.304. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of employer's motion to dismiss, but urges the Board to vacate the administrative law judge's findings under Section 718.304, and remand the case for further consideration thereunder.

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).

On appeal, employer first contends that the administrative law judge erred in denying its motion to summarily deny benefits or dismiss employer from this case. In contending that the administrative law judge should never have considered the instant claims, employer argues that the district director made a determination on August 27, 1996 that claimant abandoned her claims, yet inconsistently and irrationally allowed claimant to continue to litigate her case in the months that followed, and thus erred in ultimately referring the claims back to the OALJ. Employer's contention lacks merit. As discussed *supra*, in an Order dated August 5, 1996, Judge Levin remanded this case to the district director for "further appropriate action" because it "appeared" to Judge Levin that claimant had abandoned her claim. Director's Exhibit 122. The district director then sent claimant a letter dated August 27, 1996, advising her that her "claim has been determined to be abandoned within the meaning of 20 C.F.R. §725.409(a)(3), and [that][,] accordingly[,] [the] claim was remanded to this office for appropriate action by the district director." Director's Exhibit 123. We reject employer's argument that this correspondence clearly constitutes a determination by the district director that claimant had abandoned her claims. Pursuant to Section 725.409(a)(3), the district director may deny a claim by reason of abandonment where the claimant fails to pursue the claim with reasonable diligence. *See* 20 C.F.R. §725.409(a)(3). However, where the district director determines that a denial by reason of

[6]We affirm, as unchallenged on appeal, the administrative law judge's finding under 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3.

abandonment is appropriate, the district director is required to notify the claimant of the reasons for an impending denial and of the action which must be taken to avoid a denial by reason of abandonment. *See* 20 C.F.R. §725.409(b). As noted by the Director in his response brief, the district director's letter dated August 27, 1996 indicates that the district director did not independently make a determination that the claim was abandoned, but merely referred to Judge Levin's Order remanding the case. Director's Exhibit 123. Moreover, the district director did not inform claimant of what measures she needed to undertake to avoid a denial of her claim, as required under Section 725.409(b). *Id*. Consequently, contrary to employer's contention, the district director did not deny the instant claims by reason of abandonment on August 27, 1996. It, therefore, was proper for the district director to afford claimant opportunities to submit evidence thereafter, and ultimately to submit the case to the OALJ after doing so. As the Director states in his response brief, the fact that claimant did not actually submit evidence pursuant to her granted requests that she be given an opportunity to do so is not relevant, since the record reflects that during the course of the district director's Section 725.409(b) proceedings, claimant expressed unequivocally that she did not intend to abandon her claims, as discussed *supra*. *See* Director's Exhibits 127, 129. We affirm, therefore, the administrative law judge's denial of employer's motion to dismiss.

Employer further contends that the administrative law judge improperly credited the opinions of Drs. Roggli and Green in finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304. The Director agrees, urging the Board to remand the case for further consideration. The contentions of employer and the Director have merit. Dr. Roggli, who assisted the autopsy prosector by preparing the autopsy slides of the miner's lungs,[7] diagnosed the miner with complicated pneumoconiosis based upon a lesion which measured over two centimeters in diameter pathologically. Director's Exhibit 50. Dr. Green based his diagnosis of complicated pneumoconiosis on a different lesion measured pathologically at 1.7 centimeters in diameter. Claimant's Exhibits 1-3. The administrative law judge found that it was medically reasonable to diagnose complicated pneumoconiosis based on lesions from one to three centimeters measured pathologically, and credited the opinions on this basis. Decision and Order at 14. We agree with employer that, in making this conclusion, the administrative law judge appears to have substituted his own medical opinion for that of the experts, which is not a proper exercise of his discretion.[8] *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Furthermore, as the Director contends, the administrative law judge did not make

[7]Dr. Babich was the autopsy prosector, but Dr. Roggli prepared the slides of the miner's lung tissue. Director's Exhibit 50.

[8]While the administrative law judge duly noted that several of employer's experts have adopted a two centimeter minimum standard for diagnosing complicated pneumoconiosis pathologically, the administrative law judge appears to have found a one to three centimeter standard medically reasonable merely on the basis of the existence of disagreement among the experts, rather than making adequate credibility determinations with regard to the differing opinions.

an equivalency determination as to whether the lesions Drs. Roggli and Dr. Green observed on the autopsy slides would measure greater than one centimeter if observed by x-ray. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999), that Section 921(c)(3) of the Act, 30 U.S.C. §921(c)(3), requires the fact-finder to make an equivalency determination. *See Blankenship, supra; but see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000).[9] Accordingly, we vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis under Section 718.304(b), and remand the case for the administrative law judge to make the required equivalency determination. *See Blankenship*.

[9]In *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000), the Fourth Circuit held that an administrative law judge's failure to make an equivalency determination did not undermine the administrative law judge's ultimate conclusion that both the x-ray and autopsy evidence was sufficient to establish complicated pneumoconiosis. *See Scarbro, supra*, at 256. The court stated that, given the record in that particular case, the court was "given no reason to believe that nodules of 1.7 centimeters would not produce x-ray opacities of greater than one centimeter." *Scarbro, supra*, at 258. The court noted that seven of eight x-ray interpretations of an x-ray in that case indicated that there were opacities greater than one centimeter, which the court found was persuasive evidence that the miner's lesions on the autopsy slides would show opacities of that size. *Id*. In the instant case, the administrative law judge tersely analyzed the x-ray evidence stating that "*some* [x-rays] were interpreted as showing Category A opacities, *some* were interpreted as positive only for simple pneumoconiosis." Decision and Order at 18. We hold that the instant case is thus distinguishable from the court's decision in *Scarbro*.

In addition, both employer and the Director correctly contend that the administrative law judge substituted his own opinion for that of employer's medical experts when he discounted the opinions of Drs. Naeye and Fino specifically, and the opinions of employer's other experts generally, on the ground that these physicians based their opinions that the miner did not have complicated pneumoconiosis, in part, on their observations that the miner did not exhibit evidence of significant pulmonary impairment.[10] *See Marcum, supra*; Decision and Order at 17. Furthermore, employer is correct in contending that while the administrative law judge summarized the opinions of Kleinerman, Hansbarger, Bush, Fishman, Tuteur, Jarboe, Crouch, Hutchins, Castle and Zaldivar, he did not adequately discuss these opinions and provide a sufficient basis for discounting them, as required by the Administrative Procedure Act. *See* 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). Accordingly, we vacate the administrative law judge's rejection of employer's experts under Section 718.304(b). On remand, in weighing the medical opinions and resolving the conflicts posed by the evidence, the administrative law judge must consider the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See 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).

Additionally, we agree with employer that the administrative law judge erred in failing to discuss all of the x-ray evidence and CT scan evidence of record under Section 718.304(a) and (c). Employer is correct that the administrative law judge failed to consider Dr. Fino's CT scan interpretations. Director's Exhibit 92. There is also merit to employer's contention that the administrative law judge improperly substituted his opinion for Dr. Wheeler's opinion with regard to whether the nodules Dr. Wheeler saw on the CT scans he reviewed were located in those portions of the lungs where one would expect to find complicated pneumoconiosis. *See Marcum, supra*; Decision and Order at 18; Director's Exhibit 82. Additionally, as employer argues, in noting that the record contains conflicting x-ray evidence and CT scan evidence and in merely finding that the evidence did not refute the autopsy findings of complicated pneumoconiosis, Decision and Order at 18-19, the administrative law judge erred in failing to determine whether claimant met her burden of establishing complicated pneumoconiosis by a preponderance of this evidence.

[10]While the administrative law judge correctly stated that a claimant is not required to prove the existence of a totally disabling respiratory impairment where invocation of the irrebuttable presumption is established under 20 C.F.R. §718.304 by evidence of complicated pneumoconiosis, the administrative law judge improperly concluded that "...the absence of impairment is not a consideration in determining whether the [miner's lung] tissue contains massive lesions of complicated pneumoconiosis." Decision and Order at 17-18. Employer's experts, namely, Drs. Naeye, Zaldivar, Hutchins, Hansbarger, Bush, Tuteur, Crouch, Fino, Castle and Kleinerman, uniformly opined to the contrary. Director's Exhibits 68-71, 74, 75, 81, 84, 86-88, 120; Employer's Exhibits 1-3, 5-10, 12, 13.

Accordingly, we vacate the administrative law judge's findings under Section 718.304(a) and (c). On remand the administrative law judge must consider all of the relevant evidence under these subsections. If on remand the administrative law judge determines that the evidence of record is insufficient to establish the existence of complicated pneumoconiosis under Section 718.304(a)-(c), he should consider entitlement on both the miner's and survivor's claim under 20 C.F.R. Part 718.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge