BRB No. 02-0819 BLA

EMORY A. WADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GARDEN CREEK POCAHONTAS COMPANY	)	DATE ISSUED: 09/08/2003
	)	
Employer-Respondent	)	
	)	
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 Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Ashley M. Harmon (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (99-BLA-0205) of Administrative Law Judge Daniel F. Sutton 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).[1] In its most recent decision in this case pursuant to

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended

employer=s appeal, the Board affirmed as unchallenged the administrative law judge=s findings that the x-ray evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(1), but that the x-ray evidence, standing alone, did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. ' 718.304(a). The Board went on to vacate the administrative law judge=s determination that complicated pneumoconiosis was established based on CT scan evidence pursuant to 20 C.F.R. ' 718.304(c) because when evaluating the CT scan evidence, the administrative law judge did not render the requisite equivalency determination as required by *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 244 (4th Cir. 1999), when he found that the CT scan evidence established the existence of complicated pneumoconiosis.[2] The Board, therefore, remanded the case to the administrative law judge to make the requisite equivalency determination, *i.e.*, to determine whether the lesions described on the CT scan evidence would, if seen on a conventional chest x-ray, show as greater than one centimeter opacities in accordance with *Blankenship* and then, if equivalency were established, the administrative law judge was instructed to weigh together all the relevant evidence at Section 718.304(a)-(c) to determine whether the existence of complicated pneumoconiosis was established and consequently, whether claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth at 30 U.S.C. ' 921(c)(3), as implemented at 20 C.F.R. ' 718.304. *Wade v. Garden Creek Pocahontas Co.*, BRB No. 00-1085 BLA (Aug. 21, 2001) (unpub.).

After considering the CT scan evidence on remand, the administrative law judge concluded that it was not sufficient under the equivalency analysis to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(c) and, after weighing all of the relevant medical evidence of record, concluded that claimant failed to establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge concluded that claimant was not entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis and denied benefits.

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regulations.

[2] Because the record does not contain autopsy or biopsy evidence, Section 718.304(b) is not applicable. 20 C.F.R. ' 718.304(b).

On appeal, claimant argues that the administrative law judge erred by failing to find that the evidence was sufficient to establish the presence of complicated pneumoconiosis under Section 718.304 and, having found the irrebuttable presumption was not invoked, by failing to address whether the qualifying arterial blood gas studies and the opinion of Dr. Forehand were sufficient to demonstrate total respiratory disability. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers= Compensation Programs, as party-in-interest, has not filed a response to this appeal. In addition, employer has filed an Advisory of New Precedent noting that, subsequent to the filing of briefs in this case, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, issued *Clinchfield Coal Co. v. Fultz*, No. 02-1107 (4th Cir. Apr. 2, 2003) (unpub.),[3] in which the court discusses how the equivalency analysis set forth by the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), and *Blankenship* should be applied by the administrative law judge.

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that the preponderance of the CT scan evidence establishes the existence of complicated pneumoconiosis and is supported by the x-ray evidence, citing the CT scan findings of Drs. Iko, Aycoth and Radom diagnosing a 1.5 centimeter or larger density due to complicated coal workers= pneumoconiosis and the reading of Dr. Alexander diagnosing a 1.3 centimeter density consistent with pneumoconiosis. Claimant further contends that the opinions of the radiologists who failed to diagnose the presence of complicated pneumoconiosis are not probative because Drs. Wheeler and Kim failed to state the size of the density shown on the CT scans, Drs. Scott and Kim diagnosed tuberculosis, a

[3] In *Clinchfield Coal Co. v. Fultz*, No. 02-1107 (4th Cir. Apr. 2, 2003) (unpub.), the administrative law judge rendered the equivalency analysis and found that the autopsy evidence showing lesions that measured 1.2 centimeters and two centimeters satisfied the statutory definition of complicated pneumoconiosis because these lesions would be expected on x-ray to yield one or more large opacities greater than one centimeter in diameter. The court, however, held that the record lacked any medical testimony or evidence Aestablishing that the size of a lesion on x-ray would support this equivalency determination@ and remanded the case for such testimony and further proceedings. *Fultz, slip op.* at 2. The court declined to Apresume that lesions of 1.2 centimeters are so large that there need be no further testimony or evidence as to whether they would have shown on x-ray as opacities of greater than one centimeter.@ *Fultz, slip op.* at 8-9.

condition that had been ruled out, and Dr. Jarboe did not interpret the CT scans but merely reviewed the opinions of the radiologists. Therefore, claimant argues that the preponderance of the CT scan evidence demonstrates the presence of complicated pneumoconiosis.

Applying the equivalency analysis set forth in *Scarbro* and *Blankenship*, the administrative law judge found that only Drs. Jarboe and Castle addressed the question of whether the CT scan findings of a nodule having a diameter of one centimeter or greater were the equivalent of a chest x-ray finding of an opacity greater than one centimeter in diameter, but that both testified that the CT scan findings were not transferable to the I.L.O. system under which chest x-rays are classified for the presence of pneumoconiosis, and that Dr. Jarboe specifically testified that a nodule measuring one centimeter on CT scan would not be classified as complicated pneumoconiosis on a plain chest x-ray because the size of what appears on the CT scan is not the same as what would be shown on a chest x-ray, but is closer to what would be seen on autopsy. The administrative law judge concluded, therefore, that in view of the absence of contrary evidence, he could not find that the CT scans showed a condition that would produce an opacity greater than one centimeter if viewed on chest x-ray under the equivalency test and were not, therefore, sufficient to trigger the irrebuttable presumption pursuant to Section 718.304(c). This was proper. *See Scarbro*, 220 F.3d at 256, 2-100-101; *Blankenship*, 177 F.3d at 243-244 (Anodules are generally larger on autopsy examination than they appear on a chest radiograph@); *Braenovich v. Cannelton Industries Inc.*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Gollie v. Elkay Mining Co.*, BLR , BRB No. 02-0741 BLA (Jul. 31, 2003); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Anderson v. Valley Camp Coal Co. of Utah Inc.*, 12 BLR 1-111, 1-113 (1989). Accordingly, we affirm the administrative law judge=s finding that the CT scan evidence failed to establish the existence of complicated pneumoconiosis and that claimant was not, therefore, entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304, implementing 30 U.S.C. '921(c)(3).

Next, claimant asserts that the administrative law judge erred in crediting on remand the same physicians he had given no probative weight to in his prior decision because these same physicians had not actually viewed the CT scans. In his prior decision, the administrative law judge found that the opinions of Drs. Jarboe, Castle, Michos, Sargent, Fino, Dahhan, Spagnolo, and Morgan were not probative in determining the existence of complicated pneumoconiosis under Section 718.304(c) because these physicians had not actually viewed the CT scans, but had merely reviewed the reports and findings of the radiologists. Administrative Law Judge=s Decision and Order issued July 17, 2000 at 15 n.6. In addressing that decision on appeal, however, the Board held that, A[m]edical opinions by physicians who have examined claimant and reviewed the medical evidence of record constitute probative evidence at Section 718.304(c)@ and Ait is for the administrative law judge to determine the weight to be accorded such evidence.@ *Wade,* BRB No. 00-1085 BLA, *slip op*. at 7. Accordingly, the Board instructed the administrative law judge when

determining the credibility of these opinions on remand, to consider the physicians= credentials, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.

In assessing the credibility of the medical opinions, the administrative law judge determined that even though Drs. Sutherland, Forehand, Castle, Sargent, Spagnolo, Dahhan, Fino, Morgan, Jarboe, and Michos agreed that claimant suffered from simple coal workers= pneumoconiosis, none of them found that this condition had progressed to the complicated stage and that no physician opined that claimant had a condition which would produce an opacity greater than one centimeter on x-ray. *See Scarbro*, 220 F.3d at 256, 2-100-101; *Blankenship*, 177 F.3d at 243-244. Thus, the administrative law judge properly found that the medical opinion evidence did not establish the existence of complicated pneumoconiosis and, that upon weighing all the relevant evidence together, claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis.

Finally, claimant contends that the irrebuttable presumption does not provide the only method of establishing total disability, and that having found that the evidence was insufficient to establish entitlement to the irrebuttable presumption, the administrative law judge should have considered whether there was evidence sufficient to establish total disability, *i.e.*, the qualifying blood gas studies and the medical opinion evidence, specifically the most recent opinion of Dr. Forehand. *See* 20 C.F.R. ' 718.204(b)(2)(i)-(iv).[4] We agree. This case must, accordingly, be remanded for the administrative law judge to consider where there is evidence sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i)-(iv) and, if reached, disability causation pursuant to Section 718.204(c). Likewise, although the Board affirmed the administrative law judge=s prior finding that the x-ray evidence established the existence of simple pneumoconiosis, in determining whether claimant has established the existence of pneumoconiosis pursuant to

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4 Claimant renews his objection to the administrative law judge=s admission of any evidence from Dr. Castle and Dr. Hippensteel since the technician who administered the pulmonary function and blood gas studies to claimant on their behalf lacked the appropriate license in the state of Virginia to administer such tests. Because the Board previously addressed and rejected this argument in its prior Decision and Order, however, we will not address it again. *See Wade*, BRB No. 00-1085 BLA, *slip op*. at 7 n.4.

Section 718.202(a), the administrative law judge must weigh the x-ray evidence together with the other evidence relevant to the existence of pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and also determine, if reached, whether pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). 20 C.F.R. ' 718.203(b).

Accordingly, the Decision and Order on Remand Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge