BRB No. 04-0948 BLA

VERNON EDWARD BREWSTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 09/28/2005
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Awarding Benefits (04-BLA-5314) of Administrative Law Judge Linda S. Chapman (the administrative law judge) on a subsequent claim[1] 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). The administrative law judge credited claimant with twenty-eight years of coal mine employment, and considered the instant claim to be timely filed. The administrative law judge also found that the newly submitted evidence establishes invocation of the irrebuttable presumption at 20 C.F.R. §718.304(a), *see* 30 U.S.C. §921(c)(3), and thereby establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) since the prior denial of benefits. Considering the claim on its merits, the administrative law judge further found that the evidence of record establishes that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment under 20 C.F.R. Part 718 and thus, is entitled to benefits. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge's findings on the timeliness issue are inadequate as a matter of law. Employer also contends that the administrative law judge erred in finding invocation at 20 C.F.R. §718.304. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief. The Director urges the Board to affirm, pursuant to the Board's decisions in *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990) and *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990), the administrative law judge's "ultimate conclusion that this [subsequent] claim was timely filed." Director's Brief at 2. The Director, however, notes his disagreement with the Board's decisions in *Andryka* and *Faulk*, argues in favor of the applicability of the limitations provision at 20 C.F.R. §725.308 (a claim for benefits under the Act must be filed within three years after a medical determination of total disability due to pneumoconiosis is communicated to the miner), and asserts that the evidence is insufficient to rebut the presumption of timeliness provided at 20 C.F.R. §725.308(c). Employer has filed a brief in reply to the Director's response brief, and restates its argument that the administrative law judge's findings on the timeliness issue are inadequate as a matter of law and therefore cannot be affirmed.

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[1]Claimant filed his first application for benefits on May 22, 1996, which was denied by the district director on October 7, 1996 for failure to establish total disability due to pneumoconiosis. Director's Exhibit 1. Claimant took no further action on that claim. Claimant filed the instant subsequent claim on August 22, 2001. Director's Exhibit 3.

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).

Employer, citing *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), contends that the administrative law judge erred by not determining whether claimant met her burden to establish that the instant subsequent claim was filed within three years after a medical determination of total disability due to pneumoconiosis was communicated to claimant.[2] Employer thus argues that the administrative law judge's finding on the timeliness issue is inadequate under the Administrative Procedure Act (APA), 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), and cannot be affirmed. Employer further asserts that, contrary to the administrative law judge's finding, it never conceded or stipulated to the issue of timeliness. Employer argues that, given the administrative law judge's finding that claimant was first advised that he was totally disabled due to pneumoconiosis in 1996, the administrative law judge should have then determined whether the instant subsequent claim was timely filed.

Employer's contentions lack merit. The three-year timeliness limitation at 20 C.F.R. §725.308(a) applies only to the first claim filed, herein in 1996, and not to subsequent claims

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[2]The administrative law judge found:

> At the hearing Employer's counsel explained that Employer would contest the issues of timeliness, dependency, and responsible operator depending upon Claimant's testimony. Although Employer's counsel did not expressly concede these issues at the end of the hearing, the Claimant's testimony and the record make it clear that these are in fact not at issue in this matter. Claimant's testimony reveals that he first learned he was totally disabled due to pneumoconiosis from Dr. Rasmussen in September, 1996; that he is married to Juanita, his sole dependent; and, that the last 26 years of his employment were with the named Employer, ending in 1996. Indeed, the evidentiary record wholly supports his testimony. Moreover, neither party addressed these issues in their post-hearing briefs. Thus, it is clear that the issues have been conceded, and they will not be further addressed in this decision.

Decision and Order at 2-3 n.4.

such as the instant claim, filed in 2001.[3] *See Andryka*, 14 BLR at 1-36-37; *Faulk*, 14 BLR at 1-21-22. Consequently, we reject employer's assertion that the administrative law judge's finding, that claimant was first advised that he was totally disabled due to pneumoconiosis in 1996, Decision and Order at 2-3 n.4; *see* Hearing Transcript at 18, 19; Director's Exhibit 1, is critical to determining "whether this 2001 claim was timely filed." Employer's Brief at 8. Based on the foregoing, we affirm the administrative law judge's implicit determination that the instant claim was timely filed.

Employer next challenges the administrative law judge's determination that claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304.[4] Employer argues that the administrative

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2. We reject employer's argument that the administrative law judge erred by not applying the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) to determine whether the instant *subsequent claim* was timely filed. With respect to cases arising within the Fourth Circuit, *Kirk* does not constitute controlling precedent. *Shupe*, 12 BLR at 1-202. The Board has consistently applied *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990) and *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990) in cases that arise in the Fourth Circuit.

[4]The administrative law judge, citing the decision of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), stated that the findings of Category A opacities on the July 28, 2003 and August 27, 2003 x-rays by Drs. Capiello, Ahmed and Patel, "alone [are] enough to trigger the irrebuttable presumption under 20 C.F.R. §718.304 and [*Scarbro*]." Decision and Order at 11. The administrative law judge also found that employer's evidence does not affirmatively show that these opacities "are not there or are due to another disease process." *Id.* at 12. The administrative law judge found unexplained, the interpretations of the July 28, 2003 x-ray by Drs. Scott and Scatarige, diagnosing simple pneumoconiosis and attributing large masses to tuberculosis or granulomatous disease, as well as the interpretation of the August 27, 2002 x-ray by Dr. Wheeler, reading the x-ray as negative for pneumoconiosis and attributing calcified granuloma to tuberculosis or histoplasmosis. *Id.* at 11-12; *see* Employer's Exhibits 1, 4. The administrative law judge further determined that the opinions of Drs. Crisalli and Spagnolo, that the radiological evidence shows a condition that is not complicated coal workers' pneumoconiosis or any disease related to claimant's exposure to coal dust, are not credible. *See* Employer's Exhibits 1, 5, 7, 8. The administrative law judge concluded that the newly submitted evidence

law judge failed to weigh all the relevant evidence together, as required under 20 C.F.R. §718.304(a), (b), and (c), before determining that claimant established invocation at 20 C.F.R. §718.304(a). Employer asserts that the administrative law judge thereby misapplied the controlling legal standard set forth in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000) and *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

Employer's contentions have merit. While 20 C.F.R. §718.304(a), (b), and (c) set forth three different methods by which a claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must, in every case, review all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). The Fourth Circuit has specifically held that evidence under one prong of 20 C.F.R. §718.304 can diminish the probative value of evidence under another prong if the two forms conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117. Further, as 20 C.F.R. §718.304 offers no opportunity for rebuttal, failure to require an administrative law judge to consider all relevant evidence at the invocation stage may violate an opposing party's right to due process. *Melnick*, 16 BLR at 1-33. A review of the record and the Decision and Order reveals that the administrative law judge cast her analysis of the relevant evidence in terms of claimant having shown radiographic evidence of Category A opacities and employer not providing explanations that cause this evidence to "lose force" under *Scarbro*. *See* Decision and Order at 11, 12-13. The administrative law judge erroneously shifted to employer the burden of proving "that the opacities are not there or are not what they seem to be." *Id.* at 11-13. As employer correctly argues, the administrative law judge did not consider the totality of the relevant evidence of record, as required under *Scarbro*, to determine whether, when considered as a whole, it establishes invocation at 20 C.F.R. §718.304(a), as is *claimant's* burden to establish. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117. Thus, we find merit in employer's argument that the administrative law judge effectively afforded claimant the benefit of "a non-existent presumption" that the Category A x-ray findings by Drs. Capiello, Ahmed and Patel are correct, by stating that this evidence "alone is enough to trigger the irrebuttable presumption

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demonstrates a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), but that the previously submitted evidence, with the exception of Dr. Gaziano's Category A reading of the June 14, 1996 x-ray, *see* Director's Exhibit 1, contains no evidence that claimant has complicated pneumoconiosis.

under 20 C.F.R. §718.304 and [*Scarbro*]." Decision and Order at 11; Employer's Response Brief at 12. Consequently, we hold that the administrative law judge's decision making process and evidentiary analysis are inconsistent with *Scarbro* and *Lester*. We, therefore, vacate the administrative law judge's finding at 20 C.F.R. §718.304(a) and remand the case for consideration of all the relevant evidence prior to a determination on invocation thereunder. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117. In this regard, we note that the administrative law judge did not make specific findings at 20 C.F.R. §718.304(b) or (c), and must do so on remand. *Id.*

Employer relies on the opinions of Drs. Crisalli and Spagnolo "to establish that complicated pneumoconiosis is not present at all, and the masses are the result of an etiology other than coal dust exposure." Employer's Brief at 22. Drs. Crisalli and Spagnolo each opined that claimant is totally disabled due to a respiratory or pulmonary impairment and that this disability is not due to complicated coal workers' pneumoconiosis or any other disease related to claimant's coal mine employment. Employer's Exhibits 7, 8. Employer asserts that the administrative law judge made an impermissible medical determination that evidence regarding total disability is not relevant to the inquiry at 20 C.F.R. §718.304.[5] On remand, the administrative law judge must consider all relevant evidence concerning the presence and etiology of any condition that may be sufficient to establish invocation at 20 C.F.R. §718.304. 20 C.F.R. §§718.203(b), 718.302, 718.304.

Employer contends that the administrative law judge improperly required that employer rule out exposure to coal mine dust as a cause of the Category A opacities seen on x-ray. Employer specifically refers to the administrative law judge's finding, on invocation at 20 C.F.R. §718.304, that while Drs. Scott, Scatarige and Wheeler "are willing to exclude pneumoconiosis as a cause for the mass, they are not willing to make an affirmative diagnosis of the etiology of this mass." Decision and Order at 12.

Employer's contention has merit. It is claimant's burden to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. In so doing claimant must show that the condition revealed by x-ray, biopsy or autopsy or other means is a "chronic dust disease of the lung." Claimant must then establish the requisite etiology of his complicated pneumoconiosis. *See* 20 C.F.R. §718.203. Based on

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[5] The facts in *Boyden v. Westmoreland Coal Co.*, BRB No. 99-0900 BLA (Sept. 29, 2000)(unpublished), relied upon by employer, *see* Employer's Brief at 20, 21, are distinct from the facts in the case *sub judice*. In *Boyden*, the Board held that the administrative law judge improperly concluded that the absence of impairment is not a consideration in determining whether the miner's lung tissue shows lesions of complicated pneumoconiosis. *Boyden*, slip op. at 6-7 n.10. The administrative law judge herein made no such finding.

claimant's more than ten years of coal mine employment, he is entitled to the presumption that his complicated pneumoconiosis arose out of that employment. 30 U.S.C. §921(c)(1); 20 C.F.R. §§718.302, 718.203(b). The administrative law judge in the instant case found claimant entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment. Decision and Order at 4-5 n.6. The administrative law judge, however, considered the evidence tending to rebut this presumption in the context of her finding on invocation at 20 C.F.R. §718.304, a finding which we herein vacate.[6] *See* discussion, *supra*. If, on remand, the administrative law judge again finds the evidence sufficient to meet claimant's burden on invocation at 20 C.F.R. §718.304, and thereby finds a chronic dust disease of the lung, she must then determine whether employer has rebutted the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §§718.203(b), 718.302.

[6]The administrative law judge added, in a footnote, "It is important to note that nothing in the record indicates that Claimant was ever diagnosed with, treated for, hospitalized for, complained of, or displayed symptoms of tuberculosis." Decision and Order at 12, n.12. We are not persuaded by employer's assertion that the administrative law judge thereby substituted her judgment for that of the medical experts; this statement constitutes an accurate characterization of the record.

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge