BRB No. 09-0816 BLA

LUCKY BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SILVER RIVERS COAL, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/29/2010
	)	
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 on Remand Awarding Benefits of Linda S. Chapman, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Wendy G. Adkins and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Rita Roppolo (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (07-BLA-5111) of Administrative Law Judge Linda S. Chapman rendered 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 December 20, 2005,[1] and is before the Board for the second time.

In the initial decision, after crediting claimant with twenty-two years of coal mine employment,[2] the administrative law judge determined that the evidence did not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), (4). The administrative law judge, however, found that the new evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on 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 2005 claim on the merits. The administrative law judge found that the evidence, as a whole, established that claimant was entitled to invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, holding, *inter alia*, that the administrative law judge had improperly shifted the burden of proof to employer to rule out the existence of complicated pneumoconiosis. *L.B.* [*Blankenship*] *v. Silver River Coals, Inc.*, BRB No. 08-0395 BLA (Mar. 30, 2009)(unpub.). The Board, therefore, remanded the case to the administrative law judge for further consideration. *Id.*

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[1] Claimant filed a prior claim for benefits on November 19, 1998, which was denied by the district director on January 25, 1999, on the grounds that claimant failed to establish any element of entitlement. Director's Exhibit 1. There is no indication that claimant took any further action in regard to his 1998 claim.

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 6. 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*).

On remand, the administrative law judge again found that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing 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. On the merits, the administrative law judge also again found that the evidence established the existence of complicated pneumoconiosis, and that claimant, therefore, was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge failed to comply with the Board's instructions and again improperly shifted the burden of proof to employer to rule out the existence of complicated pneumoconiosis. Employer also contends that the administrative law judge erred in her analysis of the x-ray, CT scan, and medical opinion evidence. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief. [3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[3] By Order dated May 20, 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. Claimant, employer, and the Director, Office of Workers' Compensation Programs (the Director), have responded. The recent amendments to the Act, which became effective on March 23, 2010, apply to claims filed after January 1, 2005. Although the amendments apply to claimant's claim based on its filing date, the parties agree that the amendments do not affect the adjudication of the claim, because the evidence of record does not establish that claimant suffers from a totally disabling respiratory impairment.

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). In this case, claimant's prior claim was denied because he failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Consequently, claimant was required to submit new evidence establishing at least one of the elements of entitlement in order to obtain review of the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

On remand, the administrative law judge determined that new evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order on Remand at 11. Section 411(c)(3) of the Act, implemented by Section 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 United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (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*).

Employer contends that the administrative law judge failed to follow the Board's remand instructions and improperly placed the burden of proof on employer to establish that the abnormalities seen on claimant's x-rays and CT scans did not arise from coal dust

exposure. Employer's Brief at 12-15. We agree. Despite the Board's holding that the administrative law judge erred in failing to "make specific findings under the distinct provisions of subsections 718.304(a) and (c) as to whether claimant satisfied his burden of proving the existence of complicated pneumoconiosis based on the x-ray, CT scan or medical opinion evidence," *Blankenship,* BRB No. 08-0395 BLA, slip op. at 6, the administrative law judge again failed to make specific findings under these subsections. Rather, on remand, the administrative law judge determined that, because all of the physicians who reviewed claimant's x-rays[4] and CT scans agreed that claimant has large masses in his lungs, and three of the physicians diagnosed Category B complicated pneumoconiosis, "the x-ray evidence, under prong (A), as well as the CT scan evidence, under prong (C), considered both separately or together, overwhelmingly establishes that [claimant] has a disease process in his lungs that shows up on x-ray as opacities of at least one centimeter in diameter." Decision and Order on Remand at 7. In her consideration of the etiology of the masses, the administrative law judge found that the conclusions of Drs. Wheeler and Repsher did "not outweigh the designations by Dr. Rasmussen, Dr. Alexander, and Dr. DePonte of these masses as category B opacities of pneumoconiosis." *Id*. at 7, 11. The administrative law judge, therefore, found that claimant established the existence of complicated pneumoconiosis.

We agree with employer that the administrative law judge again improperly shifted the burden of proof to employer to establish that the x-ray and CT scan interpretations diagnosing Category B opacities are incorrect. Rather than requiring claimant to establish the existence of complicated pneumoconiosis, the administrative law judge presumed that the abnormalities seen on claimant's x-rays and CT scans are complicated pneumoconiosis, and required employer to "outweigh" this presumption. Contrary to the administrative law judge's analysis, claimant has the burden of establishing entitlement to benefits and bears the risk of nonpersuasion if his evidence does not establish a requisite element of entitlement. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Because the administrative law judge impermissibly shifted the burden of

[4] The new evidence includes nine interpretations of four x-rays. The March 13, 2006 x-ray was interpreted by Dr. Rasmussen, a B reader, and Dr. Alexander, a Board-certified radiologist and B reader, as showing Category B opacities of complicated pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 2. Dr. Wheeler, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. Employer's Exhibit 3. The April 27, 2006 and April 18, 2007 x-rays were interpreted by Dr. DePonte, a Board-certified radiologist and B reader, as showing Category B complicated pneumoconiosis, while Dr. Wheeler interpreted these x-rays as completely negative for pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibit 5, 8. The June 27, 2007 x-ray was interpreted by Dr. Repsher, a B reader, and Dr. Wheeler as completely negative for pneumoconiosis. Employer's Exhibits 2, 4.

proof to employer to disprove the existence of pneumoconiosis, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304.

We additionally find merit in employer's assertion that the administrative law judge again erred in her consideration of the CT scan evidence[5] pursuant to Section 718.304(c). Despite the Board's instructions to address the equivalency requirements in weighing the CT scan evidence on remand, the administrative law judge failed to do so. Given that the physicians who interpreted the CT scans did not provide any measurements for the irregularities they saw, or state an opinion as to what size the masses would appear on x-ray, it is unclear how the administrative law judge determined that the CT scan evidence supports a finding of complicated pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998).

We also find merit in employer's assertion that the administrative law judge erred in discounting Dr. Repsher's opinion. Dr. Repsher opined that claimant's x-ray findings were not consistent with complicated pneumoconiosis because there was no significant background of small rounded opacities, which "is virtually always found with conglomerate pneumoconiosis." Employer's Exhibit 2. The administrative law judge rejected Dr. Repsher's opinion because he was not provided with Dr. Valiveti's October 25, 2006 CT scan report, in which Dr. Valiveti noted a reticular nodular pattern with multiple densities in both lungs. Decision and Order on Remand at 10. Employer correctly points out, however, that Dr. Valiveti did not expressly identify the abnormalities seen on claimant's CT scan as complicated pneumoconiosis, and the administrative law judge failed to provide any explanation as to why Dr. Valiveti's finding of background nodules is more credible than the contrary findings in the CT scan and x-ray reports of Drs. Repsher and Wheeler. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); Employer's Brief at 15.

[5] The record contains three interpretations of two computerized tomography (CT) scans. The October 10, 2005 CT scan was interpreted by Dr. Andrew Goodwin as showing areas of increased density in each upper lung field, consistent with massive pulmonary fibrosis as a complication of occupational pneumoconiosis. Claimant's Exhibit 3. Dr. Wheeler interpreted this CT scan as negative for pneumoconiosis. Employer's Exhibit 5. Dr. Wheeler further found masses in both lungs, compatible with conglomerate granulomatous disease more likely than cancer. *Id*. The October 25, 2006 CT scan was read by Dr. Valiveti as showing bilateral perihilar densities related to pneumoconiosis. Dr. Valiveti indicated that the possibility of an underlying malignancy could not be excluded, even though he felt that it was unlikely. Claimant's Exhibit 3.

We also agree with employer that the administrative law judge erred in according less weight to Dr. Wheeler's opinion at 20 C.F.R. §718.304(c). The administrative law judge provided the following reasons for according less weight to Dr. Wheeler's opinion: (1) Dr. Wheeler did not review Dr. Valiveti's CT scan interpretation; (2) Dr. Wheeler's opinion that the abnormalities in claimant's lungs were due to granulomatous disease or cancer is speculative; (3) Dr. Wheeler's belief, that pneumoconiosis "stops dead" after exposure to coal mine dust ends, is contrary to the underlying premises of the Act; and (4) Dr. Wheeler improperly requires biopsy evidence in order to make a medical diagnosis of complicated pneumoconiosis. Decision and Order on Remand at 8-10.

For the same reasons mentioned above with respect to Dr. Repsher, the administrative law judge erred in discounting Dr. Wheeler's opinion based on Dr. Valiveti's CT scan report. Further, with respect to the administrative law judge's finding that Dr. Wheeler's opinion is speculative, as the Board previously stated, "[t]he mere fact that a physician has not identified a definitive alternate source for the x-ray findings does not undermine a negative x-ray interpretation, since the burden of proof rests with claimant to establish the existence of complicated pneumoconiosis." *Blankenship*, BRB No. 08-0395, slip op. at 8. Thus, the administrative law judge erred in discounting Dr. Wheeler's opinion as speculative. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). Similarly, the Board previously explained that, "although Dr. Wheeler testified that he considered a biopsy to be proper protocol for treatment of claimant's lung condition, Dr. Wheeler also gave specific reasons why he did not diagnosis [*sic*] complicated pneumoconiosis in this case, even in the absence of a biopsy." *Id*. at 10. The administrative law judge, therefore, erred in finding that Dr. Wheeler requires biopsy evidence to make a diagnosis of complicated pneumoconiosis. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326. Moreover, although the administrative law judge accurately characterized Dr. Wheeler's opinion as stating that pneumoconiosis "stops dead" after exposure to coal mine dust ends, the administrative law judge did not explain how this belief undermines Dr. Wheeler's opinion regarding the absence of small background nodules weighing against a diagnosis of complicated pneumoconiosis. *Id*. Thus, the administrative law judge did not provide a valid basis for according less weight to Dr. Wheeler's opinion. On remand, the administrative law judge must assess the probative value of the rationales that Drs. Repsher and Wheeler provided for excluding a diagnosis of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.3d at 1146, 17 BLR at 2-118.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new evidence established the existence of complicated pneumoconiosis

pursuant to 20 C.F.R. §718.304, and remand the case for reconsideration.[6] In light of our decision to vacate this finding, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309.[7]

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] Employer requests that the case be remanded for reassignment to a different administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

[7] On remand, if the administrative law judge finds that the evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, claimant is not automatically entitled to benefits. The administrative law judge must also consider whether the evidence establishes that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. *See Daniels v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).