BRB No. 04-0716 BLA

MORELLE MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PLOWBOY COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/08/2005
	)	
and	)	
	)	
CONNECTICUT INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (03-BLA-5495) of Administrative Law Judge Richard T. Stansell-Gamm on a subsequent 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] The administrative law judge credited claimant with twenty-two years of coal mine employment. The administrative law judge found that claimant suffered from complicated pneumoconiosis, that claimant invoked the irrebutable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and thus that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge further found that claimant established all of the requisite elements of entitlement at 20 C.F.R. Part 718. Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing: that the administrative law judge improperly shifted the burden of proof to employer to affirmatively establish that large opacities seen on chest-x-rays were due to something other than complicated pneumoconiosis; that the administrative law judge erred in evaluating the CT scan evidence; and that the administrative law judge erred in his consideration of the medical opinions of Drs. Paranthaman, Kanwal, Smiddy and Castle. The Director, Office of Worker's Compensation Programs, (the Director) filed a brief responding to certain arguments raised by employer concerning the administrative law judge's application of the evidentiary limitations and his consideration of the opinions of Drs. Kanwal and Smiddy. The Director, however, takes no position on the ultimate issue of entitlement. Claimant has not filed a brief.

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 applicable law, they are binding upon the 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Claimant previously filed claims for benefits on November 18, 1982, June 2, 1986 and January 20, 1998, which were denied by the district director on April 12, 1983, April 16, 1998, and June 16, 1998, respectively. Director's Exhibits 1, 2, 3. Claimant's most recent prior claim of January 20, 1998 was denied on June 16, 1998 for his failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3. Claimant took no further action with respect to the denial of his third claim. He filed the instant claim, his fourth claim, on April 9, 2001. Director's Exhibit 5. The district director issued a Proposed Decision and Order Awarding Benefits on November 18, 2002. Director's Exhibit 21. At employer's request, the case was sent to the Office of Administrative Law Judges for a forming hearing, which was held on June 10, 2003 before Administrative Law Judge Richard T. Stansell-Gamm.

A. Evidentiary Challenge

Initially, we address employer's assertion that the administrative law judge exceeded his authority in designating Dr. Kanwal's opinion as one of claimant's two medical reports in support of his affirmative case. Employer maintains that Dr. Kanwal's opinion was not properly of record since claimant did not specifically designate Dr. Kanwal's April 15, 2002 report at the hearing as one of his two affirmative medical opinions. As noted by the Director, however, claimant originally submitted Dr. Kanwal's report to the district director and the report was included in the record transmitted to the Office of Administrative Law Judges when the case was referred for hearing. Director's Brief at 2. The regulation at 20 C.F.R. §725.421 provides that all medical evidence submitted to the district director shall be made part of the record at the hearing subject to the objection of the parties. *See* 20 C.F.R. §725.421. The Director correctly points out that Dr. Kanwal's opinion was properly in the record before the administrative law judge because: (1) it was part of the Director's Exhibits transmitted to the Office of Administrative Law Judges; (2) no one objected at the hearing to the admission of Dr. Kanwal's opinion, and (3) Dr. Kanwal's report does not exceed the evidentiary limitations. Director's Brief at 2. Since Dr. Kanwal's opinion does not exceed the evidentiary limitations, and since employer did not object to Dr. Kanwal's report as part of the Director's Exhibits, we affirm, as within his discretion, the administrative law judge's designation of Dr. Kanwal's opinion as one of claimant's two medical reports at Section 725.414(a)(2)(i).

B. Invocation of the Irrebuttable Presumption

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis.

Section 411(c)(3) of the Act provides that:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that at the

> time of death he was totally disabled by pneumoconiosis, as the case may be.

30 U.S.C. §921(c)(3).

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. Furthermore, 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 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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 (4th Cir. 1999).

In this case, the administrative law judge interpreted the *Scarbro* decision as setting forth a two prong test for consideration of whether a claimant could establish invocation of the irrebuttable presumption. He described the first prong as follows:

> [T]he adjudication of whether claimant is able to invoke the irrebuttable presumption under 20 C.F.R. §718.304 involves a two-step process. First, I must determine whether: a) the preponderance of the chest x-rays establishes the presence of large opacities characterized by size as Category A, B, or C under the recognized standards; or b) biopsy evidence or other diagnostic results exist which are equivalent to chest x-ray evidence of large opacities characterized as Category A, B, C. At this stage of the process, the essential inquiry is whether such large opacities, or their equivalent exist. Thus, as observed by the *Scarbro* court, definitive evidence indicating the large opacities are not really present would preclude invocation of the 20 C.F.R. §718.304 presumption.

Decision and Order at 10.

The administrative law judge determined that claimant established the first prong of the test because he found that all three x-rays developed since claimant filed his present claim contained evidence of a pulmonary opacity greater than one centimeter in diameter. Decision and Order at 12. He further noted that the CT scan evidence confirmed that the large opacities on the x-ray films "represent actual large masses in [claimant's] lungs," and therefore, that claimant "has definitively established the presence of a large opacity in his lungs through chest x-rays which is a requirement of 20 C.F.R. §718.304(a) for the invocation of the irrebuttable presumption of total disability due to pneumoconiosis." *Id.* The administrative law judge then moved to the second prong of the analysis, and considered "whether the preponderance of the other medical evidence affirmatively [showed] that the large opacities in [claimant's] right upper lung were caused by some other pathology than coal workers' pneumoconiosis." Decision and Order at 12. He described the "other medical evidence" in this case as including objective pulmonary test results, medical opinion based on pulmonary examination, chest CT scan interpretations, and opinions by physicians who evaluated the chest x-rays. *Id*. After considering the other evidence, the administrative law judge concluded that the evidence was insufficient to affirmatively establish that some pathology other than pneumoconiosis was responsible for the large opacities seen on claimant's x-rays. Decision and Order at 21. The administrative law judge therefore found that claimant established invocation of the irrebuttable presumption at 20 C.F.R. §718.304 that he was totally disabled due to pneumoconiosis. *Id*.

Employer argues that the administrative law judge erred in his analysis of whether claimant met his burden of proof to invoke the irrebuttable presumption at 20 C.F.R. §718.304. Employer specifically contends that, contrary to *Scarbro* and *Lester,* the administrative law judge erred in first finding that each of the three x-rays of record established the presence of a large opacity greater than one centimeter (cm) in diameter, at which point that the administrative law judge then shifted the burden of proof to employer to present affirmative evidence that the large opacities were not complicated pneumoconiosis. Employer's Brief at 7. Employer maintains that the administrative law judge erred by not weighing all of the conflicting evidence prior to deciding that claimant had established complicated pneumoconiosis based on the x-ray evidence at Section 718.304(a).

We agree that the administrative law judge erred in weighing the x-ray evidence. Contrary to the administrative law judge's analysis, in weighing the x-ray evidence, the first step was not *only* to determine whether there was a large opacity greater than one centimeter in diameter, but also to address whether claimant established the existence of pneumoconiosis. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. In this case, the administrative law judge cites to no evidence to establish that there is a large opacity

"due to pneumoconiosis" or any dust disease. By failing to weigh the negative readings for pneumoconiosis by Drs. Wheeler and Scatarige prior to invoking the irrebutable presumption, the administrative law judge improperly shifted the burden of proof in this case to employer to disprove that claimant did not have complicated pneumoconiosis. *Id*.

Additionally, the administrative law judge erred by not independently weighing the CT scan evidence relevant to whether claimant has complicated pneumoconiosis. Employer's Brief at 9. Rather, the administrative law judge addressed only whether the CT scan evidence called into question the x-ray evidence of complicated pneumoconiosis. Once he considered the x-ray evidence and found it sufficient to establish a large opacity, the administrative law judge then proceeded to the second prong of his test, shifting the burden of proof to employer to affirmatively establish, based on the CT scan evidence, that the large opacities on claimant's chest-x-rays were not complicated pneumoconiosis. Such an analysis is contrary to *Scarbro*. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18 The administrative law judge must independently address whether the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis, and then whether the CT scan evidence is sufficient to establish the existence of complicated pneumoconiosis.[2] If the administrative law judge finds that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.203(a) and/or (c), then the administrative law judge must weigh all of the relevant evidence pursuant to the standard set out in *Scarbro*. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100.

Based on these errors, we vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis. We remand the case to the administrative law judge for him to properly explain the weight accorded the x-ray evidence, specifically the negative x-ray evidence for pneumoconiosis. The administrative law judge is further directed to consider all relevant evidence as to whether claimant established the existence of pneumoconiosis, and whether he is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 based on a finding of complicated pneumoconiosis.

In the interest of judicial economy, we also address below employer's arguments with respect to the administrative law judge's weighing of the medical opinion evidence We agree that the administrative law judge did not adequately explain how he reached his conclusions concerning the weight of the medical opinion evidence, particularly in view of the fact that most of the physicians of record, including Drs. Kanwal and Smiddy, reviewed evidence, and based their opinions, in part, on evidence that was not introduced

[2] CT scan evidence falls into the "other means" category of establishing complicated pneumoconiosis at 20 C.F.R. §718.304.

into the formal record. The administrative law judge erred by not fully addressing the regulations at 20 C.F.R. §725.414(a)(2)(i) and (a)(3)(i), which provide that "Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible" in accordance with the evidentiary limitations contained at 20 C.F.R. §725.414.

With respect to Dr. Kanwal, the administrative law judge specifically noted "Dr. Kanwal *did not specify* the date of the chest x-ray upon which he based his diagnosis of progressive massive fibrosis." Decision and Order at 5 (emphasis added); Director's Exhibit 25. Thus, his opinion raises some concern about compliance with 20 C.F.R. §725.414(a)(2)(i), which contains a similar evidentiary restriction as the 20 C.F.R. §725.414(a)(3)(i) limitation affecting Dr. Castle's opinion. Decision and Order at 5. After specifically noting that Dr. Kanwal did not specify in his report what evidence was available for his review, the administrative law judge nonetheless credited Dr. Kanwal's diagnosis of complicated pneumoconiosis, speculating that Dr. Kanwal had considered Dr. Paranthaman's May 2001 chest-x-ray interpretation and CT scan interpretations by Drs. Alexander and Deponte. On remand, the administrative law judge must address whether Dr. Kanwal's April 15, 2002 report provides a documented and reasoned opinion that claimant has complicated pneumoconiosis. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge is also directed to more fully address, in accordance with the restriction at Section 725.414(a)(2)(i), whether Dr. Kanwal's opinion is based on inadmissible evidence. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

With respect to Dr. Smiddy's opinion, the administrative law judge noted that Dr. Smiddy referenced inadmissible objective medical evidence in his March 31, 2003 report, including a stack of x-rays that claimant brought with him to the examination, but which were not made part of the record. Claimant's Exhibit 5. Since Dr. Smiddy did not identify the sources of the multiple x-rays he reviewed, the administrative law judge stated that he was unable to ascertain whether the x-rays in question were part of claimant's hospitalization records or whether the x-rays would be inadmissible because they exceeded the evidentiary limitations. Decision and Order at 5. Although the administrative law judge acknowledged that he was required to consider Dr. Smiddy's opinion in light of Section 725.414(a)(4), he failed to complete that analysis. The administrative law judge erred by not explaining how he was able to separate Dr. Smiddy's diagnosis of complicated pneumoconiosis from the physician's reliance on inadmissible x-ray readings.[3] Notwithstanding, the administrative law judge on remand

[3] The Director notes that the administrative law judge "credited Dr. Smiddy's finding of complicated pneumoconiosis without explaining how he was able to separate that diagnosis from Dr. Smiddy's reliance on the inadmissible x-ray readings."

may consider some portions of Drs. Smiddy's opinion without violating the evidentiary limitations. Dr. Smiddy reviewed one identified x-ray of record dated February 3, 2003, which was proffered by claimant in support of his affirmative case. Since there was only one x-ray reading submitted by claimant to support his affirmative case, the administrative law judge may consider whether Dr. Smiddy's interpretation of the same film could be considered claimant's second x-ray reading in accordance with 20 C.F.R. §725.414(a)(2).

Lastly, the administrative law judge improperly rejected Dr. Castle's opinion because it was based in part on Dr. Castle's own inadmissible interpretation of the August 1, 2001 x-ray and April 2001 CT scan.[4] Decision and Order at 16. In so doing, the administrative law judge has inconsistently applied the evidentiary restriction at 20 C.F.R. §725.414(a)(4), rejecting Dr. Castle's opinion, but crediting the opinions of Drs. Kanwal and Smiddy, which were similarly based on inadmissible evidence. On remand, the administrative law judge is directed to explain how he has reconciled the opinions of Drs. Castle, Kanwal and Smiddy with the regulation at 20 C.F.R. §725.414(a)(4).[5]

Director's Brief at 2. The Director, however, maintains that the administrative law judge's error was harmless since Dr. Smiddy based his diagnosis of complicated pneumoconiosis in part on Dr. Miller's interpretation of the February 3, 2003 x-ray, which was one of the two allowable x-ray readings claimant proffered in support of his affirmative case. The Director further points out that Dr. Smiddy's personally read the same film and agreed with Dr. Miller that it demonstrated Category A large opacities and simple pneumoconiosis, and that Dr. Smiddy's reading arguably could be considered one of claimant's two affirmative x-ray readings, although claimant did not specifically designate it as such. Director's Brief at 2, n. 4.

[4] The administrative law judge indicated that he would not consider portions of Drs. Castle's report that reviewed medical evidence from 1995 through 2001. The administrative law judge, however, failed to take into consideration that all of the evidence reviewed by Dr. Castle from 1995 through 2001 was part of claimant's three prior claims, and that, as such, the medical evidence was automatically made part of the record in the instant claim. *See* 20 C.F.R. §725.309(d). The administrative law judge therefore must give proper consideration to Dr. Castle's opinion in weighing all relevant evidence to determine whether claimant suffers from pneumoconiosis.

[5] Contrary to employer's assertion, the administrative law judge had discretion to assign less probative weight to the opinions of Drs. Wheeler and Scott that claimant's x-rays revealed healed tuberculosis (TB) insofar as the administrative law judge properly noted that "neither Dr. Scott nor Dr. Wheeler addressed whether the March 2002 and June 2003 negative TB test would alter their etiology opinion." Decision and Order at 19; Employer's Brief at 9.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with the majority that the administrative law judge erred in weighing the medical evidence when determining whether claimant was entitled to the irrebuttable presumption under 30 U.S.C. §921(c)(3) and 20 C.F.R. §718.304, that his disability was due to pneumoconiosis. Accordingly, I agree that the administrative law judge's decision must be vacated and the case remanded for reconsideration. However, I agree with the Director, that any error in the administrative law judge's consideration of the individual medical opinions is harmless.

The administrative law judge erred in weighing the medical opinions because he held that the irrebuttable presumption was invoked if x-ray evidence of the lungs establishes the existence of a large opacity. Decision and Order at 12. The administrative law judge overlooked a crucial part of the law. Section 921(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides in relevant part:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor

> Organization, then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis (emphasis added).

The regulation at 20 C.F.R. §718.304 essentially follows the statute. The law makes clear that to invoke the irrebuttable presumption with x-ray evidence it must show an opacity of pneumoconiosis greater than one centimeter. When the existence pneumoconiosis is at issue, as in the instant case, the administrative law judge must weigh all evidence together relevant to that issue before finding the irrebuttable presumption invoked.

The administrative law judge believed he was following the teaching of the United States Court of Appeals in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-99 (4th Cir. 2000), which contains statements susceptible to misunderstanding, such as:

> "Section 921(c)(3) of the Act creates an irrebuttable presumption that the death or total disability was due to pneumoconiosis if (A) an x-ray of the miner's lungs shows at least one opacity greater than one centimeter in diameter…."

In *Scarbro*, all x-ray readers had found pneumoconiosis; the only issue was the existence of an opacity greater than one centimeter, hence, when that issue was resolved, the irrebuttable presumption was invoked. In the case at bar, the administrative law judge reasonably resolved the issue of the size of the opacity. On remand, he must also resolve whether the opacity is a pneumoconiosis before invoking the irrebuttable presumption.

I also agree with the majority's determination that the administrative law judge properly considered Dr. Kanwal's opinion as one of claimant's two medical reports. But I disagree with the majority in holding that the administrative law judge must determine whether Dr. Kanwal's opinion is based on inadmissible evidence. In accordance with the regulations, *see* 20 C.F.R. §725.456(a), the report was transmitted by the district director to the Office of Administrative Law Judges and placed in the record without objection. Any objection employer may have had to the report has long since been waived.

I agree with the Director that the administrative law judge erred in his consideration of the reports of both Dr. Smiddy and Dr. Castle, and that in both instances the error was harmless. I join in the majority's decision to remand the case only because I believe the administrative law judge erred in his consideration of the evidence relevant to the irrebuttable presumption.

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REGINA C. McGRANERY
Administrative Appeals Judge