BRB No. 09-0685 BLA

RONALD D. HARRISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/27/2010
	)	
SUNSET LAND AND 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 on Remand Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (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 (2004-BLA-06815) of Administrative Law Judge Robert B. Rae, with respect to a subsequent

claim[1] 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).[2] This case is before the Board for the third time. Pursuant to the Board's prior Decision and Order,[3] the administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, based on the newly submitted evidence and the evidence as a whole, and that he, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge awarded benefits.

Employer appeals, asserting that claimant's subsequent claim was not timely filed and arguing that the administrative law judge did not follow the Board's instructions on remand or weigh all of the relevant evidence at 20 C.F.R §718.304. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, stating that the Board should again reject employer's statute of limitations argument.

---

[1] Claimant's prior claim, filed on April 10, 1997, was denied by the district director because claimant did not establish that he was totally disabled. Director's Exhibit 1. Claimant filed his present claim on January 17, 2002. Director's Exhibit 3.

[2] By Order dated April 8, 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. *Harrison v. Sunset Land & Coal Co.*, BRB No. 09-0685 BLA (Apr. 8, 2010)(unpub. Order). The Director, Office of Workers' Compensation Programs, and employer have responded, agreeing that Section 1556 does not apply to the instant claim as it was filed prior to January 1, 2005. Based upon the parties' responses, and our review, we hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as claimant's subsequent claim was filed prior to January 1, 2005.

[3] In the Board's previous decision, it affirmed Administrative Law Judge Linda S. Chapman's finding that the claim was timely filed. *See R.D.H.* [*Harrison*] *v. Sunset Land & Coal Co.*, BRB No. 07-0995 BLA (Sept. 30, 2008)(unpub.). However, the Board vacated the award of benefits on the grounds that Judge Chapman erred in her consideration of the evidence relevant to invocation of the irrebuttable presumption at 20 C.F.R. §718.304. *Id*. The Board granted employer's request and remanded the case for assignment to a new administrative law judge. *Id*. The case was then assigned to Administrative Law Judge Robert B. Rae (the administrative law judge).

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.[4] 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).

I. Timeliness of Subsequent Claim

In its prior Decision and Order, the Board reaffirmed its holding that claimant's subsequent claim was timely filed. *See R.D.H.* [*Harrison*] *v. Sunset Land & Coal Co.*, BRB No. 07-0995 BLA (Sept. 30, 2008)(unpub.). In the current appeal, employer simply reprises its previous argument by asserting that the Board improperly held that *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006), is distinguishable from this case. *Id.* As employer has not shown that the Board's holding was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination at 20 C.F.R. §725.308. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*)(Hall, C.J., and Nelson, J., concurring and dissenting).

II. 20 C.F.R. §718.304

Pursuant to Section 411(c)(3)(A) of the Act, as implemented by 20 C.F.R. §718.304 of the regulations, 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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a)-(c). While subsections (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); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000);

[4] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibit 4; Hearing Transcript at 36. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Melnick v. Consolidation Coal Co., 16 BLR 1-31 (1991)(*en banc*). The United States Court of Appeals for 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 types of evidence 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. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993). Furthermore, the Board has recognized that, because 20 C.F.R. §718.304 does not provide any 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. *See Melnick*, 16 BLR at 1-33.

A. The Administrative Law Judge's Findings on Remand

In considering the newly submitted evidence at 20 C.F.R. §718.304, the administrative law judge examined twelve interpretations of six x-rays, dated March 14, 2002, July 23, 2002, September 4, 2002, September 17, 2002, March 31, 2003, and June 5, 2004; interpretations of CT scans taken on September 17, 2002 and March 31, 2003; and the medical opinions of Drs. Baker, McSharry, Fino, Foster, and Wheeler.[5] The administrative law judge found that the x-ray interpretations of Drs. Baker, Cappiello, and DePonte, which were positive for coal workers' pneumoconiosis with size A opacities, satisfied the requirements of 20 C.F.R. §718.304(a). Decision and Order on Remand at 11; Director's Exhibit 11; Claimant's Exhibits 1, 2.

The administrative law judge then indicated that he considered the x-ray interpretations that do not satisfy the requirements of 20 C.F.R. §718.304(a) and the other evidence under 20 C.F.R. §718.304(c), as required by *Scarbro*. Decision and Order on Remand at 11. The administrative law judge determined that the CT scan interpretations confirming the presence of significant masses were persuasive evidence in support of the x-ray interpretations of Drs. Baker, Cappiello and DePonte.[6] *Id*.

[5] The administrative law judge correctly noted that the record on remand does not contain the interpretation of the chest x-ray, dated March 31, 2003, by Dr. Scatarige or the interpretation of the CT scan, dated March 31, 2002, by Dr. Scott. *See* Decision and Order on Remand at 7 n.8; Employer's Exhibit 13. Therefore, the administrative law judge relied on the table prepared by Judge Chapman in conjunction with her Decision and Order Awarding Benefits, dated September 23, 2005.

[6] Drs. Verzosa and Wheeler reviewed the September 17, 2002 CT scan. Director's Exhibit 43; Employer's Exhibit 11. Dr. Verzosa identified conglomerate masses in claimant's right upper lobe, which he found were compatible with coal workers'

The administrative law judge accorded little weight to the x-ray interpretations of Drs. Fino, Scatarige, Scott and Wheeler because they did not diagnose the presence of simple pneumoconiosis and because their opinions were equivocal, speculative and lacked credibility.[7] Decision and Order on Remand at 11. In contrast, the administrative law judge gave greater weight to the opinions of Drs. Baker, Cappiello and DePonte, based on the totality of the medical evidence. *Id*. at 11-12. As a result, the administrative law judge concluded that the newly submitted evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id*. at 12. Further, based on claimant's over twenty-two years of coal mine employment, the administrative law judge determined that claimant's complicated pneumoconiosis arose from his coal mine employment at 20 C.F.R. §718.203(b) and that the contrary evidence does not rebut the presumption. *Id*.

---

pneumoconiosis. Director's Exhibit 43. Dr. Wheeler stated that the mass in claimant's right apex was not a large opacity of coal workers' pneumoconiosis because it was apical, the background profusion of small nodules was low, and the pattern indicated a healing granulomatous process. Employer's Exhibit 11. The March 31, 2003 CT scan was reviewed by Drs. Verzosa and Scott. Director's Exhibit 43; Employer's Exhibit 13. Dr. Verzosa again stated that the conglomerate larger nodules in claimant's right upper lobe were most compatible with coal workers' pneumoconiosis, while Dr. Scott determined that the large mass was probably granulomatous and due to tuberculosis, but that cancer could not be ruled out. *Id*.

[7] Dr. Fino interpreted the September 17, 2002 x-ray as negative for pneumoconiosis and found that claimant's CT scan results were more consistent with granulomatous disease. Employer's Exhibits 8, 11, 12. Dr. Scatarige interpreted the June 23, 2002 and March 31, 2003 x-rays as containing no abnormalities consistent with pneumoconiosis and attributed the observed mass to tuberculosis or histoplasmosis. Employer's Exhibits 9, 13. Dr. Scott found that the March 14, 2002 x-ray contained a mass, which he determined was due to granulomatous disease or cancer. Employer's Exhibit 5. In addition, Dr. Scott opined that the mass on the March 31, 2003 CT scan was probably granulomatous disease caused by tuberculosis but that cancer could not be ruled out. Employer's Exhibit 13. Dr. Wheeler attributed the mass he identified on the September 4, 2002 x-ray to a granuloma, scar, or tumor. Employer's Exhibit 2. After reviewing an x-ray dated June 5, 2004, Dr. Wheeler identified a mass compatible with conglomerate tuberculosis, histoplasmosis, or cancer. Employer's Exhibit 13. In addition, Dr. Wheeler interpreted a September 17, 2002 CT scan as showing a mass compatible with conglomerate tuberculosis. Employer's Exhibit 11.

After reviewing the record as a whole, the administrative law judge found that claimant established the existence of complicated pneumoconiosis arising out of his coal mine employment and invocation of the irrebuttable presumption of total disability at 20 C.F.R. §718.304. Decision and Order on Remand at 13. The administrative law judge noted that the lack of evidence of complicated pneumoconiosis in claimant's prior claim did not diminish the probative value of the more recent x-ray findings because of the progressive nature of pneumoconiosis. *Id*. at 12-13. As a result, the administrative law judge awarded benefits, effective March 1, 2002. *Id*. at 13.

B. Arguments on Appeal

Employer contends that the administrative law judge's did not comply with the Board's instructions on remand or the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer asserts that the Board already rejected the conclusion that complicated pneumoconiosis was established by the x-ray interpretations of Drs. Baker, Cappiello and DePonte and the discrediting of the interpretations of Drs. Fino, Scatarige and Scott. In addition, employer states that the administrative law judge impermissibly determined that the CT scan evidence, showing a large mass, supported the positive x-ray readings.

Employer further argues that the administrative law judge improperly shifted the burden of proof by requiring employer "to provide a uniform alternative explanation sufficient to diminish the persuasive value of . . . claimant's proof." Employer's Brief at 16. Employer also asserts that the administrative law judge impermissibly discounted the x-ray interpretations of Drs. Fino, Scatarige, and Scott because they did not diagnose simple pneumoconiosis, which conflicted with the finding of simple pneumoconiosis in the previous claim. In addition, employer states that the administrative law judge mischaracterized the opinions of Drs. Scott, Fino, Scatarige and Wheeler when he discredited them for being equivocal. Further, employer asserts that the administrative law judge did not consider the medical opinions and objective tests suggesting the absence of a respiratory impairment, which employer argues is inconsistent with complicated pneumoconiosis.

Employer's contentions have merit, in part. As an initial matter, we disagree with employer that we previously held that the conclusion reached by the administrative law judge, with respect to the x-ray readings by Drs. Baker, Cappiello, DePonte, Fino, Scatarige and Scott, is not valid. Rather, we vacated Administrative Law Judge Chapman's weighing of the x-ray evidence at 20 C.F.R. §718.304(a) because she did not properly weigh the x-ray interpretations. *See Harrison*, slip op. at 8. This does not equate to a finding that the administrative law judge could not rationally determine that

complicated pneumoconiosis is established based on the readings by Drs. Baker, Cappiello and DePonte.

Employer is correct, however, in maintaining that the administrative law judge failed to follow our instructions on remand and did not comply with the APA, when addressing the x-ray evidence. The administrative law judge impermissibly discredited the x-ray interpretations of Drs. Fino, Scatarige, Scott and Wheeler, on the ground that they did not diagnose simple pneumoconiosis. While the administrative law judge indicated that he relied on the newly submitted evidence to determine that claimant has, at least, simple pneumoconiosis, he provided no reasoning to support this finding. Decision and Order on Remand at 6. In a footnote, he stated that he assumed that claimant established the presence of simple pneumoconiosis in his previous claim, based on the x-ray evidence, which consisted of two positive x-ray readings, and the district director's denial of the prior claim for failure to establish total disability. *Id*. at 6 n.6. Contrary to the administrative law judge's determination, the finding of pneumoconiosis in claimant's previous claim is not entitled to preclusive effect in his subsequent claim because the finding was not essential to the prior decision, since it was denied based on claimant's inability to establish total disability. *Collins v. Pond Creek Mining Co*., 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006).

In addition, in finding that the x-ray interpretations of Drs. Fino, Scatarige, Scott and Wheeler were equivocal and speculative, the administrative law judge apparently relied, in part, on the fact that they did not agree as to the cause of the mass in claimant's lungs. The Fourth Circuit has held that claimant bears the burden of establishing that the large opacities represent complicated pneumoconiosis, rather than the employer being required to prove that the opacities are due to a specific non-coal dust related source. *Lester*, 993 F.2d at 1146, 17 BLR at 2-118. Further, the administrative law judge's findings do not comply with the APA, which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §432(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We also agree with employer that the administrative law judge impermissibly concluded that, because the CT scan evidence at 20 C.F.R. §718.304(c) confirmed the presence of significant masses, it supported the x-ray findings of complicated pneumoconiosis by Drs. Baker, Cappiello and DePonte at 20 C.F.R. §718.304(a). Contrary to the administrative law judge's analysis, complicated pneumoconiosis, seen as size A, B or C opacities on x-ray, is not determined solely by the presence of masses that are greater than one centimeter in diameter. The regulation at 20 C.F.R. §718.304(a) provides for invocation of the irrebuttable presumption if "such miner is suffering from a

chronic dust disease of the lung" which, when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B or C. 20 C.F.R. §718.304; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. The ILO classification form requires the physician interpreting the x-ray to first determine whether there are "[a]ny [p]arenchymal [a]bnormalities [c]onsistent with [p]neumoconiosis." *See* Form CM-933, question 2A. If the physician answers in the affirmative, then he/she proceeds to the sections regarding the size of the opacities, i.e., small opacities or large opacities of size A, B, or C. *See* Form CM-933, question 2B and 2C. However, if the physician answers the question in the negative, then he/she is instructed to skip the section regarding the size of the opacities. *See* Form CM-933, question 2A. Therefore, the fact that all of the physicians who reviewed a CT scan identified a large mass, does not support a finding that the mass is complicated pneumoconiosis at 20 C.F.R. §718.304(a).[8] *See* Employer's Exhibits 2, 5, 13.

Consequently, we vacate the administrative law judge's finding at 20 C.F.R. §718.304(a). Because the administrative law judge's weighing of the CT scan evidence at 20 C.F.R. §718.304(c) was based on his finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a), we also vacate the administrative law judge's finding at 20 C.F.R. §718.304(c). Further, based on these determinations, we vacate the administrative law judge's finding that the newly submitted evidence, and the evidence as a whole, established complicated pneumoconiosis at 20 C.F.R. §718.304. We also vacate, therefore, the administrative law judge's finding of a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) and his award of benefits. On remand, the administrative law judge must consider whether the weight of the x-ray evidence at 20 C.F.R. §718.304(a), and the weight of the CT scan and medical opinion evidence at 20 C.F.R. §718.304(c), support a finding of the existence of complicated pneumoconiosis. The administrative law judge should then weigh together all of the relevant evidence to determine whether the existence of complicated pneumoconiosis is established. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Co*., 22 BLR

[8] Drs. Scott and Wheeler did not identify the existence of a large opacity on their ILO interpretations. Employer's Exhibits 11, 13. Dr. Verzosa, the only other physician to interpret a CT scan, did not use an ILO form to provide his interpretation of claimant's chest x-rays. Director's Exhibit 43; Claimant's Exhibit 3. Further, the administrative law judge noted that there was no evidence in the record, indicating that Dr. Verzosa is a Board-certified radiologist or B reader. Decision and Order on Remand at 7 n.8. Consequently, the administrative found that Dr. Verzosa had neither qualification when comparing his credentials to those of the other physicians. *Id*. We affirm these findings, as they have not been challenged on appeal. *See Rankin v. Keystone Coal Mining Co.*, 8 BLR 1-54 (1985); *Stanley v. Director, OWCP*, 7 BLR 1-386 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

1-306 (2003); *Melnick*, 16 BLR at 1-33-34. Further, the administrative law judge must provide a clear basis for his findings in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

In the interest of judicial economy, we also address employer's additional arguments regarding the administrative law judge's consideration of the evidence at 20 C.F.R. §718.304(c). We hold that there is merit to employer's assertion, that the administrative law judge did not consider the medical opinions of Drs. Baker, McSharry, Foster, Fino, and Wheeler at 20 C.F.R. §718.304(c), especially their consideration of whether there was evidence of any disability. While the administrative law judge suggests that, in weighing the totality of the evidence, he considered such reports, this is not evident from his findings. Specifically, the administrative law judge did not assign any weight to the opinions of Drs. McSharry and Foster, or provide any support for his discrediting of the opinions of Drs. Fino and Wheeler, or for assigning greater weight to Dr. Baker's opinion. *See Wojtowicz*, 12 BLR at 1-165. In addition, while claimant is not required to establish total disability pursuant to 20 C.F.R. §718.304, evidence pertaining to the presence or absence of a respiratory impairment may be relevant in determining whether the abnormalities seen on claimant's x-ray are due to complicated pneumoconiosis. *See Mullins*, 484 U.S. at 145, 2 BLR at 2-6 (evidence regarding impairment may shed light on interpretation of x-ray evidence); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-40 (1976) (while complicated pneumoconiosis may be present without impairment, the disease "usually produces significant pulmonary impairment"). Therefore, on remand, the administrative law judge must also weigh the totality of the physicians' opinions in determining whether claimant has met his burden of proof pursuant to 20 C.F.R. §718.304, including their assessments as whether the objective studies are consistent with the presence of complicated pneumoconiosis.[9] *See Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick*, 16 BLR at 1-31.

[9] Dr. Baker opined that claimant had a minimal respiratory impairment. Director's Exhibit 11. Dr. McSharry determined that there was no objective evidence of a significant respiratory impairment and that the mild impairment observed was due to asthma, rather than coal dust exposure. Employer's Exhibit 1. Dr. Fino opined that when complicated pneumoconiosis is present, he generally sees a significant respiratory impairment, especially related to oxygen transfer, and such a finding was not present in the instant case. Employer's Exhibits 8, 12 at 48. Dr. Foster noted that claimant's pulmonary function study results showed normal spirometry, with the exception of some reduction in diffusing capacity. Director's Exhibit 43.

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

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge