

BRB No. 07-0496 BLA

D.W.)
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 Claimant-Respondent)
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 v.) DATE ISSUED: 03/28/2008
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 HOBET MINING, INCORPORATED)
)
 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 – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (06-BLA-5012) of Administrative Law Judge Daniel L. Leland rendered 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 At the hearing, the administrative law judge found that a negative x-ray reading submitted by employer in rebuttal to a reading of the same x-ray contained in claimant's medical treatment records was not admissible under the evidentiary limitations of 20 C.F.R. §725.414. The administrative law judge therefore excluded employer's proffered rebuttal reading.

In his decision, the administrative law judge credited claimant with thirty-three years and eight months of coal mine employment.² The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of complicated pneumoconiosis, thereby entitling claimant to 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 both a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and entitlement to benefits. Finding that the medical evidence did not establish when claimant became totally disabled due to pneumoconiosis, the administrative law judge awarded benefits as of the month in which this claim was filed, pursuant to 20 C.F.R. §725.503(b).

On appeal, employer challenges the administrative law judge's exclusion of the rebuttal x-ray reading. Further, employer contends that the administrative law judge erred in his analysis of the medical evidence when he found that the existence of complicated pneumoconiosis was established pursuant to 20 C.F.R. §718.304. Additionally, employer argues that the administrative law judge erred in finding that benefits should commence as of the month in which this claim was filed. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge properly excluded employer's x-ray reading submitted to rebut claimant's medical treatment x-ray, and properly determined the date for the commencement of benefits.

¹ Claimant's first claim for benefits, filed on August 6, 1997, was denied on January 9, 1998. Director's Exhibit 1. Claimant's second claim, filed on February 5, 1999, was denied on June 3, 1999. Director's Exhibit 2. Claimant's third claim, filed on February 12, 2001, was denied on September 4, 2002. Director's Exhibit 3. All of claimant's prior claims were denied because claimant did not establish total disability due to pneumoconiosis. Claimant filed his current claim on August 2, 2004. Director's Exhibit 5.

² The record indicates that claimant's coal mine employment occurred in West Virginia. August 30, 2006, Hearing Transcript at 36. 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, 1-202 (1989)(*en banc*).

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. 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).

Employer argues that the administrative law judge erred by failing to permit it to submit an x-ray reading in rebuttal to an x-ray reading that was contained in claimant's medical treatment records. The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004)(*en banc*).

Under the applicable evidentiary limitations, the parties could submit two x-ray interpretations each in support of their affirmative case, and one interpretation in rebuttal of each affirmative x-ray interpretation submitted by the opposing party. See 20 C.F.R. §725.414(a)(2),(a)(3). Further, "[n]otwithstanding" these limitations, the parties could submit "any record of a miner's hospitalization . . . or medical treatment for a respiratory or pulmonary or related disease . . ." ³ 20 C.F.R. §725.414(a)(4). Pursuant to this latter provision, claimant submitted the medical treatment records of Dr. Kowatli, dated from April 13, 2005, to July 14, 2006. Claimant's Exhibits 5, 6, 10. These records included a reading by Dr. Abramowitz of an x-ray dated June 13, 2005. Dr. Abramowitz stated that this x-ray showed "occupational pneumoconiosis." Claimant's Exhibit 5.

At the hearing, employer proffered Dr. Scatarige's negative reading of the June 13, 2005 x-ray, which employer designated as rebuttal to Dr. Abramowitz's reading of the x-ray contained in Dr. Kowatli's treatment records. August 30, 2006, Hearing Transcript (Tr.) at 12-15. Claimant objected that since Dr. Abramowitz's reading was not submitted as claimant's affirmative x-ray evidence, it was not subject to rebuttal by employer under the rebuttal evidence provision of 20 C.F.R. §725.414(a)(3). Employer argued that if claimant "is submitting that interpretation and relying on it . . . we should be able to offer evidence to be considered on that x-ray as well." Tr. at 14. The administrative law judge found that Dr. Abramowitz's x-ray reading contained in a treatment record did not "come in as part of [claimant's] affirmative evidence," and noted that 20 C.F.R. §725.414 includes no specific provision for the rebuttal of treatment records. *Id.* The administrative law judge therefore excluded Dr. Scatarige's reading.

³ On appeal, the Director notes that 20 C.F.R. §725.414 provides for the rebuttal of specific types of affirmative medical evidence, but includes no independent rebuttal provision for evidence admitted under the hospital and medical treatment records exception of 20 C.F.R. §725.414(a)(4). Director's Brief at 3, citing 64 Fed.Reg. 54996 (Oct. 8, 1999).

Ultimately, the administrative law judge did not rely on Dr. Abramowitz's x-ray reading, because Dr. Abramowitz "did not properly classify the x-ray." Decision and Order at 7.

Employer argues that the administrative law judge violated its right to due process, as incorporated into the Administrative Procedure Act (APA),⁴ when he permitted claimant to submit Dr. Abramowitz's reading of the June 13, 2005 x-ray as a treatment record without allowing employer the opportunity to rebut that evidence. We disagree.

Due process may require an opportunity for rebuttal if it is necessary to the full presentation of a party's case. *See* 5 U.S.C. §556(d); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 149, 16 BLR 2-1, 2-5 (4th Cir. 1991). However, employer does not explain how the exclusion of its proposed rebuttal reading of the treatment x-ray prevented employer from fully presenting its case. As noted, the June 13, 2005 x-ray, taken during the course of claimant's treatment, was not classified for the existence of pneumoconiosis under the ILO classification system. Claimant's Exhibit 5. Under the regulations, an x-ray "to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the" ILO system. 20 C.F.R. §718.102(b). Thus, Dr. Abramowitz's reading could not constitute evidence of pneumoconiosis, and the administrative law judge did not rely on it. Decision and Order at 7. Therefore, we agree with the Director that employer did not need to rebut the unclassified x-ray reading to fully present its case.⁵ *See Henderson*, 939 F.2d at 149, 16 BLR at 2-5. Detecting no abuse of discretion by the administrative law judge, we reject employer's allegation of error. *See Dempsey* 23 BLR at 1-55. We now turn to the administrative law judge's analysis of the medical evidence.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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

⁴ Administrative Procedure Act, 5 U.S.C. §556(d), 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).

⁵ In view of our holding on this issue, we reject employer's related contention that the unclassified nature of Dr. Abramowitz's reading established good cause for employer to submit Dr. Scatarige's reading in excess of the evidentiary limitations, pursuant to 20 C.F.R. §725.456(b)(1). Therefore, if there was any error by the administrative law judge in not specifically addressing this "good cause" argument that employer advanced in its post-hearing brief, the oversight did not affect the disposition of the case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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). The administrative law judge determined that claimant’s prior claim was denied because he did not establish total disability. Decision and Order at 2, 6. Consequently, claimant had to submit new evidence establishing that he is totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(d)(3). The administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and that therefore, the only avenue left for claimant was to establish that the irrebuttable presumption of 20 C.F.R. §718.304 applied. *See* 20 C.F.R. §718.204(b)(1).

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, 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. §718.304.⁶ The introduction of

⁶ Section 718.304 provides in relevant part:

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis . . . if such miner is suffering . . . from a chronic dust disease of the lung which:

- (a) When diagnosed by chest X-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . .; or
- (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
- (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. 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. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered six readings of three new x-rays.⁷ Dr. Alexander, a Board-certified radiologist and B reader, and Dr. Ranavaya, a B reader, read the October 4, 2004 x-ray as positive for both simple pneumoconiosis and category “A” large opacities.⁸ Director’s Exhibit 16; Claimant’s Exhibit 1. Dr. Scott, a Board-certified radiologist and B reader, read the same x-ray as negative for both simple and complicated pneumoconiosis. Employer’s Exhibit 9. Dr. Alexander read the April 18, 2005 x-ray as positive for simple pneumoconiosis and category A large opacities. Claimant’s Exhibit 2. Dr. Rosenberg, a B reader, read the same x-ray as positive for simple pneumoconiosis, and noted category B large opacities. Employer’s Exhibit 4. However, in a May 3, 2005 narrative report accompanying the x-ray report, Dr. Rosenberg stated that the changes he recorded as category B on the x-ray form “clearly” were “not consistent with the presence of CWP,” based on their distribution and character. Employer’s Exhibit 4 at 5. Dr. Abramowitz read the June 13, 2005 x-ray as compatible with occupational pneumoconiosis, but, as discussed, the administrative law judge did not rely on this unclassified reading. Claimant’s Exhibits 5, 6, 9. The administrative law judge found that a preponderance of the properly classified x-ray evidence demonstrated large opacities.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered four readings of three new CT scans, and the medical opinions of Drs. Ranavaya, Repsher, and Rosenberg. Dr. Repsher, a B reader, read the June 30, 2004 CT scan as showing a pattern “classic for pulmonary sarcoidosis and extraordinarily atypical for medical CWP.” Employer’s Exhibit 4 at 14-16. Dr. Valiveti, with unknown radiological qualifications, reported that the November 17, 2004 CT scan showed changes that “may be related to pneumoconiosis,” but stated that possible malignancy could not be excluded.

⁷ The administrative law judge found that a reading of a fourth x-ray, dated January 7, 1992 and submitted by employer, was irrelevant under 20 C.F.R. §725.309(d), because it predated the denial of the miner’s prior claim. Decision and Order at 7.

⁸ Dr. Binns, a Board-certified radiologist and B reader, interpreted the October 4, 2004 x-ray for its film quality only. Employer’s Exhibit 9.

Claimant's Exhibit 4. Dr. Alexander interpreted the April 18, 2005 CT scan as positive for complicated pneumoconiosis, but Dr. Rosenberg read the same scan as negative for both simple and complicated pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 5.

Dr. Ranavaya examined and tested claimant and diagnosed complicated pneumoconiosis. Director's Exhibit 16. Dr. Ranavaya later testified that although the pattern of claimant's lung disease was atypical for coal workers' pneumoconiosis or progressive massive fibrosis, it was more likely than not that claimant has complicated pneumoconiosis. Employer's Exhibit 1 at 10-17. Dr. Rosenberg examined and tested claimant and diagnosed an "interstitial process with large opacity formation" that was not progressive massive fibrosis or coal workers' pneumoconiosis. Employer's Exhibit 4 at 5-6. Dr. Rosenberg advised that a tissue sample be obtained to "establish a definitive diagnosis [D]epending on what is found (sarcoidosis, vasculitis, lymphoma, infection, etc.), clearly intervention with various therapeutic modalities would be available." Employer's Exhibit 4 at 6. When deposed, Dr. Rosenberg testified that claimant does not have x-ray or CT scan findings of simple or complicated pneumoconiosis, but has a pattern "most consistent with . . . sarcoidosis, which is inflammation . . . in the lungs of a granulomatous process." Employer's Exhibit 11 at 15. Based on claimant's overall clinical picture, Dr. Rosenberg concluded it was more likely than not that claimant has sarcoidosis. *Id.* at 17. Dr. Repsher reviewed the medical evidence and diagnosed claimant with "[c]lassic pulmonary sarcoidosis, both radiographically and physiologically." Employer's Exhibit 7 at 3. Dr. Repsher testified that the location and pattern of claimant's marked lung abnormalities, in the absence of any impairment, was "absolutely classic" for pulmonary sarcoidosis, and he concluded "to an overwhelming probability" that claimant has sarcoidosis. Employer's Exhibit 14 at 25, 26.

The administrative law judge found that the June 30 and November 17, 2004 CT scans did not "satisfy the criteria" of 20 C.F.R. §718.304(c). Decision and Order at 7. The administrative law judge credited Dr. Alexander's positive reading of the April 18, 2005 CT scan interpretation over Dr. Rosenberg's interpretation, based on Dr. Alexander's dual qualifications, and found that this CT scan "would show the large opacities found on the chest x-rays." *Id.* The administrative law judge further found that although Drs. Rosenberg and Repsher concluded that the large opacities seen on the x-rays and CT scans were not representative of pneumoconiosis, these doctors "did not definitively diagnose sarcoidosis or rule out complicated pneumoconiosis." Decision and Order at 8. The administrative law judge therefore found that Drs. Rosenberg and Repsher were "equivocal as to whether the opacities represent coal workers' pneumoconiosis or some other disease such as sarcoidosis," and he accorded their opinions less weight. *Id.* The administrative law judge further found Dr. Alexander's diagnosis supported by his radiological credentials. Based on this analysis of the

evidence, the administrative law judge found that “the evidence of record invokes the presumption in § 718.304” *Id.*

Employer argues that the administrative law judge’s finding, that the opinions of Drs. Repsher and Rosenberg were equivocal, is not supported by substantial evidence. Employer also argues that the administrative law judge “appear[ed] to require Dr. Rosenberg and Dr. Repsher to ‘rule out’ complicated pneumoconiosis,” when it is claimant’s burden to establish the disease. Employer’s Brief at 12.

We agree with employer that substantial evidence does not support the administrative law judge’s finding that the opinions of Drs. Repsher and Rosenberg were equivocal. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365-366, 23 BLR 2-374, 2-385-386 (4th Cir. 2006). Dr. Repsher was unequivocal in stating that claimant does not have complicated pneumoconiosis but has sarcoidosis. Specifically, Dr. Repsher “strongly” disagreed with the physicians who diagnosed complicated pneumoconiosis, and stated that the “radiographic abnormalities are absolutely classic for sarcoidosis, which is a disease of unknown cause and has never been related to the inhalation of coal mine dust.” Employer’s Exhibit 14 at 12. Additionally, Dr. Repsher interpreted the June 30, 2004 CT scan as “absolutely classical” for sarcoidosis. Employer’s Exhibit 14 at 16. Moreover, Dr. Repsher concluded that claimant, “to an overwhelming probability,” has pulmonary sarcoidosis. Employer’s Exhibit 14 at 25.

Neither was Dr. Rosenberg equivocal in stating that claimant does not have complicated pneumoconiosis but has sarcoidosis. Specifically, Dr. Rosenberg concluded, to a reasonable degree of medical certainty, that claimant has large opacities but which are not consistent with coal workers’ pneumoconiosis. Employer’s Exhibit 4 at 6. Dr. Rosenberg explained that claimant’s x-rays did not show abnormalities consistent with pneumoconiosis because they showed a progression in the lower lung zones instead of in the upper zones. Employer’s Exhibit 11 at 11-12. Moreover, Dr. Rosenberg opined that claimant’s x-rays, CT scans, and normal pulmonary function studies were “most consistent with” sarcoidosis. Employer’s Exhibit 11 at 14-16. Finally, Dr. Rosenberg concluded that it was more likely than not that claimant has sarcoidosis.⁹ Employer’s Exhibit 11 at 17-20.

Consequently, we vacate the administrative law judge’s finding pursuant to 20 C.F.R. §718.304(c). On remand, the administrative law judge must reweigh the newly submitted CT scan and medical opinion evidence, while maintaining the burden of proof

⁹ As employer notes, the administrative law judge found that Dr. Ranavaya’s similarly worded opinion, that claimant’s abnormalities “more probably than not” represented complicated pneumoconiosis, was “unequivocal.” Decision and Order at 8.

on claimant to establish the existence of complicated pneumoconiosis. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Additionally, on remand, the administrative law judge must determine if the medical opinions are documented and reasoned. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-533, 21 BLR 2-334-2-335 (4th Cir. 1998). In reconsidering the medical opinions on remand, the administrative law judge must take into account the qualifications of Drs. Ranavaya, Repsher, and Rosenberg.¹⁰ See *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997).

To avoid any repetition of error on remand, we also vacate the administrative law judge's finding at 20 C.F.R. §718.304(a). The administrative law judge did not consider Dr. Rosenberg's explanation that the large opacities he noted on claimant's April 18, 2005 x-ray were not consistent with pneumoconiosis. On remand, the administrative law judge should consider Dr. Rosenberg's reading and explanation of the April 18, 2005 x-ray before determining whether Dr. Rosenberg's reading establishes large opacities of complicated pneumoconiosis. See *Melnick*, 16 BLR at 1-37. On remand, after weighing the x-rays, CT scans, and medical opinions, the administrative law judge should weigh all the relevant evidence together to determine whether claimant has established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. See *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.

In light of the foregoing, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d). If the administrative law judge, on remand, finds that the new evidence establishes a change in an applicable condition of entitlement, he must determine whether all of the evidence establishes claimant's entitlement to benefits.

Pursuant to 20 C.F.R. §725.503(b), employer argues that the administrative law judge did not explain why the evidence did not establish the month of onset of claimant's total disability due to pneumoconiosis. Moreover, employer argues that the "default" onset provision applied by the administrative law judge violates Section 7(c) of the APA by shifting the burden of proof to the party opposing entitlement.

We reject employer's argument that 20 C.F.R. §725.503(b) violates Section 7(c) of the APA. See *Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47, 70-71 (D.D.C. 2001).

¹⁰ The record reflects that Drs. Repsher and Rosenberg are Board-certified in Internal Medicine and Pulmonary Disease, Employer's Exhibits 6, 8, while Dr. Ranavaya is Board-certified in preventive medicine with a subspecialty in occupational medicine. Employer's Exhibit 1 at 4. Additionally, Drs. Ranavaya, Repsher, and Rosenberg are all B readers. Employer's Exhibits 1, 6, 8.

However, because we vacate the administrative law judge's finding of entitlement to benefits, we vacate his onset finding. If, on remand, the administrative law judge finds that claimant establishes entitlement to benefits, he must again determine the date from which benefits commence. *See* 20 C.F.R. §725.503; *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration 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