BRB No. 09-0311 BLA

ARSENIO VELASQUEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES FUEL COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 11/18/2009
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Scott M. Busser (Moseley, Busser & Appleton, P.C.), Denver, Colorado, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5318) of Administrative Law Judge Richard K. Malamphy rendered on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with thirty-seven years of coal mine employment[2] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Because employer conceded the existence of simple pneumoconiosis, the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits of entitlement, the administrative law judge found that claimant did not establish the existence of complicated pneumoconiosis or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.304, 718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in excluding a computerized tomography (CT) scan reading submitted by claimant, and erred in failing to find complicated pneumoconiosis established. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response in this appeal.[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 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the

[1] Claimant's initial claim, filed on August 18, 1991, was denied by the district director on February 11, 1993, for failure to establish any element of entitlement. Director's Exhibit 1. The record does not reflect that claimant took any further action until filing the instant claim for benefits on August 20, 2001. Director's Exhibit 3.

[2] The law of the United States Court of Appeals for the Tenth Circuit is applicable as claimant was employed in the coal mining industry in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Evidentiary Limitations

Claimant initially asserts that the administrative law judge erred in excluding Dr. Lynch's interpretation of the March 24, 2008 CT scan, submitted by claimant, as exceeding the evidentiary limitations on affirmative evidence at 20 C.F.R. §725.414. Claimant's Brief at 7. We disagree.

CT scans constitute "other medical evidence," the admissibility of which is governed by 20 C.F.R. §718.107. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (*en banc*). The Board has held that 20 C.F.R. §718.107 is reasonably interpreted to permit the submission of one reading of each CT scan, as part of a party's affirmative case. *Id*. Because claimant submitted Dr. James's interpretation of the March 24, 2008 CT scan as his affirmative CT scan interpretation, the administrative law judge rationally found Dr. Lynch's interpretation of the same CT scan to exceed the evidentiary limitations.[4] *See* 20 C.F.R. §718.107; *Webber*, 23 BLR at 1-135; Decision and Order at 11 n.5.

We additionally reject claimant's assertion that Dr. Lynch's March 24, 2008 CT scan is admissible "rebuttal evidence." Claimant's Brief at 7-8. The applicable regulation provides that where "the party opposing entitlement has submitted the results of other testing pursuant to §718.107, the claimant shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal." 20 C.F.R. §725.414(a)(2)(ii). As employer did not submit any CT scan interpretations, Dr. Lynch's March 24, 2008 CT scan interpretation cannot constitute "rebuttal evidence." *See* 20 C.F.R. §§718.107; 725.414(a)(2)(ii). We therefore affirm the administrative law judge's determination to exclude Dr. Lynch's interpretation of the March 24, 2008 CT scan from the record.

20 C.F.R. §718.304: Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, if (A) an x-ray of the miner's lungs shows an opacity

[4] Claimant did not argue to the administrative law judge that good cause existed to submit an additional, affirmative computerized tomography (CT) scan reading. *See* 20 C.F.R. §725.456(b)(1).

greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304. 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 consider all relevant evidence on this issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Claimant asserts that the administrative law judge erred in finding that the x-ray evidence does not establish complicated pneumoconiosis under 20 C.F.R. §718.304(a). Specifically, claimant asserts that the administrative law judge erred in conducting a numerical counting of expert opinions. Claimant's Brief at 4. We disagree.

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered four interpretations of three x-rays and considered the doctors' radiological qualifications.[5] Dr. Newell, a Board-certified radiologist and B reader, and Dr. Dubiel, a Board-certified radiologist, interpreted the December 5, 2001 x-ray as positive for Category "A" complicated pneumoconiosis. Director's Exhibit 15; Claimant's Exhibit 1. Dr. Newell interpreted the February 16, 2005 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 46. Dr. Lynch, a Board-certified radiologist and B reader, interpreted the March 29, 2008 x-ray as negative for complicated pneumoconiosis. Claimant's Exhibit 16. Based on the foregoing readings, the administrative law judge reasonably found the December 5, 2001 x-ray to be positive for complicated pneumoconiosis, and the February 16, 2005 and March 29, 2008 x-rays to be negative for complicated pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Further, contrary to claimant's assertion, the administrative law judge did not base his finding, that the x-ray evidence overall does not establish complicated pneumoconiosis, upon a numerical counting of the x-ray interpretations. Rather, the administrative law judge considered the qualifications of the readers and reasonably found that the preponderance of the x-ray evidence did not establish complicated pneumoconiosis. *See*

[5] The administrative law judge accurately noted that the record contains three quality-only readings of the December 5, 2001 and February 16, 2005 x-rays. Decision and Order at 7. Dr. Preger read the December 5, 2001 x-ray as quality 1, and noted a "superimposition of shadows [right] lower lung," while Dr. Nanani read the same x-ray as quality 2, imperfect pleural detail. Director's Exhibits 16, 17. Dr. Nanani read the February 16, 2005 x-ray as quality 3, overexposed. Director's Exhibit 47.

Hansen v. Director, OWCP, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996). Consequently, we affirm the administrative law judge's permissible finding under 20 C.F.R. §718.304(a).

Claimant additionally contends that the administrative law judge erred in his consideration of the CT scan evidence[6] under 20 C.F.R. §718.304(c). We agree.

The administrative law judge found Dr. James's statement, that CT scans are a clinically acceptable test to diagnose respiratory disease, to be persuasive. The administrative law judge summarized the CT scan evidence in conjunction with the medical opinion evidence[7] and concluded:

> I accord Drs. Repsher, Rose and James's opinions with the most weight because each opinion was based on extensive medical data and each doctor

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[6] The record contains one CT scan interpretation. Dr. James diagnosed complicated pneumoconiosis based on the presence of a "large opacity measuring 12 [millimeters] that was seen on the chest CT scan from 3/24/2008." Claimant's Exhibit 19. Dr. James further stated that:

> The chest CT scan is a clinically acceptable test to diagnose respiratory disease and is used on a regular basis in routine clinical practice. It can provided [*sic*] detail of lung structure that may not be seen on a plain chest x-ray. The chest CT scan of [claimant] was able to differentiate between the small opacities and the large opacities present in the same region of the lung. On the plain chest x-ray, which did not show a large opacity, the overlying shadows obscured the large opacity.

Id.

[7] The record contains five medical opinions. As the administrative law judge stated, the opinions of Drs. Poitras and Tudor do not discuss complicated pneumoconiosis. Decision and Order at 15, Director's Exhibit 12; Claimant's Exhibits 22-25. Dr. Repsher stated that there is no accepted standard under the regulations for establishing complicated pneumoconiosis from a CT scan and, based on claimant's x-rays, pulmonary function test, and arterial blood gas study, Dr. Repsher opined that there is not sufficient evidence to support a diagnosis of complicated pneumoconiosis. Director's Exhibit 18. Based on the results of claimant's February 16, 2005 x-ray, Dr. Rose found that there were no large opacities to suggest complicated pneumoconiosis. Director's Exhibit 46. Dr. James diagnosed complicated pneumoconiosis based on the results of claimant's March 24, 2008 CT scan. Claimant's Exhibits 11, 19.

> is a board-certified Pulmonologist. I accord less weight to Dr. Poitras because, although he is board-certified in internal medicine, he does not have a subspecialty in pulmonary disease. Finally, I accord Dr. Tudor's opinion with the least weight because his is an Oncologist and does not specialize in pulmonary diseases.
>
> The evidence in the record fails to prove that the Claimant suffers from complicated pneumoconiosis.

Decision and Order at 16. In so finding, the administrative law judge did not explain the weight, if any, he accorded to the CT scan evidence, nor did he explain his finding that Dr. James's opinion on the existence of complicated pneumoconiosis was entitled to less weight than the opinions of Drs. Repsher and Rose. *See* 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, we must vacate the administrative law judge's finding at 20 C.F.R. §718.304(c) and remand this case for further consideration.

Further, we reject employer's assertion that Dr. James's CT scan interpretation is legally insufficient to support a finding of complicated pneumoconiosis because claimant "offered no evidence upon which the ALJ could determine that the CT scan findings were equivalent to or greater than a one centimeter opacity on complying x-ray."[8] Employer's Brief at 16-17. The United States Court of Appeals for the Tenth Circuit has not adopted the United States Court of Appeals for the Fourth Circuit's rule requiring that all evidence diagnosing complicated pneumoconiosis be compared to x-rays. *See 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). Consequently, on remand, the administrative law judge must determine whether Dr. James diagnosed a condition that could reasonably be expected to yield a Category A, B, or C x-ray opacity, or to yield massive lesions in the lung when diagnosed by biopsy or autopsy. 20 C.F.R. §718.304(c); *see Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 986, 24 BLR 2-72, 2-92 (11th Cir. 2007). In so doing, the administrative law judge must consider Dr. James's statement that:

[8] We reject claimant's assertion that the administrative law judge erred in failing to consider Dr. Lynch's interpretation of the March 24, 2008 CT scan. As mentioned *supra*, the administrative law judge properly excluded Dr. Lynch's CT scan interpretation as exceeding the evidentiary limitations. *See* Webber *v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006)(*en banc*).

> The chest CT scan of [claimant] was able to differentiate between the small opacities and the large opacities present in the same region of the lung. On the plain chest x-ray, which did not show a large opacity, the overlying shadows obscured the large opacity.

Claimant's Exhibit 19. Further, the administrative law judge must assess whether the opinions of Drs. James, Repsher, and Rose are reasoned, in light of their underlying documentation and rationale, and explain his credibility determinations on remand. *See Hansen*, 984 F.2d at 370, 17 BLR at 2-59; *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge