

BRB No. 05-0150 BLA

TEDDY J. WHITED)
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 Claimant)
)
 v.)
)
 RHONDA COAL COMPANY) DATE ISSUED: 10/13/2005
)
 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 of Stuart A. Levin,
Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1995-BLA-01765) of
Administrative Law Judge Stuart A. Levin awarding benefits on a 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). This case is before the Board for the third
time as a petition for modification. The history of this case is set forth in the Board's
prior decisions in *Whited v. Rhonda Coal Co.*, BRB No. 00-0692 BLA (Apr. 10, 2001)
(unpub.) and *Whited v. Rhonda Coal Co.*, BRB No. 02-0591 (May 22, 2003) (unpub.).
When the case was most recently before the Board, the Board vacated the administrative
law judge's determination that claimant established a change in conditions pursuant to 20
C.F.R. §725.310¹ and the award of benefits, and remanded the case for further

¹ Claimant filed a claim for benefits on October 25, 1994, Director's Exhibit 1.
The claim was denied in a Decision and Order issued on December 5, 1996 by

consideration of whether the existence of complicated pneumoconiosis was established at 20 C.F.R. §718.304. *Whited*, BRB No. 02-0591 BLA, slip op. at 2-3. The Board also instructed the administrative law judge to consider whether reopening the case on modification would render justice under the Act. *Whited*, BRB No. 02-0591 BLA, slip op. at 4.

On remand, the administrative law judge determined that Dr. Navani's and Dr. Naik's interpretations of the March 11, 1998, CT scan were the most persuasive and thus were sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Decision and Order on Remand at 2-3. The administrative law judge further found that justice was rendered by the modification of the previous denial of benefits. Decision and Order at 3. Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in concluding that the evidence of record supported a finding of complicated pneumoconiosis and further erred in determining that claimant established a change in conditions subsequent to the prior denial of benefits. Employer further contends that the case should be reassigned to a different administrative law judge on remand. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this appeal.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 725.310, an administrative law judge is obligated to perform an independent assessment of newly submitted evidence, in conjunction with the

Administrative Law Judge Edith Barnett. Subsequent to an appeal by claimant and a cross-appeal by employer, the Board affirmed the denial of benefits. *Whited v. Rhoda Coal Co.*, BRB Nos. 97-0538 BLA and 97-0538 BLA-A (Dec. 4, 1997) (unpub.). Claimant subsequently filed the timely request for modification which is the subject of this appeal.

² We affirm, as unchallenged on appeal, the administrative law judge's determination that justice has been rendered by granting modification of the previous denial of benefits, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), but limit our holding in this regard to this specific procedural determination.

previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. See *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that there is no need for a smoking-gun factual error, changed conditions, or startling new evidence. Instead, the administrative law judge may grant the request for modification if he finds the ultimate finding, *i.e.*, entitlement or nonentitlement in error. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Employer argues that while the administrative law judge in this case recognized the proper standard on modification, he failed to engage in the requisite change in conditions analysis, and instead, based his finding of entitlement on the newly submitted evidence, without a full discussion of the prior evidence. Employer also contends that in considering the evidence relevant to Section 718.304, the administrative law judge failed to consider relevant evidence submitted previously and in conjunction with the modification request, and again relied solely upon the March, 1998, CT scan interpretations of Drs. Naik and Navani, Director's Exhibits 60, 61, in determining that claimant established the existence of complicated pneumoconiosis. For these reasons, employer asserts that the administrative law judge's decision must be vacated and the case remanded for reconsideration.

We agree with employer's assertions in this regard and thus vacate the administrative law judge's Decision and Order on Remand awarding benefits. See *Jessee*, 5 F.3d 723, 18 BLR 2-26; *Nataloni*, 17 BLR 1-82. As employer contends, the administrative law judge has failed to address evidence relevant to the existence of complicated pneumoconiosis. Specifically, the administrative law judge has failed to address a report of Dr. Wheeler reviewing a CT scan on March 9, 1999, in which the physician opined that the results demonstrated tuberculosis with a conglomerate mass, but did not demonstrate complicated pneumoconiosis. Employer's Exhibit 2. Moreover, review of the administrative law judge's opinion demonstrates that the administrative law judge failed to specifically address the majority of x-ray evidence of record, which specifically recognized the existence of calcified granulomatous disease, and simple pneumoconiosis, but noted that claimant did not suffer from complicated pneumoconiosis, Director's Exhibits 11-21, 37, 38, 41. Accordingly, the administrative law judge's Decision and Order awarding benefits must be vacated and the case remanded to the administrative law judge for further consideration of modification. See *Jessee*, 5 F.3d 723, 18 BLR 2-26; *Nataloni*, 17 BLR 1-82.

Section 411(c)(3)(A) of the Act, implemented by Section 718.304(a) of the regulations, provides that there is an irrebuttable presumption of total disability due to

pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). The Fourth Circuit court 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 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*).

With respect to the evidence relevant to Section 718.304 that was specifically considered by the administrative law judge, employer asserts that the administrative law judge erred in according greatest weight to the readings of the March 11, 1998 CT scan by Drs. Navani and Naik as the opinions were equivocal diagnoses of the existence of complicated pneumoconiosis. Employer argues that since Dr. Naik stated that because the abnormalities shown were “suggestive” of pulmonary massive fibrosis, *i.e.*, complicated pneumoconiosis, and because Dr. Navani stated that the “CT appearances are consistent with coal workers pneumoconiosis that approximates to q/r-2/1 A, em, ax, tb[,]” the physicians’ diagnoses of complicated pneumoconiosis are equivocal. Director’s Exhibits 60, 61. Employer also asserts that Dr. Navani did not have a complete history upon which to base his opinion and thus his opinion is not well-supported by underlying documentation.

We reject employer’s assertions in this regard. With respect to the alleged equivocation in the opinions of Drs. Navani and Naik, the administrative law judge acted within his discretion in interpreting the physicians’ statements as a diagnosis of complicated pneumoconiosis, as the terms used by Drs. Navani and Naik did not explicitly indicate that they were uncertain as to the identity of the disease processes observed on the CT scan. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); see also *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In addition, although an administrative law judge may refer to the amount of documentation underlying an opinion in determining its

relative weight, the fact that a medical opinion, here Dr. Navani's opinion, is based upon a smaller pool of data than other opinions of record does not require the administrative law judge to accord the opinion less weight. *See Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Employer also argues that the administrative law judge "effectively ignored" the opinion of Dr. Castle, that claimant did not suffer from complicated pneumoconiosis, but rather had a granulomatous disease such as tuberculosis or histoplasmosis, Employer's Exhibits 6-8, on the basis of the physician having relied primarily upon the findings of Drs. Scott and Wheeler. Review of Dr. Castle's opinion demonstrates that, contrary to the administrative law judge's determination, the physician based his conclusion upon a physical examination, testing, and reviews of the other medical evidence of record. Furthermore, his deposition testimony reflects that his x-ray and CT scan interpretations represent his own professional analysis. *See Employer's Exhibit 8*. Accordingly, we must vacate the administrative law judge's findings discrediting the opinions of Dr. Castle as they mischaracterize the physician's conclusions. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Employer also alleges that the administrative law judge erred in discounting the interpretations of the March 11, 1998 CT scan rendered by Drs. Wheeler and Scott, Employer's Exhibits 2, 4, on the basis of the physicians having rendered earlier negative chest x-ray readings which were "contrary to Judge Barnett's finding that the preponderance of the chest x-ray readings are positive and sufficient to establish the presence of [simple] pneumoconiosis." Decision and Order on Remand at 2.

We agree with employer's assertion. The finding of simple pneumoconiosis pursuant to Section 718.202(a)(1) is not binding upon the administrative law judge during this modification proceeding, *see Betty B Coal Company v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), particularly when, as here, new evidence has been developed pursuant to a request for modification, *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999). Moreover, review of Dr. Wheeler's deposition testimony demonstrates that the physician stated that even if claimant had simple pneumoconiosis, claimant could not have established the presence of complicated pneumoconiosis as the condition of claimant's lungs was consistent with granulomatous disease and not complicated pneumoconiosis. Accordingly we hold that the administrative law judge has failed to provide an affirmable basis for discrediting the opinions of Drs. Wheeler and Scott. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269.

Accordingly, on remand, the administrative law judge must reconsider his determination that the opinions of Drs. Naik and Navani outweigh the contrary medical evidence relevant to Section 718.304.³ In addressing the medical opinions of record, the administrative law judge should again address the explanation of the physicians' conclusions, the documentation underlying their medical judgments and the sophistication and bases of their diagnoses. See *Hicks*, 138 F.3d 524; see also *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1990); *Akers*, 131 F.3d 438, 21 BLR 2-269.

Lastly, employer requests that the case be remanded to a different administrative law judge. Employer's Brief at 29, 40, While we recognize that the administrative law judge has not fully complied with the Board's previous remand instructions, inasmuch as employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. See *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-108 (1992).

³ The administrative law judge's determination that Dr. Naik's opinion is entitled to greater weight as it was "prepared as part of Claimant's ongoing treatment and not in preparation for these proceedings" Decision and Order on Remand at 2, is not valid. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35 (1991); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Thus, on remand, the administrative law judge must reconsider his crediting of this opinion.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed in part, 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

REGINA C. McGRANERY
Administrative Appeals Judge