BRB No. 05-0213 BLA

PETER E. BARBUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLORENCE MINING COMPANY	)	DATE ISSUED: 07/29/2005
	)	
Employer-Respondent	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Julie Ann Roland (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03- BLA-5872) of Administrative Law Judge Daniel L. Leland 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). Claimant filed a subsequent claim on January 22, 2001.[1] Director's Exhibit 3. In a Proposed Decision and Order issued on January 22, 2003, the district director awarded benefits. Employer requested a hearing, which was held on May

[1] Claimant filed two prior claims for benefits on October 15, 1971 and June 22, 1993, respectively. Both claims were denied on the grounds that claimant failed to establish all requisite elements of entitlement. Director's Exhibits 1, 2.

7, 2003. The administrative law judge first considered the new evidence and determined pursuant to 20 C.F.R. §725.309, that claimant established the existence of simple coal workers' pneumoconiosis, an element of entitlement previously adjudicated against him in his prior claims. The administrative law judge then considered all of the record evidence relevant to whether claimant was totally disabled due to pneumoconiosis. The administrative law judge found that claimant failed to establish that he had complicated pneumoconiosis, and therefore, that claimant was unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant failed to establish that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.[2]

Claimant appeals, challenging the administrative law judge's weighing of the evidence relevant to whether he established complicated pneumoconiosis and was entitled to invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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 the instant case, claimant challenges the administrative law judge's determination that he failed to establish the existence of complicated pneumoconiosis and thereby failed to invoke the irrebuttable presumption at 20 C.F.R. §718.304 that he is totally disabled due to pneumoconiosis. After reviewing the administrative law judge's Decision and Order, and the issues and arguments raised by the parties on appeal, we vacate the administrative law judge's findings at 20 C.F.R. §718.304 because he failed to properly explain the weight accorded the conflicting evidence relevant to whether claimant has complicated pneumoconiosis.

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[2] We affirm the administrative law judge's finding that claimant established the existence of simple coal workers' pneumoconiosis at 20 C.F.R. §718.202(a), and his determination that claimant is not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), as those findings are not challenged by any of the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

> 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.[3] *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*). The Board has held that Section 718.304(a)-(c) does not provide alternative means of establishing invocation of the irrebuttable presumption, but rather requires the administrative law judge to first evaluate the evidence in each category, and then weigh together the evidence in the categories at subsections (a)-(c) prior to invocation. *See Melnick,* 16 BLR 1-31.

With respect to Section 718.304(a), the administrative law judge noted that two Board-certified radiologists and B-readers, Drs. Harron and Mital, found Category A

[3] Because claimant's last coal mine employment occurred in the Commonwealth of Pennsylvania, this claim arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

opacities on the December 4, 2000 and February 26, 2001 x-rays respectively, while two other dually qualified readers, Drs. Mathur and Wolfe, along with one B-reader, Dr. Pickerill, did not find any large opacities on those same x-rays. The administrative law judge thus determined that the x-ray evidence failed to "*conclusively* show the presence of complicated pneumoconiosis [emphasis added]". Decision and Order at 7; Claimant's Brief in Support of Petition for Review at 3.

Claimant correctly asserts that the administrative law judge imposed the wrong standard of proof when he weighed the x-ray evidence relevant to the presence of complicated pneumoconiosis. Contrary to the administrative law judge's inquiry, the proper inquiry at Section 718.304(a) is whether claimant is able to establish the existence of complicated pneumoconiosis based on a *preponderance* of the x-ray evidence. *See generally Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986). Because the administrative law judge applied an incorrect standard of proof in evaluating the x-ray evidence for the presence of complicated pneumoconiosis, we vacate his finding at Section 718.304(a).

We also agree with claimant that the administrative law judge erred in his consideration of whether the biopsy evidence established the existence of pneumoconiosis at 20 C.F.R. §718.304(b), *i.e.*, that the biopsy evidence was insufficient to establish the presence of complicated pneumoconiosis. The administrative law judge noted that Dr. Yousem, Perper and Oesterling did not diagnose complicated pneumoconiosis on the biopsy of July 7, 2000. Decision and Order at 7. However, with respect to the June 20, 2001 needle biopsy, the administrative law judge found:

> Although Dr. Perper testified that the June 20, 2001 biopsy demonstrated complicated pneumoconiosis, his testimony was equivocal as he found a strip of tissue that was over one centimeter long rather than a nodule that was more than one centimeter in diameter. It is not clear that Dr. Perper diagnosed a massive lesion that would be seen as one [centimeter] opacity on chest x-ray.

Decision and Order at 7.

Although the administrative law judge has discretion to weigh the evidence, he incorrectly described Dr. Perper's opinion as being equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Claimant's Brief in Support of Petition for Review at 5. We note that Dr. Perper has not made contradictory statements between his various reports and deposition testimony. Dr. Perper repeatedly diagnosed that claimant has masses in his lungs consistent with complicated pneumoconiosis.[4] Dr. Perper explained

[4] An equivalency determination is necessary when there is a question about whether nodules found in the lung upon medical examination (autopsy or biopsy) would

during his deposition how a needle biopsy is performed and that it consists of inserting a needle into an identified nodule and extracting a length of tissue. Dr. Perper testified that, in this case, the needle biopsy was necessary because of a large nodule observed on claimant's May 12, 2001 CT scan and his June 12, 2001 x-ray. Dr. Perper explained that four samples were drawn from the identified nodule and that one sample "showed in at least one dimension [that the nodule had] a diameter of more than one centimeter." May 4, 2004 Deposition Transcript of Dr. Perper at 75. Thus, because Dr. Perper has not provided inconsistent testimony to warrant a finding that his opinion is equivocal, we vacate the administrative law judge's finding at 20 C.F.R. §718.304(b).

On remand, the administrative law judge must fully explain the weight accorded the conflicting x-rays, biopsy evidence, and medical opinions of Drs. Perper, Yousem and Oesterling. In considering the x-ray evidence, the administrative law judge must apply the correct burden of proof. With respect to Dr. Perper, the administrative law judge must specifically decide whether Dr. Perper offered a reasoned and documented opinion that claimant has a massive lesion or nodule demonstrated by the biopsy that would correspond to an opacity viewed on an x-ray as being over one centimeter in diameter, and thereby constituting complicated pneumoconiosis. *See Clites Jones & Louglin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3rd Cir. 1981). 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. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34.

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correspond to opacities viewed on an x-ray indicating complicated pneumoconiosis. *See Clites Jones & Louglin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3rd Cir. 1981).

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge