

BRB No. 08-0617 BLA

J.M.)
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 Claimant-Respondent)
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 v.)
)
 U.S. STEEL MINING COMPANY, LLC/) DATE ISSUED: 05/20/2009
 U.S. STEEL CORPORATION)
)
 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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2005-BLA-5054) of Administrative Law Judge Alice M. Craft 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 This case is before the

¹ Claimant filed his first claim for benefits on May 18, 1994. Director's Exhibit 1-1. The district director denied the claim because claimant did not establish pneumoconiosis and did not establish that he is totally disabled due to pneumoconiosis.

Board for the second time. In her original Decision and Order Granting Benefits, the administrative law judge credited the miner with at least twenty-three years of coal mine employment, and adjudicated this subsequent claim, filed on March 5, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718.² The administrative law judge found a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) based on employer's post-hearing concession that the miner had simple pneumoconiosis, an element of entitlement that was previously adjudicated against him. Considering the claim on the merits, the administrative law judge found that claimant had established simple pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that claimant had established the existence of complicated pneumoconiosis and was entitled to the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §§718.304, 718.204(b)(1). Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's finding regarding length of coal mine employment and her findings pursuant to Sections 718.202(a), 718.203(b), and 725.309(d) as unchallenged on appeal. With respect to the issue of complicated pneumoconiosis, the Board affirmed the administrative law judge's finding that the biopsy reports were outweighed by the more recent x-ray readings pursuant to Section 718.304(b), but vacated the administrative law judge's findings pursuant to Section 718.304(a), and remanded the case for the administrative law judge to take into account the radiological qualifications of the readers. [*J.M.*] v. *U.S. Steel Mining Co.*, BRB No. 06-0818 BLA, slip op. at 6 (May 24, 2007) (unpub.). The Board also vacated the administrative law judge's findings pursuant to Section 718.304(c), and instructed her to separately weigh all medical opinions thereunder on remand, taking into consideration the qualifications of the physicians, *id.* at 7, and then to weigh all the evidence together before determining whether complicated pneumoconiosis was established at Section 718.304. *Id.* at 8.

Director's Exhibit 1-27. Claimant subsequently requested a formal hearing before an administrative law judge, but did not appear at the hearing despite being given notice of it. February 11, 1999 Hearing Transcript at 3. Administrative Law Judge Edward Terhune Miller issued an order on April 8, 1999 dismissing the miner's claim due to his "unexcused failure to appear at a scheduled hearing and for failure to prosecute." Order of Dismissal dated April 8, 1999. Claimant took no further action on the claim. Director's Exhibit 1.

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

On remand, the administrative law judge found the x-ray evidence of record insufficient to support a finding of complicated pneumoconiosis at Section 718.304(a), and reinstated her prior finding that the biopsy evidence of record was insufficient to support a finding of complicated pneumoconiosis at Section 718.304(b). Decision and Order on Remand at 15. The administrative law judge found, however, that the opinion of Dr. Forehand was sufficient to establish complicated pneumoconiosis pursuant to Section 718.304(c), and that the weight of the evidence in all categories together was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's finding of complicated pneumoconiosis at Section 718.304, and the resultant finding of total disability due to pneumoconiosis pursuant to Section 718.204(b)(1). Claimant responds, urging affirmance of the award of benefits. The Director has declined to file a brief in this case.

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

Section 411(c)(3) of the Act, implemented by Section 718.304 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); 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 Section 718.304. 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 *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Pursuant to Section 718.304(a), the administrative law judge reviewed the x-ray evidence of record and determined that the June 16, 1995 x-ray was interpreted as

positive for complicated pneumoconiosis by three Board-certified radiologists and B readers, Drs. Ahmed, Aycoth, and Cappiello, and by one B reader, Dr. Ranavaya, but was read as negative for complicated pneumoconiosis by two Board-certified radiologists and B readers, Drs. Cole and Franke. Director's Exhibits 1-14, 1-15, 1-16, 1-26. Based on a numerical preponderance of the dually qualified physicians, the administrative law judge concluded that this film supported a finding of complicated pneumoconiosis. Decision and Order on Remand at 13. However, as the April 16, 2003 x-ray was interpreted by one B reader, Dr. Forehand, as positive for complicated pneumoconiosis, but was interpreted as negative for complicated pneumoconiosis by two dually qualified physicians, Drs. Baek and Binns, Director's Exhibits 17, 31; Employer's Exhibit 2, the administrative law judge concluded that this film was insufficient to support a finding of complicated pneumoconiosis. Decision and Order on Remand at 14. Similarly, as the January 8, 2005 x-ray was interpreted as positive for complicated pneumoconiosis by one dually qualified physician, Dr. DePonte, Claimant's Exhibit 1, but negative for complicated pneumoconiosis by two dually qualified physicians, Drs. Abramowitz and Binns, Employer's Exhibits 1, 3, the administrative law judge concluded that this film was insufficient to support a finding of complicated pneumoconiosis. *Id.* The administrative law judge permissibly found, therefore, that claimant failed to establish the presence of complicated pneumoconiosis based on the x-ray evidence of record, as only the earliest x-ray, taken in 1995, constituted evidence of the disease. Decision and Order on Remand at 15; *see Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Accordingly, we affirm the administrative law judge's findings pursuant to Section 718.304(a), as supported by substantial evidence.

At Section 718.304(c), the administrative law judge accurately reviewed the relevant medical opinion evidence of record, consisting of Dr. Forehand's report and deposition testimony, as well as Dr. Piracha's treatment notes.³ Dr. Forehand examined claimant on April 16, 2003, and opined that claimant had a significant respiratory impairment due to his x-ray changes of simple and complicated pneumoconiosis with Category A opacities and a 2x2 cm density in the left lower lung. Dr. Forehand suggested that claimant undergo a CT scan to rule out pulmonary density and

³ The administrative law judge found Dr. Ranavaya's 1995 diagnosis of coal workers' pneumoconiosis with Category A opacities to be unreasoned, and Dr. Frey's 1995 diagnosis of simple coal workers' pneumoconiosis to be undocumented. The administrative law judge further found these opinions to be "too remote in time to cast much light on claimant's current condition." Decision and Order on Remand at 16; Director's Exhibit 1-12, 1-16, 1-24.

malignancy.⁴ Director's Exhibit 14. In his deposition, Dr. Forehand testified that his diagnosis of complicated pneumoconiosis was additionally based on his physical examination of claimant, as well as claimant's work history that put the miner at extremely high risk. Dr. Forehand testified that the density observed on x-ray was not cancer because it had not changed in size, and because claimant did not have a history of weight loss. He further stated that the density was not caused by an infection because claimant did not have a fever. Director's Exhibit 34 at 11. Dr. Piracha, claimant's treating physician, followed claimant for pneumoconiosis, chronic obstructive pulmonary disease, osteoarthritis, and hypertension from November 26, 2002 through February 24, 2005. On November 26, 2002, Dr. Piracha stated that a CT scan of claimant's chest showed pneumoconiosis but no evidence of any malignancy. Claimant's Exhibit 2.

Employer contends that the administrative law judge erred in relying on the third prong of Section 718.304, as that prong does not open the door for a finding of complicated pneumoconiosis via a medical report when the underlying objective basis for the report has been discredited. Specifically, employer argues that Dr. Forehand's opinion is not reasoned, as the physician based his diagnosis of complicated pneumoconiosis on his own positive x-ray reading, contrary to the administrative law judge's finding that the x-ray in question, as well as the weight of the x-ray evidence as a whole, was insufficient to establish complicated pneumoconiosis. Employer's Brief at 7-9. Employer's argument has merit.

In considering the medical opinion evidence of record, the administrative law judge noted that Dr. Forehand was the only physician who offered a diagnosis of complicated pneumoconiosis. The administrative law judge acknowledged that Dr. Forehand was a Board-certified allergist and pediatrician rather than a pulmonologist, but acted within her discretion in finding that Dr. Forehand was well-qualified to render an opinion, as he testified that he has been treating coal miners and examining them on behalf of the Department of Labor since he qualified as a B reader in 1992, and has examined between 3000 to 4000 miners. Decision and Order on Remand at 16-17. While the administrative law judge found Dr. Forehand's opinion to be undermined by her finding that the x-ray evidence of record was insufficient to establish invocation at Section 718.304(a), she nonetheless found that Dr. Forehand's opinion was well-reasoned and documented because "he based his diagnosis of complicated pneumoconiosis on claimant's work history, the physical examination, the findings of crackles in the lungs,

⁴ A CT scan was performed on January 21, 2004, but was not admitted into evidence. Director's Exhibit 34 at 19-20. The CT scan performed in 2002 that was referred to in the treatment records was also not admitted into evidence. Decision and Order on Remand at 10.

and the changes on x-ray.”⁵ Decision and Order on Remand at 17. The administrative law judge found Dr. Forehand’s conclusion, that the 2 cm density on x-ray was a conglomerate of complicated pneumoconiosis, to be persuasive and sufficient to support a finding of complicated pneumoconiosis under the third prong of Section 718.304, as the doctor was able to rule out infection and cancer. *Id.*

In reviewing all the evidence of record together, the administrative law judge found the evidence from the initial claim to be of little assistance in determining claimant’s current condition, as it was too remote in time. Decision and Order on Remand at 18. Noting that the x-ray and the biopsy evidence did not support a finding of complicated pneumoconiosis under the first and second prongs of Section 718.304, the administrative law judge found, nonetheless, considerable evidence in the record to support Dr. Forehand’s opinion under the third prong. The administrative law judge credited the facts that all of the x-ray interpretations since 2002 referenced the 2-3 cm density in the left lung,⁶ and that Dr. Ahmed, a treating physician, opined that x-ray changes could be related to pneumoconiosis and possible progressive massive fibrosis. The administrative law judge further noted that the treatment records reflected that Dr. Piracha diagnosed pneumoconiosis from a CT scan, but found no evidence of malignancy and continued to treat claimant for pneumoconiosis and not cancer; and that the x-ray findings over time from claimant’s treatment records support Dr. Forehand’s diagnosis of complicated pneumoconiosis. Decision and Order on Remand at 18.

⁵ Dr. Forehand stated that his diagnosis of complicated pneumoconiosis was based on “claimant’s work history, physical examination, findings of crackles in the lungs, and *the chest x-ray.*” Director’s Exhibit 34 at 4, 10 (emphasis added). Dr. Forehand examined claimant once, and did not review any other x-ray interpretations of record.

⁶ Except for Dr. Forehand, all of the readers who classified the x-rays interpreted them as showing possible cancer or neoplasm (either a benign or malignant tumor). Drs. Cole and Franke noted probable or possible metastases of the left lung on the June 16, 1995 x-ray. Director’s Exhibits 1-14, 1-15. The remaining readers of that x-ray, Drs. Ahmed, Aycoth, Cappiello, and Ranavaya, also noted a possible neoplasm in the left lung. Director’s Exhibit 1-16, 1-26. Regarding the April 16, 2003 x-ray, Drs. Baek and Binns indicated that the possibility of a neoplasm could not be excluded. Director’s Exhibit 31, Employer’s Exhibit 2. Regarding the January 12, 2005 x-ray, Dr. DePonte stated that the 2.5 cm opacity . . . is unchanged from February 10, 2004. . .[t]he stability speaks for benignity, however this should be followed for at least two years to confirm.” Claimant’s Exhibit 1. Drs. Abramowitz and Binns stated that a neoplasm cannot be excluded. Employer’s Exhibits 1, 3.

We agree with employer's argument that Dr. Forehand's medical opinion cannot support a finding of complicated pneumoconiosis at Section 718.304(c). Because Dr. Forehand's underlying positive x-ray interpretation was discredited, there was no other means of diagnosis, coupled with the necessary equivalency finding, as required by *Scarbro*, 220 F.3d 250, 22 BLR 2-93, to support a finding of complicated pneumoconiosis. See 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Furthermore, stability of the density shown on x-ray over time, and the lack of treatment for cancer, do not affirmatively establish the existence of complicated pneumoconiosis, especially where, as here, Dr. DePonte suggested that the stability could represent a benign tumor. Claimant's Exhibit 1. Consequently, we must reverse the administrative law judge's finding of complicated pneumoconiosis at Section 718.304. Further, as substantial evidence supports the administrative law judge's finding that, if complicated pneumoconiosis were not established, the evidence of record was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2),⁷ Decision and Order on Remand at 11, we affirm her findings thereunder and reverse the award of benefits.

⁷ The administrative law judge determined that the pulmonary function studies and blood gas studies of record were essentially normal; that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record; that Dr. Frey's questionnaire was undocumented; and that Dr. Forehand's finding of total disability was based on the significant changes seen on x-ray. Decision and Order on Remand at 11, 16.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed in part and reversed in part, and the award of benefits is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge