BRB No. 11-0483 BLA

ROBERT L. GIBSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALEX ENERGY INCORPORATED	)	
	)	DATE ISSUED: 04/19/2012
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 (2009-BLA-5604) of Administrative Law Judge Ralph A. Romano, granting modification of the denial of a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). In her original decision, issued on April 2, 2008, Administrative Law Judge Janice K. Bullard accepted the parties' stipulation to

thirty-five years of coal mine employment, and adjudicated the claim pursuant to the provisions at 20 C.F.R. Part 718. Judge Bullard denied benefits, finding that the evidence was sufficient to establish the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a), but insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b).

On August 8, 2008, claimant filed a timely request for modification. Following employer's request for a hearing, the case was assigned to Judge Romano (the administrative law judge), whose Decision and Order, issued on March 23, 2011, is the subject of this appeal. The administrative law judge found that a preponderance of the evidence submitted in support of modification, considered in conjunction with the previously submitted evidence, established the existence of both simple and complicated pneumoconiosis. Thus, the administrative law judge concluded that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant established a mistake in a determination of fact and a basis for modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were awarded, commencing as of November 2008.

On appeal, employer challenges the administrative law judge's weighing of the medical evidence of record in finding complicated pneumoconiosis and a mistake in a determination of fact established. Employer also asserts that the administrative law judge failed to properly consider whether granting claimant's modification request would render justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that allowing modification will not render justice under the Act.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence is sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but insufficient to establish complicated pneumoconiosis by biopsy evidence pursuant to 20 C.F.R. §718.304(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. Hearing Transcript at 16; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

In the present case, the administrative law judge determined that claimant established a mistake in a determination of fact by establishing the existence of complicated pneumoconiosis. Decision and Order at 14. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability, or death, due to pneumoconiosis if the miner suffered 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. The introduction of 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). The burden of establishing that the large opacities, as defined at Section 718.304, are due to coal mine dust exposure, rests with claimant. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18.

Pursuant to Section 718.304(a), the administrative law judge considered fourteen interpretations of five x-rays dated June 16, 2005; September 14, 2005; March 20, 2006; June 12, 2007; and November 11, 2008. Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, read the June 16, 2005 x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, Category B, Claimant's Exhibit 2, while Dr. Wheeler, also dually qualified, read the film as negative for both simple and complicated pneumoconiosis, while noting large masses compatible with granulomata, the largest measuring 6 cm. Director's Exhibit 44.

The September 14, 2005 x-ray was read as positive for simple pneumoconiosis and complicated pneumoconiosis, Category B, by Dr. Rasmussen, a B reader, Director's Exhibit 15, and by Dr. Alexander, who is dually qualified. Claimant's Exhibit 1. Dr. Scatarige, who is dually qualified, read the film as negative for simple and complicated pneumoconiosis, but noted that the x-ray revealed a large 5 cm mass of possible cancer or tuberculosis. Dr. Wheeler, also dually qualified, read the x-ray as negative for simple and complicated pneumoconiosis and identified large masses compatible with granulomata. Director's Exhibit 44.

Dr. Willis, who is dually qualified, read the March 20, 2006 x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, Category B, Director's Exhibit 43, while Dr. Wheeler read the film as negative for simple and complicated pneumoconiosis, noting masses of granulomata. Director's Exhibit 44.

The June 12, 2007 x-ray was read as positive for simple pneumoconiosis and complicated pneumoconiosis by two dually qualified physicians. Dr. Miller classified the large opacities as Category B, Director's Exhibit 43, while Dr. Ahmed classified them as Category A, Director's Exhibit 43. Dr. Wheeler read the x-ray as negative for simple and complicated pneumoconiosis, and noted 5-6 cm masses compatible with conglomerate granulomatous disease, histoplasmosis or tuberculosis. Dr. Scatarige also read the x-ray as negative for simple pneumoconiosis and complicated pneumoconiosis, and identified masses compatible with conglomerate tuberculosis or histoplasmosis. Director's Exhibit 44.

The November 11, 2008 x-ray was read as positive for simple and complicated pneumoconiosis, Category B, by Dr. DePonte, a dually qualified physician, Director's Exhibit 53, and as negative for simple and complicated pneumoconiosis by Dr. Wheeler, who noted masses, the largest being 5 cm, compatible with conglomerate granulomatous disease. Employer's Exhibit 2.

In weighing the x-ray evidence at 20 C.F.R. §718.304(a), the administrative law judge accorded greater weight to the dually qualified readers, and determined that the x-rays dated June 16, 2005, September 14, 2005, and June 12, 2007 were in equipoise, based on the conflicting interpretations by readers with equal qualifications. Decision and Order at 9. Because Dr. Willis did not provide an I.L.O. classification with his report, the administrative law judge accorded greater weight to Dr. Wheeler's negative interpretation, and determined that the March 20, 2006 x-ray was negative for pneumoconiosis. *Id*. However, the administrative law judge found that, "notwithstanding his impressive credentials,"[3] Dr. Wheeler's interpretation of the

[3] Dr. Wheeler is an associate professor of radiology at Johns Hopkins Medical Institutions. Director's Exhibit 44.

November 11, 2008 x-ray was equivocal and, based on Dr. DePonte's positive interpretation, concluded that this x-ray was positive for simple and complicated pneumoconiosis. The administrative law judge stated:

> Dr. Wheeler's comments do not explain the question marks he placed on his I.L.O. form. In particular, the question in box 2A directs the physician to answer further questions regarding small and large opacities if they answer yes to the question regarding abnormalities consistent with pneumoconiosis; Dr. Wheeler's equivocal answer regarding the threshold question calls his entire simple and complicated pneumoconiosis opinions into doubt.

Decision and Order at 8-9. Noting that application of the "later evidence" rule[4] is appropriate in cases where, given the progressive and irreversible nature of pneumoconiosis, later positive x-rays are not inconsistent with earlier negative x-rays, the administrative law judge accorded determinative weight to the November 11, 2008 x-ray, finding it to be "consistent with the earlier studies, of which none established pneumoconiosis," Decision and Order at 10. Thus, the administrative law judge concluded that the weight of the x-ray evidence established both simple and complicated pneumoconiosis at Sections 718.202(a)(1), 718.304(a). *Id.* The administrative law judge then determined that the biopsy evidence and the other relevant evidence of record, including CT scans, medical opinions and treatment records, did not establish complicated pneumoconiosis at Section 718.304(b) or (c). Decision and Order at 11-13. Finding that the positive interpretation of the November 11, 2008 x-ray at Section 718.304(a) outweighed the remaining evidence, the administrative law judge concluded that claimant established invocation of the irrebuttable presumption at Section 718.304, and a mistake in a determination of fact under Section 718.310. Decision and Order at 13, 14.

Upon consideration of the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's finding of complicated pneumoconiosis cannot be affirmed. We agree with employer that the administrative law judge failed to fully consider Dr. Wheeler's comments regarding the November 11, 2008 x-ray, and misapplied the later evidence rule, as the x-ray evidence does not show a progression of disease. Rather, large masses have consistently been noted on all of claimant's x-rays,

[4] The United States Court of Appeals for the Fourth Circuit has held that the crediting of later evidence may be appropriate where the evidence, on its face, shows that the miner's condition has worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).

and the interpretations have not indicated that these masses have changed in size over the years. Contrary to the administrative law judge's analysis, while Dr. Wheeler placed a question mark after the form query, "Any Parenchymal abnormalities consistent with Pneumoconiosis?," and another question mark under Section 2B.b., "Small Opacities" and "Zones," he specifically marked the I.L.O. classification form as showing a 0/1 profusion of small q-shaped opacities, and found Category 0 large opacities. In his comments, Dr. Wheeler explained, with regard to the small opacities, that he observed "subtle small nodules in left mid and upper lung and possibly in lateral right mid lung compatible with granulomata from histoplasmosis more likely than TB or CWP." Dr. Wheeler reported other abnormalities as follows:

> 5 cm mass right hilum and adjacent right mid lung, 4 cm mass LUL and probably involving upper lateral left hilum, 2 cm ill defined MAA lower lateral RUL or lateral superior segment RLL and probable 2 cm mass lower left apex all compatible with conglomerate granulomatous disease: histoplasmosis more likely than TB or mycobacterium avium complex (MAC).

Employer's Exhibit 2. Because Dr. Wheeler unequivocally opined that the November 11, 2008 x-ray did not show any large opacities of complicated pneumoconiosis, and because application of the "later evidence" rule is not appropriate on this record, we vacate the administrative law judge's finding of complicated pneumoconiosis under Section 718.304(a), and remand this case for a reassessment of the evidence thereunder. Moreover, as the administrative law judge's weighing of the x-ray evidence affected his credibility determinations in weighing the medical opinions at Section 718.304(c),[5] we vacate the administrative law judge's finding of complicated pneumoconiosis at Section 718.304, and his finding of a mistake in a determination of fact under Section 725.310, and remand this case for further findings.

[5] The administrative law judge accorded little weight to the opinions of Drs. Crisalli and Wheeler, that claimant does not have complicated pneumoconiosis, because he found that "the November 11, 2008 x-ray discredits their opinions." Decision and Order at 12. Similarly, the administrative law judge discounted Dr. Spagnolo's opinion, that claimant does not have complicated pneumoconiosis, on the ground that the physician did not address Dr. DePonte's positive interpretation of the November 11, 2008 x-ray. Decision and Order at 11-12. Lastly, the administrative law judge accorded little weight to the opinion of Dr. Rasmussen, that claimant has complicated pneumoconiosis, as it was based on a positive interpretation of the September 14, 2005 x-ray, which the administrative law judge found to be negative for pneumoconiosis. Decision and Order at 12.

On remand, in considering whether claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must consider the evidence under each category at Section 718.304(a) and (c) separately, consistent with this decision, and then weigh all relevant evidence together and resolve the evidentiary conflicts. The administrative law judge is instructed to assess the probative value of the medical opinions in light of the physicians' supporting documentation and reasoning, and the record as a whole. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). If the administrative law judge finds that claimant has established the existence of complicated pneumoconiosis under Section 718.304, and a mistake in a determination of fact under Section 725.310, he must also determine whether granting modification would render justice under the Act. *See Sharpe v. Director, OWCP*, 495 F.3d 125, 130-131, 24 BLR 2-56, 2-70-71 (4th Cir. 2007). In the event that the administrative law judge concludes that invocation under Section 718.304 has not been established, he must consider whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)[6] and, if so, whether employer has satisfied its burden on rebuttal by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

[6] Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

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.

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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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BETTY JEAN HALL
Administrative Appeals Judge