BRB No. 00-1085 BLA

EMORY A. WADE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: _____
GARDEN CREEK POCAHONTAS COMPANY	)	
	)	
	)	
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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (1999-BLA-0205) of Administrative Law Judge Daniel F. Sutton rendered 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).[1] Claimant filed his application for benefits on October 7, 1991, Director's Exhibit 1, and the District Director of the Office of Workers' Compensation Programs denied benefits. Following a hearing, Administrative Law Judge Joan Huddy Rosenzweig credited claimant with thirty years of coal mine employment and found that although the chest x-ray evidence of record established the existence of simple pneumoconiosis arising out of coal mine employment, the chest x-rays, CT scans, and medical opinions did not establish the existence of complicated pneumoconiosis. Director's Exhibit 102. Judge Rosenzweig therefore concluded that claimant did not establish invocation of the irrebuttable presumption that he was totally disabled due to pneumoconiosis. Because claimant did not establish invocation of the irrebuttable presumption, Judge Rosenzweig considered whether claimant proved by a preponderance of the evidence that he suffered from a totally disabling respiratory or pulmonary impairment, and found that claimant did not prove that he was disabled. Accordingly, Judge Rosenzweig denied benefits.

Upon consideration of claimant's appeal, the Board affirmed Judge Rosenzweig's finding that claimant did not prove that he was totally disabled, but vacated Judge Rosenzweig's finding that the existence of complicated pneumoconiosis was not established and remanded the case for her to reconsider the x-rays, CT scans, and medical opinions and determine whether complicated pneumoconiosis was established pursuant to 20 C.F.R. §718.304. *Wade v. Garden Creek Pocahontas Co.*, BRB No. 94-2583 BLA (Mar. 30, 1995)(unpub.); Director's Exhibit 109. On remand, Judge Rosenzweig

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

reweighed the evidence and found that it did not establish the existence of complicated pneumoconiosis. Director's Exhibit 110. Accordingly, she denied benefits.

Upon consideration of claimant's appeal, the Board affirmed Judge Rosenzweig's Decision and Order denying benefits as supported by substantial evidence and in accordance with law. *Wade v. Garden Creek Pocahontas Co*., BRB No. 96-1222 BLA (Jun. 20, 1997)(unpub.); Director's Exhibit 117. Thereafter, claimant timely filed a petition for modification with the District Director pursuant to 20 C.F.R. §725.310, alleging that the denial of benefits was a mistake. Director's Exhibit 121.

In support of claimant's position that a mistake of fact was made, he submitted new chest x-ray reports, some of which reported the presence of Category A large opacities, and additional rereadings of the two CT scans of record. Director's Exhibits 125, 128, 129, 131, 133, 142; Claimant's Exhibit 31. Claimant also submitted the reports and treatment notes of Dr. J. Randolph Forehand diagnosing claimant totally disabled due to simple coal workers' pneumoconiosis. Director's Exhibit 133; Claimant's Exhibits 22, 25, 32. Employer responded with the x-ray and CT scan reports of several physicians who diagnosed claimant with only simple pneumoconiosis, and who opined that the lesions seen on his chest x-rays and CT scans were not complicated pneumoconiosis but were instead scars of healed tuberculosis or histoplasmosis. Director's Exhibits 144, 145; Employer's Exhibits 1, 3, 4, 6, 7, 13-15. Employer also submitted the medical opinions of several physicians who either examined claimant, reviewed the medical evidence, or both, and concluded that claimant does not have complicated pneumoconiosis but has simple pneumoconiosis, and is not totally disabled by a respiratory impairment but is totally disabled by cardiac disease. Director's Exhibit 145; Employer's Exhibits 2, 4, 8, 9-11, 15. An additional physician who reviewed the medical evidence at the request of the Department of Labor concluded that claimant does not have complicated pneumoconiosis, but has simple pneumoconiosis and is totally disabled by cardiac disease. Director's Exhibit 147.

The District Director denied modification and claimant requested a formal hearing, which was held on March 4, 1999 by Administrative Law Judge Daniel F. Sutton. In his Decision and Order, the administrative law judge found that the weight of the chest x-ray evidence established the existence of simple pneumoconiosis, but did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The administrative law judge found, however, that a preponderance of the CT scan readings established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). In making this finding, the administrative law judge noted briefly that the multiple medical opinions that claimant does not have complicated pneumoconiosis "[were] not probative in determining the presence of complicated pneumoconiosis at [S]ection 718.304(c)," because the physicians did not view the actual CT scans. Decision and Order at 15 n.6. In addition, the administrative law judge found

that the CT scan evidence was not undercut by the "inconclusive" x-ray evidence. Decision and Order at 16. Having determined that the evidence established the existence of complicated pneumoconiosis, the administrative law judge found that there was a mistake of fact in the prior decision denying benefits, and concluded further that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in considering Dr. Alexander's reading of an August 19, 1996 chest x-ray. Employer further asserts that the administrative law judge did not properly weigh all of the relevant evidence before determining that the existence of complicated pneumoconiosis was established pursuant to 20 C.F.R. §718.304, and did not explain his conclusion that a mistake of fact was demonstrated pursuant to 20 C.F.R. §725.310. Claimant responds, urging affirmance of the award of benefits, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.310 that the administrative law judge has the authority to consider all of the evidence on modification to determine whether there has been a mistake in a determination of fact, including the ultimate fact of

[2] We affirm as unchallenged on appeal the administrative law judge's findings that the chest x-ray evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the chest x-rays, standing alone, did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *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).

entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

A review of the hearing transcript indicates that employer objected to the admission of Dr. Alexander's Category A, large opacity reading of the August 19, 1996 chest x-ray proffered by claimant, Director's Exhibit 129, because the original film was not furnished to employer despite employer's requests for the film. Tr. at 6-9. Apparently, the original film was lost after claimant's attorney returned it to the Holston Valley Hospital and Medical Center. The administrative law judge deferred ruling on employer's objection pending another search by claimant's counsel for the August 19, 1996 x-ray film, and left the record open for employer to submit post-hearing rereadings of that film, if it was found. On August 19, 1999, employer renewed its objection, reporting that it had not been furnished with the original film, and moved that Dr. Alexander's reading be stricken from the record. By order issued January 11, 2000, the administrative law judge overruled employer's objection on the grounds that claimant was not at fault for the loss of the original film, and ruled further that employer would have the opportunity to depose Dr. Alexander. Employer maintained that Dr. Alexander's reading should not be admitted into evidence, but nevertheless deposed Dr. Alexander and submitted the transcript. Employer's Exhibit 17.

The administrative law judge in his Decision and Order found that Dr. Alexander's Category A reading of the August 19, 1996 chest x-ray and the other x-ray readings did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), but concluded that when the x-rays and CT scans were "considered together, it is apparent that the category A complicated pneumoconiosis classifications made by Drs. Bassali, Aycoth and Alexander are more credible than the conflicting interpretations. . . ." Decision and Order at 16. Employer contends that the administrative law judge violated employer's due process rights by relying on Dr. Alexander's August 19, 1996 chest x-ray reading to invoke an irrebuttable presumption, when employer never had the opportunity to have the original film reread.

We need not engage in a due process analysis or attempt to determine the extent of the administrative law judge's reliance on Dr. Alexander's reading of the August 19, 1996 chest x-ray to resolve this issue. The pertinent regulation, 20 C.F.R. §718.102(d), provides that in a living miner's claim, a chest x-ray report "shall be considered as evidence *only if the original film is otherwise available to the Office and other parties*." 20 C.F.R. §718.102(d)(emphasis supplied). Only in a deceased miner's claim is an x-ray report unaccompanied by the original film to be considered as evidence. *Id*. This is a living miner's claim in which the original film of the August 19, 1996 chest x-ray was not available to employer. Because we must remand this case for the administrative law judge to reweigh the medical evidence relevant to the existence of complicated pneumoconiosis, *see* discussion, *infra*, the administrative law judge on remand should

comply with Section 718.102(d) by either striking Dr. Alexander's reading of the August 19, 1996 x-ray from the record or by simply disregarding it.

Employer contends that the administrative law judge did not properly weigh the evidence in finding that claimant established the existence of complicated pneumoconiosis. 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, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, --- BLR --- (4th Cir. 1999). Additionally, 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*).

Here, as employer contends, the administrative law judge found that a preponderance of the CT scan readings established the existence of complicated pneumoconiosis, but did not make the "equivalency determination as required by the statute." *Blankenship*, 177 F.3d at 244, --- BLR at ---. Consequently, "[t]o determine whether [claimant's] condition meets the statutory criteria," we must vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.304(c) and remand this case for the administrative law judge to find whether the lesions described on the CT

scans, would, if seen on a conventional chest x-ray, show as greater-than-one-centimeter opacities.[3] *Id*.

Employer argues further that the administrative law judge did not fully address the contrary evidence presented in the opinions of Drs. Jarboe, Castle, Michos, Sargent, Fino, Dahhan, Spagnolo, and Morgan when he found that their opinions were "not probative in determining the presence of complicated pneumoconiosis at [S]ection 718.304(c)." Decision and Order at 15 n.6. Medical opinions by physicians who have examined claimant and reviewed the medical evidence of record constitute probative evidence at Section 718.304(c), *see Lester, supra*; *Melnick, supra*; it is for the administrative law judge to determine the weight to be accorded such evidence. However, it is unclear from the administrative law judge's brief finding whether he completely rejected the medical opinions as non-probative, or merely gave them less weight. In order to address this concern, when weighing the medical evidence on remand, the administrative law judge should address the comparative credentials of the respective physicians, the explanations of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.[4] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

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[3] The physicians who read the October 29, 1991 and June 29, 1992 CT scans described lesions of varying sizes, as follows: October 19, 1991 CT scan--Director's Exhibit 48 ("1.5 x 1.5 cm"), Director's Exhibit 128 ("13 mm"), Director's Exhibit 142 ("1.5 cm."), Employer's Exhibit 3 ("1 cm"). June 29, 1992 CT scan--Director's Exhibit 72 ("16 mms."), Director's Exhibit 128 ("13 mm"), Employer's Exhibit 6 ("1 cm"). Drs. Aycoth and Alexander further classified these lesions as "Category A" opacities. Director's Exhibits 128, 142. However, Dr. Jarboe, a B-reader, testified that the ILO x-ray classification standards do not transfer to CT scans, in part because "a one centimeter nodule on CT scanning . . . if you could see that on a plain chest film, would not be considered complicated pneumoconiosis because it wouldn't be one centimeter." Employer's Exhibit 10 at 23-24. Dr. Jarboe explained that a nodule seen on a CT scan is larger than it would appear on a standard chest x-ray, and is closer to the size that it would be if seen on autopsy examination. Employer's Exhibit 10 at 27-28.

[4] Contrary to claimant's contention, the administrative law judge did not abuse his discretion in admitting Dr. Castle's examination report and test results into the record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). The administrative law judge considered claimant's allegation that a technician utilized by Dr. Castle lacked an appropriate license in Virginia, but reasonably concluded that the evidence need not be excluded, as "[i]t is for the medical physicians who review the procedure and test results," to determine whether the tests are reliable. Decision and Order at 4.

In sum, we remand this case for the administrative law judge to determine whether the CT scan readings establish the existence of complicated pneumoconiosis in accordance with *Scarbro, supra*; *Blankenship, supra*, and then to weigh together all of the evidence to determine whether the existence of complicated pneumoconiosis is established.[5] *See Lester, supra*; *Melnick, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[5] In the event that the administrative law judge finds the existence of complicated pneumoconiosis established, employer's contention that the administrative law judge must also identify a specific factual error by Judge Rosenzweig before he can find a mistake of fact under 20 C.F.R. §725.310 lacks merit. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28 (modification authority extends to whether the ultimate fact was wrongly decided).