BRB No. 09-0761 BLA

HERMAN PECK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIUM ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	DATE ISSUED: 08/11/2010
	)	
Employer/Carrier- Petitioners	)	
	)	
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (07-BLA-5079) of Administrative Law Judge Linda S. Chapman (the administrative law judge) rendered on 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). This case is before the Board for the second time.

In the initial decision, after crediting claimant with twenty-seven years of coal mine employment,[1] the administrative law judge determined that the existence of simple pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (2). The administrative law judge, however, further found that the evidence established the existence of complicated pneumoconiosis arising out of coal mine employment, thereby entitling claimant to the irrebuttable presumption that he was totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's findings that claimant established complicated pneumoconiosis. The Board held that the administrative law judge failed to apply the proper standard in weighing the x-ray, computerized tomography (CT) scan, and medical opinion evidence as to the existence of complicated pneumoconiosis, and further erred in failing to consider the medical opinions that claimant did not suffer from a pulmonary impairment. *H.P.* [*Peck*] *v. Premium Energy, Inc.*, BRB No. 07-0787 BLA and 07-0787 BLA-S (Dec. 18, 2008)(unpub.). Consequently, the Board remanded the case for the administrative law judge to maintain the burden of proof on claimant, and to consider all relevant evidence prior to invocation of the irrebuttable presumption at 20 C.F.R. §718.304. *Peck*, slip op. at 4-8. The Board instructed the administrative law judge to first determine whether the relevant evidence in each category under 20 C.F.R. §718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then weigh the evidence at subsections (a), (b), and (c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. The Board further instructed the administrative law judge, in weighing the evidence together, to interrelate the evidence, considering whether evidence from one category supports or undercuts evidence for other categories, and to determine whether the opacities seen are related to a chronic dust disease of the lung, arising out of claimant's coal mine employment. *Peck*, slip op. at 8-9.

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[1] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

On remand, the administrative law judge again found that the evidence established invocation of the irrebuttable presumption at Section 718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge failed to comply with the Board's instructions and again improperly shifted the burden of proof to employer to rule out complicated pneumoconiosis. Employer further asserts that the administrative law judge erred in her analysis of the x-ray, CT scan, and medical opinion evidence relevant to the existence of complicated pneumoconiosis, and failed to validly explain her credibility determinations. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), declined to file a brief in this appeal.

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 establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 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 that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit 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, 22 BLR 2-554, 2-561-62 (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 2-1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Employer contends that the administrative law judge failed to follow the Board's remand instructions and improperly placed the burden of proof on employer "to establish [that] the abnormalities demonstrated on the miner's x-ray films did not arise from coal dust exposure." Employer's Brief at 6. Employer's argument has merit.

On remand, the administrative law judge initially considered whether claimant had established a condition of such severity that it would produce one or more opacities greater than one centimeter in diameter on x-ray. Finding that all of the physicians who reviewed claimant's x-rays[2] agreed that claimant has large masses in his lungs, and that

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[2] The record contains five interpretations of a March 9, 2006 x-ray. Dr. Alexander, a B reader and Board-certified radiologist, read this film as 1/2 r, r, and Category A. Director's Exhibit 13. Dr. Rasmussen, a B reader, read this film as 1/1 r, r, and Category A. Director's Exhibit 11. Dr. Wheeler, a B reader and Board-certified radiologist, read the film as 0/1 t, q, and as "O", or negative for large opacities. He noted several masses and nodular infiltrates in the miner's lungs and commented that they were compatible with conglomerate granulomatous disease, tuberculosis, and histoplasmosis. Dr. Wheeler also commented:

> CWP is unlikely because pattern is asymmetrical, involving pleura and small nodules are in lateral left mid and upper lung. CWP typically gives symmetrical small nodular infiltrates in central mid and upper lungs. Mass in RUL is not a large opacity of CWP because any background nodules are low profusion and it involves lateral pleura which has no alveoli.

Employer's Exhibit 1. Dr. Scott, a B reader and Board-certified radiologist, read this film as negative for pneumoconiosis and noted "infiltrates and/or fibrosis" in the upper lungs, and calcified granulomata, and opined that the changes "are probably due to [tuberculosis], unknown activity. . . ." Employer's Exhibit 2. Dr. Scatarige, also a B reader and Board-certified radiologist, interpreted this film as negative for pneumoconiosis. He identified a mass in claimant's lung that he believed was due to tuberculosis, and he stated "No small, round, symmetrical opacities to suggest CWP or silicosis." Employer's Exhibit 2. This film was also read as quality "2" by Dr. Navani. Director's Exhibit 12.

three of the physicians diagnosed Category A or B complicated pneumoconiosis, the administrative law judge determined that claimant established the existence of an opacity measuring greater than one centimeter on x-ray. Decision and Order on Remand at 6. Noting that the physicians who interpreted claimant's CT scans[3] acknowledged the presence of abnormalities in claimant's lungs, and that one of these physicians "suspected

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The December 21, 2006 film was read by Dr. DePonte, who is dually qualified as a B reader and Board-certified radiologist, as 1/2 q, r, and as Category B. Claimant's Exhibit 1. Dr. Wheeler read this film as negative for pneumoconiosis. He noted masses in claimant's lung that he stated were more likely compatible with histoplasmosis than tuberculosis. Employer's Exhibits 7-8. In his deposition, Dr. Wheeler stated that the x-rays did not show complicated coal workers' pneumoconiosis. Employer's Exhibit 6. The record also contains numerous x-ray interpretations submitted with claimant's hospital and treatment records that were not classified for the presence of large opacities pursuant to 20 C.F.R. §718.304(a). Claimant's Exhibits 3-6.

[3] The record contains interpretations of four computerized tomography (CT) scans. Dr. Siner read claimant's April 20, 2001 CT scan, and stated that it was "suggestive of pneumonia or progressive massive fibrosis." Claimant's Exhibit 6. Dr. Lepsch read the August 15, 2002 CT scan and stated that the findings "suggest sarcoidosis;" [however, i]nhalational disease such as silicosis or coal-miner's pneumoconiosis are also possible." Claimant's Exhibit 5. Dr. Pugh read the February 7, 2003 CT scan and stated that "Silicosis is the favored etiology. Sarcoidosis and other pneumoconiosis are also diagnostic considerations." Claimant's Exhibit 5. Dr. Wheeler read this CT scan and diagnosed masses compatible with conglomerate granulomatous disease, more likely tuberculosis than histoplasmosis, and he stated, "No symmetrical small nodular infiltrates in mid and upper lungs which could indicate CWP." Employer's Exhibit 8. The March 23, 2006 CT scan was read by Dr. McMurray, who diagnosed "Findings consistent with coal workers pneumoconiosis and/or silicosis. Extensive progressive massive fibrosis is seen in both lungs most prominent in the upper lobes." Claimant's Exhibit 6. Dr. Wheeler read this CT scan and he stated that it showed "no pneumoconiosis." Employer's Exhibit 8.

Although the Board previously pointed out that, contrary to the administrative law judge's finding, the record does not contain an August 15, 2002 CT scan interpretation by Dr. Pugh, the administrative law judge on remand stated that it can be found on page thirty-six of Claimant's Exhibit 6. Decision and Order on Remand at 6 n.3. Contrary to the administrative law judge's finding, page thirty-six of Claimant's Exhibit 6 is Dr. Pugh's interpretation of the February 7, 2003 CT scan, in which Dr. Pugh compares his findings to an August 15, 2002 CT scan that is not in the record. This is the same CT scan interpretation that can be found in Claimant's Exhibit 5 at 10.

that there were areas of progressive massive fibrosis in both lungs," the administrative law judge found that the CT scan evidence "lend[s] credibility to the conclusion that [claimant] has a process in his lungs that shows up on x-ray as an opacity of at least one centimeter in diameter." *Id*. at 8. Further, because employer offered "no consistent or corroborated medical evidence that the large opacities . . . are not there, or that they are due to an intervening pathology," the administrative law judge found that claimant established the existence of complicated pneumoconiosis.[4] *Id*. at 12. In discounting the negative x-ray and CT scan evidence submitted by employer, the administrative law judge stated:

> I find that the opinions of Dr. Wheeler, Dr. Scott, and Dr. Scatarige about the etiology of the acknowledged large masses in [claimant's] lungs are speculative and equivocal, detracting from the weight I am willing to give them. . . . In this case, Dr. Scatarige, Dr. Scott, and Dr. Wheeler speculated about the cause of the abnormalities seen on the films, and they attributed them to tuberculosis or granulomatous disease, despite the lack of any medical evidence in the record to support such a conclusion. They did not adequately explain why they excluded [claimant's] significant history of coal mine dust employment as a factor in the development of these large masses.

Decision and Order on Remand at 9.

We agree with employer that the administrative law judge again improperly shifted the burden of proof to employer to establish that the x-ray and CT scan interpretations diagnosing Category A or B opacities are incorrect. Rather than requiring claimant to establish the existence of complicated pneumoconiosis, the administrative law judge presumed that the abnormalities seen on claimant's x-rays and CT scans are complicated pneumoconiosis, and required employer to disprove this presumption. Despite the Board's prior holding that the administrative law judge erred in requiring employer to present "affirmative evidence" to "refute" the conclusion that the opacities seen by some doctors on x-ray were not there, *Peck*, slip op at 6, the administrative law judge, on remand, discounted the x-ray and CT scan interpretations of Drs. Wheeler, Scott, and Scatarige for failing to establish a definite alternative etiology for the masses seen thereon. Contrary to the administrative law judge's analysis, claimant bears the burden of establishing entitlement to benefits and bears the risk of nonpersuasion if his evidence does not establish a requisite element of entitlement. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Because the administrative law judge impermissibly shifted the burden of proof to employer to disprove the existence of pneumoconiosis, we must vacate

[4] There is no biopsy evidence for consideration at 20 C.F.R. §718.304(b).

the administrative law judge's finding pursuant to 20 C.F.R. §718.304. On remand, the administrative law judge must evaluate the evidence with an understanding that an x-ray or CT scan interpretation that unequivocally finds no pneumoconiosis or no Category A, B, or C opacities, is not equivocal as to the existence of pneumoconiosis.

We next consider the administrative law judge's evaluation of the medical opinion evidence pursuant to Section 718.304(c). Employer asserts that the administrative law judge erred in failing to apply the same level of scrutiny to Dr. Rasmussen's opinion[5] as she did to the opinions of Drs. Spagnolo and Repsher.[6] We agree.

In evaluating the medical opinion evidence, the administrative law judge discounted the opinions of Drs. Spagnolo and Repsher because they did not explain why they relied on the x-ray and CT scan findings of Drs. Wheeler, Scott, and Scatarige, over the findings of Drs. Rasmussen, Alexander, DePonte, and McMurray. Decision and Order on Remand at 10. The administrative law judge, however, did not provide a similar discussion with regard to Dr. Rasmussen's contrary opinion. Rather, the administrative law judge found Dr. Rasmussen's opinion entitled to "significant weight," because it was based on an x-ray reading and because it is consistent with some of claimant's medical records. *Id*. at 11. In requiring Drs. Spagnolo and Repsher to discuss all of the additional x-ray and CT scan reports in support of their opinions, without requiring Dr. Rasmussen to do the same, or without examining whether the results of the x-ray and CT scan evidence as a whole affect the credibility of the physicians' opinions, the administrative law judge applied an inconsistent standard in her evaluation of the medical opinion evidence. *See Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-139 (1999)(*en banc*). The administrative law judge, therefore, must reconsider the medical opinion evidence pursuant to Section 718.304(c) on remand.

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[5] Dr. Rasmussen examined claimant and diagnosed complicated coal workers' pneumoconiosis, Category A, due to claimant's coal mine dust exposure. Dr. Rasmussen noted a minimal loss of lung function, and opined that claimant retained the pulmonary capacity to perform his usual coal mine employment. Director's Exhibit 11.

[6] Dr. Spagnolo reviewed claimant's medical records and opined that claimant did not have a pulmonary or respiratory impairment aggravated by the inhalation of coal mine dust. He stated that claimant retained the respiratory capacity to perform his last coal mine employment. Employer's Exhibit 3. Dr. Repsher reviewed claimant's medical records and stated that claimant did not suffer from medical or legal coal workers' pneumoconiosis, and he opined that claimant has "no clinically significant pulmonary impairment." Employer's Exhibit 5.

We additionally find merit in employer's assertion that the administrative law judge mischaracterized Dr. Wheeler's opinion, in finding that Dr. Wheeler failed to explain why he excluded coal dust exposure as a factor in the development of the large masses seen on x-ray, or explain why a finding of granulomatous disease necessarily precluded a finding of pneumoconiosis. Decision and Order at 9; Employer's Brief at 9. Contrary to the administrative law judge's finding, Dr. Wheeler explained that the pattern seen on claimant's x-ray is asymmetrical and that pneumoconiosis produces symmetrical patterns. Employer's Exhibit 6 at 17-18.

Similarly, employer correctly asserts that the administrative law judge mischaracterized Dr. Spagnolo's opinion, in finding that Dr. Spagnolo failed to explain why he placed greater weight on Dr. Wheeler's x-ray interpretations. As the Board previously pointed out, Dr. Spagnolo stated, "I placed greater weight on this report by Dr. Wheeler who is a pre-eminent radiologist in the evaluation of chest x-rays of individuals with occupational exposure and related lung disease." *Peck*, slip op. at 8. Consequently, in weighing the medical opinion evidence on remand, the administrative law judge must consider the opinions of Drs. Wheeler and Spagnolo in their entirety, and assess their probative value in light of the physicians' supporting documentation, reasoning, and the record as a whole.[7] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Impact of the Recent Amendments

By Order dated May 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), which amended the Act with respect to the entitlement criteria for certain claims. The Director and employer have responded.

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[7] Employer argues that the administrative law judge, on remand, did not follow the Board's directive that he consider the significance of Dr. Spagnolo's opinion that claimant does not suffer from a pulmonary impairment. We disagree. Although noting that Dr. Spagnolo opined that claimant does not suffer from a pulmonary impairment aggravated by coal mine dust exposure, the administrative law judge explained that Dr. Spagnolo did not address the issue of complicated pneumoconiosis, and, therefore, did not discuss how his finding of "no respiratory impairment" would affect a diagnosis of complicated pneumoconiosis. Decision and Order on Remand at 10; *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998).

The Director contends that Section 1556 affects this case and that a remand is required if the award of benefits is not affirmed. The Director states that, because claimant filed his claim after January 1, 2005, and it was still pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim.[8] The Director requests that this case be remanded to the administrative law judge to consider whether claimant has established entitlement pursuant to the Section 411(c)(4) presumption. The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

Employer asserts that Section 1556 will not affect this case because claimant did not have at least fifteen years of underground coal mine employment, and because the administrative law judge previously found that claimant failed to establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Employer, however, agrees with the Director that if the Board remands this case for the administrative law judge to consider whether claimant is entitled to the Section 411(c)(4) presumption, the parties should be allowed to submit new evidence addressing the new standards. Employer also argues that the retroactive application of Section 411(c)(4) to this claim is unconstitutional. Employer's Supplemental Brief at 8-15.

After review of the parties' responses, we are persuaded that Section 1556 potentially affects this case. Because this case was filed after January 1, 2005, and claimant was credited with twenty-seven years of coal mine employment, if the administrative law judge, on remand, doe not find claimant entitled to invocation of the irrebuttable presumption at Section 411(c)(3), she must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, she must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R.

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[8] Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the existence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

§725.456(b)(1). Further, because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional. Employer's Supplemental Brief at 8-15.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated, and this 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